IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-1067

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAKE SKAHILL,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DUBUQUE COUNTY
THE HONORABLE MOINCA L. ZRINYI WITTING, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

None of the retention criteria in Iowa Rule of Appellate Procedure 6.1101(2) apply to the issues raised in this case, so transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(1).

STATEMENT OF THE CASE

Nature of the Case

Following his jury trial, the Honorable Monica L. Zrinyi Wittig presiding, the defendant Jake Skahill appeals the judgment entered on his three convictions for second-degree sexual abuse in violation of Iowa Code section 709.3(1)(b), enticing a minor child in violation of Iowa Code section 710.10(1), and indecent exposure in violation of Iowa Code section 709.9(1). He argues that the participation of the victim's guardian ad litem ("GAL") in his proceedings warrants reversal and that the district court erroneously admitted videotaped interviews of the victim as residual hearsay.

Facts

When KW was seven, she fell asleep on the defendant's—her dad—chest while they were sitting on a recliner. Trial Tr. (3/12/2019) 140:22–25, 144:22 to 145:11. She woke up, and the defendant took his "wienie" out and asked KW to "wiggled it." *Id.* at 145:12 to 146:1. Then he put his hand inside her clothes and touched her vagina. *Id.* at

149:1–23. The defendant told KW "this was [their] secret." *Id.* at 150:11–13.

KW's parents lived apart. *Id.* at 158:5–16. She stayed with the defendant every other weekend and with her mom the rest of the time. *Id.* at 158:5 to 160:12. KW had parent teacher conferences on a Wednesday—Valentine's Day—and no school Thursday or Friday. *Id.* at 159:24 to 160:17. She went to the defendant's house for the long weekend. *Id.*

When KW returned to her mom on Sunday afternoon, she told her mom that she had a "secret she thought she should tell." *Id.* at 162:3–6. KW told her mom that "she was getting touched by her dad … he was touching her insides" and that "he wanted her to put her hand on it" and "her mouth on it." *Id.* at 162:7–12.

KW's mom took KW to the ER. *Id.* at 162:13–25. She told KW "to be completely honest." *Id.* at 164:15–19. KW told a nurse that "I fell asleep on the chair and then I woke up and [the defendant] touched me" and then he "tried making me touch his privates" and "said, [k]eep it a secret." Trial Tr. (3/13/2019) 25:13–19. The doctor who examined KW noted a "a short linear mucosal wound inferior

and to the left of [KW's] urethral opening." *Id.* at 29:20–22; Ex. 2 (ER note) at 3; C.App.14.

KW went to the Child Protection Center ("CPC") the next day. Trial Tr. (3/13/20129) 6:3–5, 37:9–13, 55:3–6. A social work with a master's degree interviewed KW. *Id.* at 37:7–16, 54:1 to 55:6; Ex.5 at 3; S.App.5. KW told the CPC interviewer that she fell asleep on the defendant's chest while sitting on a chair in the living room. Ex.3 (redacted) at 11:20 to 12:05. When she woke up, he put his hand inside her pants and underwear and touched her vagina. *Id.* at 10:53, 11:38, 12:51 to 13:20. He exposed his "wiener" and "wiggled" it. *Id.* at 17:00, 17:40. He asked KW to touch his "wiener," and she demonstrated a stroking motion. *Id.* at 16:45 to 17:00. She explained that his "wiener" was "sticking up." *Id.* at 17:24. The defendant told KW to keep this a secret. *Id.* at 13:33. She also told the interviewer that her stepsister told her the defendant had touched the stepsister, too. Ex.3 (unredacted) at 21:25–:35. A physical exam at the CPC revealed no physical injury, but KW told the doctor "her dad touched her." Trial Tr. (3/13/2019) 11:20–22. At a second CPC interview, KW said largely the same thing as the first, but that the abuse happened more than once. *See generally* Ex.4 (redacted).

Course of Proceedings

The State charged the defendant with second-degree sexual abuse, lascivious acts, enticing a minor, and indecent exposure. Trial Info. (3/23/2018); App.6. He pleaded not guilty. Not Guilty Plea (4/3/2018); App.8. The court appointed a GAL to represent KW. Order Appointing GAL (4/13/2018); C.App.6.

The State moved in limine to admit KW's CPC interviews. Mot. Limine Re. CPC Videos (4/12/2018); App.12. The defendant initially agreed to this, but later objected. Order (5/7/2018); App.18; Tr. Hr'g Mot. Limine (1/17/2019) 9:18–24; Trial Tr. (2/19/2019) 10:4 to 16:7. After a hearing in which the GAL left before discussing the CPC videos, the district court agreed with the State that it could admit the videos. Tr. Hr'g Mot. Limine (1/17/2019) 8:15–21, 9:1–11:10; Order (2/17/2019) at 1–2; App.31–32. Before trial started, the parties and GAL discussed it again and the court reiterated its ruling. Trial Tr. (2/19/2019) 10:4 to 16:7.

The district court denied the defendant's motion in limine that sought to admit photos with his children on and around the chair he abused KW on. *Id.* at 6:8 to 9:6. It also prevented the defendant from questioning KW about the stepsister or admitting testimony from

KW's stepsister about whether the stepsister told KW that the defendant touched the stepsister's vagina. Order (2/17/2019) at 2–3; App.32–33.

At the first trial, the defendant wanted his wife to opine that KW had a reputation for untruthfulness. Trial Tr. (2/20/2019) 75:3–13, 117:20–22. The State and GAL resisted. *Id.* at 75:24 to 97:25. In voir dire outside the jury's presence, the GAL asked KW's stepmom four questions. *Id.* at 89:3–18. The district court allowed the stepmom to provide her opinion on KW's untruthfulness. *Id.* at 97:9–18.

The first trial ended in a mistrial when the jury saw a redacted part of KW's CPC video. Trial Tr. (2/22/2019) 3:8 to 10:12. After that, the defendant's two lawyers moved to withdraw. Mot. Withdraw (2/27/2019); App.38. The GAL resisted the motion because the ensuing delay would harm KW. Obj. Mot. Withdraw (3/1/2019); App.40. The district court only allowed the defendant's lawyer with a medical problem to withdraw. Order Withdraw (3/8/2019); App.44.

After the second trial, the jury convicted the defendant as charged. Verdict; App.59. The defendant moved for a new trial. Mot. New Trial (4/29/2019); App.63. The State and GAL both resisted.

State Rest. (5/8/2019); App.67; GAL Rest. (5/13/2019); App.70. The district court denied the motion. Order (5/31/2019); App.72. At sentencing, it merged the second-degree sexual abuse and lascivious acts convictions. J. & Sentence (6/6/2019) at 1; App.76. The defendant timely appealed. Notice Appeal (6/24/2019); App.82.

ARGUMENT

I. The defendant cannot prove breach or prejudice from his counsel's decision not to object to the guardian ad litem's participation in this case.

Preservation of Error

The defendant claims his counsel was ineffective for failing to object that the GAL's participation in his prosecution violated Iowa Code section 915.37. Defendant's Br. at 26–27. Ineffectiveness is an exception to error preservation; this Court can decide such claims if the record is adequate. *State v. Thorndike*, 860 N.W.2d 316, 319 (Iowa 2015). Because the district court entered judgment before July 1, 2019, Iowa Code section 814.7's bar to ineffectiveness claims on direct appeal does not apply. *State v. Macke*, 933 N.W.2d 226, 228 (Iowa 2019).

Standard of Review

This Court reviews ineffectiveness claims de novo. *Thorndike*, 860 N.W.2d at 319. The defendant must prove breach and prejudice to prevail. *State v. Ortiz*, 789 N.W.2d 761, 764 (Iowa 2010).

Merits

The district court relied on Iowa Code section 915.37 to appoint KW a GAL because KW was a seven-year-old prosecuting witness who suffered sexual abuse. Appl. Appoint GAL (4/10/2018); C.App.4; Order Appointing GAL (4/13/2018); C.App.6; *see* Iowa Code § 915.37. The defendant thinks that his counsel "was ineffective for failing to object" to certain arguments made by the GAL because the GAL's conduct "exceeded any statutory authority allowed under Iowa Code § 915.37(1)." Defendant Br. at 26. He failed to prove breach or prejudice.

A. The GAL's actions in the criminal case did not exceed her authority under Iowa Code section 915.37, so defense counsel had no duty to object.

The defendant thinks that the GAL's actions in this case violated section 915.37. The record is insufficient to rule in his favor and, in any event, he misinterprets section 915.37 to manufacture a breach where none occurred.

1. Counsel had no duty to make a novel statutory argument untethered from section 915.37's language, and the record is insufficient to show why counsel did not make that argument.

The defendant's attempt to prove breach relies on a novel argument concerning an uninterpreted statute. As he admits, no Iowa case has interpreted section 915.37 to decide what a GAL can do in a prosecution. Defendant Br. at 17, 30. Section 915.37 provides that a GAL "may attend all depositions, hearings, and trial proceedings to support the child and advocate for the protection of the child but shall not be allowed to separately introduce evidence or to directly examine or cross-examine witnesses." Iowa Code § 915.37. The defendant says section 915.37 "[w]hen read[] … as a whole, … clear[ly says] 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." Defendant Br. at 30. That interpretation of section 915.37 bears no relationship to the statute's language. Counsel had no duty to invent an interpretation for section 915.37 that is unrelated to the statute's text. *See State v. Walker*, No. 11–1768, 2012 WL 5356103, at *2 (Iowa Ct. App. Oct. 31, 2012) ("Where there has been no previous occasion to rule on the issue and the objection is novel, we will not find counsel ineffective." (citing *State v. McKetterick*, 480 N.W.2d 52,

59 (Iowa 1992))); *State v. Kerby*, No. 01–0629, 2002 WL 575305, at *5 (Iowa Ct. App. Feb. 20, 2002) (holding counsel had "no duty to raise [a] novel legal issue" about the constitutionality of an evidentiary rule).

At most, this Court should preserve the issue. There could be many reasons that counsel did not object to the GAL's participation. Perhaps counsel reasonably believed that the statute allowed the GAL to participate in the way she did. Or maybe counsel feared that opposing the GAL's participation would alienate the judge and was not worth the risk. In any event, both lawyers deserve a chance to defend their choices. *See State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978) ("Even a lawyer is entitled to [her] day in court, especially when [her] professional reputation is impugned.").

2. Section 915.37's plain language refutes the defendant's argument. It allows a GAL to "support the child" and "advocate for the protection of the child" with no limit except on "introducing evidence" or questioning witnesses.

The defendant believes that "the GAL exceeded her statutorily authorized role during the trial." Defendant Br. at 33–34. He complains that the GAL made legal arguments about various motions and evidence. *Id.* at 34–51. This Court must decide what limits

section 915.37 puts on a GAL before it can decide if the GAL violated the statute.

The statute's plain language allows the GAL to do anything to support a child or advocate to protect a child besides "separately introduce[ing] evidence or … directly examin[ing] or cross-examin[ing] witnesses." Iowa Code § 915.37. The statute's plain language, therefore, provides two, and only two, limits on what the GAL can do to support the child or advocate for the child's protection: separately introduce evidence or directly question witnesses. *Id.* Thus, the GAL can do any other lawful act "to support the child and advocate for the protection of the child." *Id.*

Accepting the defendant's argument that GALs cannot make legal arguments about evidence or on motions requires adding language to section 915.37. That section already places limits on what the GAL can do. It does not say that GALs cannot make legal arguments. Instead, it says that GALs can "advocate" to protect the child. Iowa Code § 915.37. Advocating includes arguing to support a desired outcome. Reaching the defendant's conclusion would require this Court to both add language to section 915.37 placing further

limits on GALs and to remove GALs' authority to advocate. This Court should decline the defendant's invitation to amend section 915.37.

In addition to section 915.37's plain language refuting the defendant's interpretation, so does its purpose. Section 915.37 provides GALs to prosecuting witnesses who are children who suffered abuse. Those GALs support and protect the children they represent. Allowing GALs wide latitude to act to support and protect those children effectuates the statute's goal of protecting vulnerable children from further trauma.

Disagreeing, the defendant relies on *State v. Harrison*, 24 P.3d 936 (Utah 2001), to support his reading of section 915.37, but that case does not apply. There, the court concluded that Utah's statutes dealing with GALs did not allow a GAL to sit at the State's table during a criminal trial, make objections, or question witnesses. *Id.* at 945. The court reasoned that the GAL statutes in Utah provide specific authority for a GAL to act to protect a child's best interests in "a proceeding in Juvenile Court," not a criminal trial. *Id.* at 944. Because a juvenile proceeding has nothing to do with punishing "adult perpetrators," "the policy behind the [GAL's] participation in the juvenile proceedings does not apply to the same extent in the

context of a criminal trial." *Id.* at 944–45. But unlike Utah, Iowa Code section 915.37 applies in criminal cases. Iowa Code § 915.37; *see also State v. Walsh*, 495 A.2d 1256 (N.H. 1985) (per curiam) (rejecting an argument that error occurred when a GAL sat at the state's counsel table and objected to questions asked to the victim and other witnesses). Thus, *Harrison*'s rationale has no application to section 915.37.

This case offers a good example of how limiting a GAL's ability to advocate to protect a child could hurt child victims. Here, both defense counsel moved to withdraw after the first trial ended in a mistrial. Only the GAL resisted. She resisted because further delay would hurt KW's mental health and cause KW further emotional pain and trauma. Obj. Mot. Withdraw (3/1/2019); App.40; Tr. Mot. Withdraw (3/6/2019) 6:8 to 9:13; Tr. Continue (3/11/2019) 7:13 to 9:15. Had the GAL not been able to make this legal argument she could not have protected KW from avoidable suffering.

Section 915.37 places two limits on what a GAL can do "to support the child and advocate for the protection of the child": "separately introduce evidence or directly examine or cross-examine witnesses." Anything other lawful action is permissible.

3. The GAL's actions did not violate section 915.37.

The defendant says that the GAL did eight things that violated section 915.37: (1) resisted his limine motion to admit pictures of chairs, (2) supported the State's motion to admit KW's CPC videos, (3) resisted KW's stepsister testifying about whether she told KW that the defendant had abused the stepsister, (4) resisted the defendant questioning KW about what the stepsister told KW, (5) resisted opinion testimony by KW's stepmother about KW's reputation for untruthfulness, (6) voir dired the stepmother before her opinion testimony, (7) resisted both defense counsels' motions to withdraw after the mistrial, and (8) resisted the defendant's motion for new trial. Defendant Br. at 34–51. The State makes an overarching argument before addressing each action by the GAL.

To begin, this Court should interpret "advocate for the protection of the child" to allow a GAL to do anything to increase the chances of conviction that is not explicitly prohibited by section 915.37 or otherwise illegal, at least when the prosecuting witness is testifying against someone she lives with. That is because a conviction in such a case would remove the perpetrator from the child victim. Keeping a perpetrator away from their child victim helps to protect

the child. *See* Iowa Code § 915.37. Under such a construction, everything the GAL did here complies with the statute. But even under a more limited construction of "to support the child and advocate for the protection of the child," section 915.37 authorized the GAL's actions here.

Photos of chairs. The defendant sought to admit photos of the chair he abused KW on with his other children in the photos. The State resisted admitting the photos, in part because the children suggested the defendant was a "family man," which was not an issue in the case. Trial Tr. (2/19/2019) 6:11 to 7:5. The GAL agreed that photos showing "other children involved in other tangential ways … might impact the jury inadvertently." *Id.* at 8:12–16. This argument advocated to protect KW by ensuring the jury decided her case based on proper evidence, not improper emotional appeals. The GAL's argument was proper.

KW's CPC videos. The defendant sought to exclude videos of KW's CPC interviews. Trial Tr. (2/19/2019) 10:4–24. The State resisted. *Id.* at 11:1 to 12:14. Before trial, the GAL argued for admitting the videos. *Id.* at 13:3 to 14:6. She said that KW was eight years old at trial and the videos were a more uninhibited conversation than her

trial testimony would be and that the videos captured KW's memory of what happened when the events were fresher. *Id.* at 13:3–16. This argument supported KW by ensuring her story was told at trial via the most accurate means: a recorded interview from a few days after the abuse occurred. It also protected KW in the event testifying was too difficult by ensuring the jury still heard about the abuse she suffered. This argument comported with the statute.

Issues related to KW's stepsister. In her CPC interview, KW said that her stepsister told KW that the defendant had touched the stepsister's vagina. Ex.3 (unredacted) at 21:25–35. The defendant wanted to ask KW about that statement and call the stepsister to say the stepsister never told KW that the defendant touched her vagina. Trial Tr. (2/19/2019) 217:17–18; Trial Tr. (2/20/2019) 4:22 to 19:8. The State and GAL resisted both. Trial Tr. (2/19/2019) 217:17–19; Trial Tr. (2/20/2019) 4:22 to 19:8.

As for opposing the stepsister's testimony, the GAL argued that whether the stepsister got touched was not an issue in the case. Trial Tr. (2/20/2019) 100:6–10. The GAL also asserted that the defendant should have let the State play the part of the CPC video about the stepsister if it wanted to call the stepsister to contradict KW's claim

because "[t]hat would have been a less traumatic … way to make th[e] point" that KW was inconsistent. *Id.* at 100:6–10, 15–19. Protecting KW from undue trauma is within the GAL's statutory authority. And trying to exclude irrelevant evidence protected KW from the jury rendering a verdict on an improper basis. It also supported KW by making sure the jury decided whether the defendant touched KW's vagina, not whether he touched KW's stepsister's vagina.

As for questioning KW about her stepsister, the GAL resisted the defendant recalling KW to do so. *Id.* at 9:7–18. The GAL argued that "[y]esterday was very difficult for [KW]," but she testified, and the defendant could have asked her more then. *Id.* The GAL could protect KW from the further stress and trauma she would experience by testifying again.

The stepmother's opinion about KW's untruthfulness. The defendant wanted to have his wife—KW's stepmother—testify that KW had a character for untruthfulness. Trial Tr. (2/20/2019) at 75:3–13, 77:17 to 78:3, 97:9–14. Ultimately, the State agreed that the stepmother could testify to KW's character for untruthfulness. *Id.* at 97:9–17. Before that agreement, the GAL reiterated the State's position that the stepmother should not be able to testify that KW "is

a liar." *See id.* at 76:11–19, 77: 6–15. After the parties questioned the stepmother in voir dire, the GAL continued to resist the stepmother testifying that she thought KW lied. *Id.* at 92:8 to 94:23. The GAL could advocate against the stepmother testifying because if successful, excluding the stepmother's opinion would spare KW from the emotionally traumatic experience of discovering that her stepmother—whom KW cared about—called KW a liar. Plus, one of the issues that the stepmom testified about in voir dire was an alleged touching incident between KW and a cousin. *Id.* at 83:11–20, 84:1–21. The GAL could protect KW by advocating to prevent the jury from hearing about a possible sexual interaction between KW and her cousin.

The GAL questioning the stepmother in voir dire. The defendant argues that the GAL should not have questioned the stepmother during voir dire to decide if she could offer an opinion on KW's truthfulness. Defendant Br. at 43–44. True, the statute says that the GAL shall not be allowed to "directly … cross-examine witnesses." Iowa Code § 915.37. While the GAL "cross-examined" the stepmother during voir dire, it was not before a jury. That questioning did not become evidence in the case. Rather, it established foundation for the

district court to decide whether to allow the stepmother to offer an opinion on KW's truthfulness. Thus, the GAL asking four questions to help decide the admissibility of the stepmother's testimony should not be viewed as impermissible cross-examination.

In contrast, the GAL's questions to the stepmother were permissible advocacy to protect KW. She asked the stepmother if she discussed KW's allegations with KW and established the stepmother's bias towards the defendant. Trial Tr. (2/20/2019) 89:3–18. Those questions protected KW by showing that the stepmother had no knowledge about the abuse KW suffered. Plus, the GAL's questions tried to prevent an opinion that could be emotionally devastating to KW: that her stepmother believed she is a liar. The questions protected KW. *See* Iowa Code § 915.37.

Even if the GAL should not have asked the stepmother four questions in voir dire, the district court allowed the defendant to elicit the stepmother's opinion on KW's untruthfulness. Trial Tr. (2/20/2019) 97:9–18. Any violation caused the defendant no harm.

Motions to withdraw. After the defendant's first trial ended in a mistrial, both his lawyers moved to withdraw. Mot. Withdraw (2/27/2019); App.38. While the State did not resist, the GAL did. Obj.

Mot. Withdraw (3/1/2019); App.40; Tr. Hr'g Mot. Withdraw (3/6/2019) 9:15 to 10:2. She argued that allowing counsel to withdraw would create a delay that would be emotionally harmful to KW. Obj. Mot. Withdraw (3/1/2019); App.40; Tr. Hr'g Mot. Withdraw (3/6/2019) 7:2 to 9:13. She submitted an opinion from KW's therapist confirming the harm to KW from delay. GAL Ex. 1 (therapist letter); C.App.10. The GAL highlighted the many delays in the case and how KW does not understand what is happening and how the postponements create stress for KW. Tr. Hr'g Mot. Withdraw (3/6/2019) 7:12 to 8:3. Plus, she noted KW's memory would only get worse with delay. Obj. Mot. Withdraw (3/1/2019) at 3; App.42. The GAL's advocacy resisting the withdrawal of defense counsel was permissible because it protected KW from the emotional harm from further delay. *See* Iowa Code § 915.37.

Motion for new trial. Finally, the defendant complains that the GAL should not have resisted his motion for new trial. Defendant Br. at 49–50. The GAL argued that the jury had found her client credible and that granting a new trial would harm KW by forcing her to experience the trauma of testifying again and continue to leave her in limbo about what would happen. GAL Rest. Mot. New Trial

(5/13/2019); App.70; Tr. Hr'g Mot. New Trial (5/21/2019) 8:8 to 9:1. The statute allowed the GAL to make these arguments aimed at protecting KW from harm from another trial.

* * *

The defendant cannot prove a breach of duty because he misinterprets section 915.37. Properly interpreted, the GAL's conduct at his trial complied with that section. Counsel had no duty to object.

B. The defendant cannot prove prejudice because, absent the GAL's participation, he would have been convicted.

The defendant asserts that the GAL's participation in his trial prejudiced him. Defendant Br. at 51–55. He essentially argues that the GAL's conduct was unfair because she acted as a de facto second prosecutor. *Id.* The defendant says that the GAL argued the legal merits about admitting evidence and usually agreed with the State but disagreed with the State once. *Id.* In the end, he thinks that the GAL lessened the State's burden and made the defense's job harder, which was unfair. *Id.* at 53–55. But general "unfairness" does not prove *Strickland* prejudice; rather, the defendant must undermine confidence in the outcome of his case.

Starting with his evidentiary complaints, the defendant fails to argue that excluding pictures of the chairs changed the result of his trial. *Id.* at 51–55. It is not clear how it could. Nor does he argue that excluding testimony by KW's stepsister about whether the stepsister told KW the stepsister had been abused by the defendant hurt his case. *Id.* at 51–55. Indeed, as the district court observed, such testimony could easily make the defendant look like he abused multiple children. Trial Tr. (2/20/2019) 11:17 to 12:9, 13:21 to 14:10.

Also, the State offered overwhelming evidence of the defendant's guilt. To summarize that overwhelming evidence, KW unwaveringly insisted that the defendant touched her vagina. Trial Tr. (3/12/2019) 149:1–23. Her mother, an ER nurse, CPC doctor, and the videos of KW's CPC interviews all reveal that KW said that the defendant touched her vagina while they sat on a chair in the living room and that he "wiggled" his "wiener" while trying to get KW to touch it. *Id.* at 162:7–12; Trial Tr. (3/13/2019) 11:20–22, 25:13–19; Ex.3 (redacted) 10:53, 11:38, 12:51 to 13:12. And a medical exam a few days after the abuse revealed a scratch on the mucosal tissue near KW's urethra. Ex.2 (ER notes) at 3; C.App.14.

Turning to the GAL's questioning of the stepmother in voir dire, the defendant makes no claim that the GAL's questions undermine confidence in the trial outcome. Nor could he. The district court ruled in his favor by allowing the stepmother to offer an opinion about KW's untruthfulness. Trial Tr. (2/20/2019) 97:9–18.

Moreover, the defendant cannot show that any of the court's rulings would have been different had the GAL not argued. He does not say that any of the evidentiary rulings would have changed. Defendant Br. at 51–55. That makes sense because those arguments largely echoed the State's. Nor does he suggest that the court would have granted his motion for new trial but for the GAL's argument. While the defendant does note that the district court adopted the GAL's argument in rejecting one lawyer's motion to withdraw, he does not show that the court would have granted the motion but for the GAL's argument. In any event, he does not claim a different lawyer would have achieved a different result at the second trial. In short, he does not show that the GAL's participation undermined confidence in his convictions. *See State v. Ortiz*, 789 N.W.2d 761, 764 (Iowa 2010).

As for the defendant's argument that he faced two prosecutors, he does not explain why that mattered. Of course, the State could have assigned two prosecutors to the case. To the extent he thinks the GAL and prosecutor "working together" could have impacted the jury, there was no such risk. When the jury was present the GAL sat behind the bar. *See* Trial Tr. (2/19/2019) 21:17 to 22:14. She did not object to questions or argue in front of the jury. *Id.* Her only participation in front of the jury was sitting by KW while KW testified via video stream. Trail Tr. (3/12/2019) 138:20–25, 146:6–7, 148:1–6. And as the defendant observes, sometimes the State and GAL disagreed. Defendant Br. at 52.

The GAL's participation did not allow the State to share its burden of proof. *Cf.* Defendant's Br. at 54. The GAL offered no evidence at trial. Thus, the State's evidence proved the case.

The defendant has not undermined confidence in the outcome of his trial. This Court should reject his ineffectiveness claim.

C. This Court should continue to reject plain-error doctrine as an end run to error preservation.

Iowa Courts "do not subscribe to the plain error rule …, have been persistent and resolute in rejecting it, and are not at all inclined to yield on the point." *E.g.*, *State v. Rutledge*, 600 N.W.2d 324, 325

(Iowa 1999) (citing *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997)). This Court should not change course now; the defendant offers no new reason to do so. Plus, his case is an inappropriate one to do so because any error was not plain. His claim depends on interpreting an uninterpreted statute in a way that is unrelated to the statute's language. His claim would fail even if this Court indulged it.

D. The GAL's participation in this case was not structural error.

The defendant asserts that he experienced a structural error, so he should not have to prove *Strickland* prejudice. He argues that the GAL "act[ed] as a prosecutor," forcing him to face two adversaries. Defendant Br. at 62. That, in turn, resulted in fundamental unfairness. *Id.* at 62–63. But the State can have multiple prosecutors on a case, so it is not immediately clear how facing two adversaries is inherently unfair.

In any event, the defendant suffered no structural error. The Iowa Supreme Court has recognized structural error when "counsel is completely denied, actually or constructively, at a crucial stage[;] … where counsel does not place the prosecution's case against meaningful adversarial testing; or [] where surrounding circumstances justify a presumption of ineffectiveness, such as where

counsel has an actual conflict." *Lado v. State*, 804 N.W.2d 248, 252 (Iowa 2011). None of these happened to the defendant. He has not shown a structural error.

The defendant argues that *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017), makes errors whose effects are too hard to measure or errors that always result in unfairness structural errors. Defendant Br. at 62. Even if he is correct, neither applies here. As the State's *Strickland* prejudice argument shows, each thing the GAL did is reviewable under the normal prejudice standard. And a GAL participating in a trial to support a child or to advocate to protect a child will not "always result in fundamental unfairness." *See Weaver*, 137 S. Ct. at 1907. The dearth of cases about the unfairness inherent in appointing GALs confirms that appointing a GAL does not always result in unfairness. Indeed, there is nothing inherently unfair about a GAL advocating to protect a child. And that is especially true where the defendant's actions—sexual abusing his seven-year-old daughter—led to the GAL's appointment and participation in his trial.

Even if the defendant suffered a structural error, *Weaver* says that structural errors do not absolve a defendant from having to prove *Strickland* prejudice, with the possible exception for structural errors

resulting in "fundamental unfairness." 137 S. Ct. at 1905, 1910–11, 1913; *see also Krogmann v. State*, 914 N.W.2d 293, 324 (Iowa 2018) (applying a fact-specific analysis to determine whether a PCR applicant did not have to prove *Strickland* prejudice when he suffered a structural error). "Structural errors" that do not impact "fundamental fairness" still require a defendant to prove *Strickland* prejudice. *Weaver*, 137 S. Ct. at 1905, 1910–11, 1913; *see also id.* at 1910 ("[T]he term 'structural error' carries with it no talismanic significance as a doctrinal matter."). As the State just explained, the GAL's participation was not unfair at all, much less fundamentally unfair. Thus, even if the defendant suffered a structural error, he had to prove *Strickland* prejudice. He did not.

In short, allowing the GAL to advocate for KW was not fundamentally unfair. The defendant has not shown the type of error that relieves him of proving *Strickland* prejudice.

II. The defendant's counsel had no duty to make a substantive due process claim attacking the GAL's participation at trial.

Preservation of Error

The defendant raises his substantive due process claim as ineffective assistance because he did not preserve error at trial.

Defendant's Br. at 64–65. Ineffectiveness is an exception to error preservation. *State v. Thorndike*, 860 N.W.2d 316, 319 (Iowa 2015). Because the district court entered judgment before July 1, 2019, Iowa Code section 814.7's bar to ineffectiveness claims on direct appeal does not apply. *State v. Macke*, 933 N.W.2d 226, 228 (Iowa 2019).

Standard of Review

This Court reviews ineffectiveness claims de novo. *Thorndike*, 860 N.W.2d at 319. The defendant must prove breach and prejudice. *State v. Ortiz*, 789 N.W.2d 761, 764 (Iowa 2010).

Merits

The defendant argues that the GAL's participation in his trial "violated [his] right to due process" under the Iowa and United States Constitutions. Defendant Br. at 64. He claims to make a substantive due process attack on the GAL statute. *Id.* at 68.

The defendant's claim more closely resembles a procedural due process challenge. Procedural due process challenges attack the procedure used when depriving a citizen of a protected liberty or property interest. *See State v. Willard*, 756 N.W.2d 207, 214 (Iowa 2008) (citation omitted) (describing procedural due process framework). The defendant attacks the procedure used in depriving

him of his liberty. Specifically, he thinks that the GAL should not have gotten to make legal arguments and the GAL's participation in the case allowed it to share the State's burden. Defendant Br. at 69–70. Because the defendant attacks the procedure used to deprive him of his liberty, his challenge seems like one for procedural due process. But because the defendant does not apply that analysis, the State does not either.

Instead, the State responds to the substantive due process claim that the defendant asserted. To begin, he faces an uphill battle because this Court "presumes statutes are constitutional." *State v. Smokers Warehouse Corp.*, 737 N.W.2d 107, 111 (Iowa 2007) (quoting *Krull v. Thermogas Co.*, 522 N.W.2d 607, 614 (Iowa 1994)). Analyzing a substantive due process claim proceeds in two steps. *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 340 (Iowa 2015) (citing *Santi v. Santi*, 633 N.W.2d 312, 317 (Iowa 2001)). First the court identifies the nature of the interest involved and determines if that interest is fundamental. *Id.* (citations omitted). "If the interest is … fundamental, strict scrutiny applies," otherwise "the government action is subject to a rational basis test." *Id.* (citing *Santi*, 633 N.W.2d at 317). Second, the court applies the appropriate level of scrutiny to

the law. *Id.* "Under the rational basis test, the government must have a legitimate interest in the regulation and there must be a reasonable fit between the government interest and the means utilized to advance that interest." *Id.*

The defendant thinks that that the right at stake is "his receipt of a fair trial." Defendant Br. at 69. But that is not the right at issue. The right at stake is the right to be free from participation by a GAL advocating for a child victim at trial. The defendant's contrary view would allow defendants to make substantive due process claims for any error at trial because the error impacted the right to a fair trial. Iowa courts have not treated substantive due process claims attacking trial procedure as implicating a fundamental right to a fair trial. *See State v. Russell*, 897 N.W.2d 717, 733 (Iowa 2017) (observing that a criminal defendant has "no general due process right to discovery").

Because the defendant has no fundamental right to be free from participation by a GAL at his trial, this Court should apply rational-basis review. Section 915.37 passes that review. The government has a legitimate interest in reducing the trauma to prosecuting child witnesses during the trials of their abusers. Similarly, the government has an interest in encouraging child victims to participate in criminal

trials. Section 915.37 has a reasonable fit with those goals because it provides attorneys to support and protect such child witnesses, thereby reducing trauma to them making it easier to testify. And GALs are appointed after courts consider the "desires and needs of the child." Iowa Code § 915.37. By providing an attorney to support and protect a child after considering the child's needs, the legislature created a reasonable fit between the GAL statute and its interests in reducing trauma to child witnesses and encouraging child witnesses to testify against their abusers.

III. The district court properly admitted KW's CPC interviews under the residual hearsay exception, could have admitted them under the medical diagnosis exception, and any error was harmless.

Preservation of Error

Before the first trial, the district court determined that videos of KW's CPC interviews were admissible. Order Mots. Limine (2/17/2019) at 1–2; App.31–32. Before the second trial, the court confirmed its prior pretrial evidentiary rulings stood. Trial Tr. (3/12/2019) 125:15 to 126:20. At trial, the defendant objected to both videos. Trial Tr. (3/13/2019) 55:19–23, 64:11–18. Error is preserved. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

Standard of Review

This Court reviews hearsay questions, including whether evidence meets the residual hearsay exception, for correction of errors at law. *State v. Neitzel*, 801 N.W.2d 612, 621 (Iowa Ct. App. 2011) (citing *State v. Paredes*, 775 N.W.2d 554, 560 (Iowa 2009)). This Court "gives deference to the district court's factual findings." *State v. Walker*, 935 N.W.2d 874, 879 (Iowa 2019) (quoting *State v. Long*, 628 N.W.2d 440, 447 (Iowa 2001) (en banc)).

Merits

The defendant argues that "the trial court erred in allowing KW's child protection center videos after KW's testimony …." Defendant Br. at 71 (typography altered). But admitting the CPC videos does not warrant reversal for three reasons. First, the district court properly determined they were admissible under the residual hearsay exception. Second, the videos were admissible under the medical diagnosis hearsay exception. Third, any error in admitting the videos was harmless.

A. The district court properly admitted the videos of KW's CPC interviews under the residual hearsay exception because the videos were necessary and admitting them served the interest of justice.

Residual hearsay is an exception to the prohibition on hearsay evidence. *State v. Veverka*, 938 N.W.2d 197 (Iowa 2020); Iowa R. Evid. 5.807. While the exception is "to be used very rarely," the Iowa legislature explicitly approved its use for recordings of child victims of sex crimes. *Veverka*, 938 N.W.2d at 199; Iowa Code § 915.38(2), (3). "'Before hearsay evidence can be admitted' under the residual exception, 'the district court must make five findings concerning the nature of the evidence: (1) trustworthiness; (2) materiality; (3) necessity; (4) notice; and (5) service of the interests of justice.'" *Veverka*, 938 N.W.2d at 200 (quoting *State v. Weaver*, 554 N.W.2d 240, 247 (Iowa 1996)); *see also* Iowa R. Evid. 5.807. The defendant argues that admitting the CPC videos was neither necessary nor served the interests of justice. Defendant's Br. at 81–85.

Necessity. Evidence satisfies the necessity requirement when it is "more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." *Veverka*, 938 N.W.2d at 199 (quoting Iowa R. Evid. 5.807(a)(3)). This case is close, but the CPC videos satisfy the necessity requirement.

The CPC interview captured by the first video happened three or four days after the abuse occurred. Trial Tr. (3/13/20129) 6:3–5, 37:9–13, 55:3–6. KW's memory was freshest at that time. It provided greater detail than KW's testimony. The second CPC video focused on further allegations and contained statements that the defendant says were inconsistent. *See generally* Ex.4 (redacted); *see*, *e.g.,* Trial Tr. (2/20/2019) 8:24 to 9:1, 59:5–9. The jury needed to see both interviews to effectively evaluate KW's allegations and credibility. Allowing the jury to view KW's detailed videos allowed them to assess her credibility and fully understand her allegations compared with her comparatively brief testimony. That made them more probative evidence than KW's testimony. It also made the videos more probative than relying on testimony from KW's mom and treating providers about what KW told them.

This case is close because KW did not recant or forget what happened, both of which satisfy the necessity element. *State v. Rojas*, 524 N.W.2d 659, 662, 663 (Iowa 1994) (recanting); *State v. Neitzel*, 801 N.W.2d 612, 623 (Iowa Ct. App. 2011) (victim's young age prevents testimony at trial). But Iowa courts have found that CPC interviews are necessary when child victims of sex crimes are able to

testify about their abuse but not in detail. *State v. Barnard*, No. 18–0757, 2019 WL 5792578, at *2, *4, (Iowa Ct. App. Nov. 6, 2019); *State v. Heggebo*, No. 17–1194, 2018 WL 6719729, at *2, *4–5 (Iowa Ct. App. Dec. 19, 2018); *State v. Pantaleon*, No. 15–0129, 2016 WL 740448, at *2 (Iowa Ct. App. Feb. 24, 2016); *State v. Green*, No. 04–0339, 2005 WL 1629993, at *2–3 (Iowa Ct. App. July 13, 2005). KW's testimony may have been slightly more developed than these cases, but her testimony was not so detailed as to render it more probative than her CPC interviews. Plus, KW testified via video stream at trial, so the CPC video was similar in form to KW's testimony, giving KW's testimony no advantage in assessing her credibility. While close, this case satisfies the necessity prong.

Interest of justice. "[E]vidence serves the interests of justice where 'the appropriate showing of reliability and necessity were made, and admitting the evidence advances the goal of truth-seeking.'" *Veverka*, 938 N.W.2d at 204 (quoting *Rojas*, 524 N.W.2d at 663). The defendant does not dispute that the evidence was reliable, and the State just explained why it was necessary. Defendant Br. at 84–85. Instead, he asserts that the jury could evaluate KW's testimony so admitting the videos does not serve the interests of

justice. *Id.* But the videos gave the jury more information with which to evaluate KW's allegations. *Cf. Heggebo*, 2018 WL 6719729, at *4–5; *Pantaleon*, 2016 WL 740448, at *2; *Green*, 2005 WL 1629993, at *2. As the district court observed, assessing KW's credibility was especially important because her credibility was a central issue in the case. Order Mots. Limine (2/17/2019) at 2; App.31. Admitting the videos of KW's CPC interviews furthered the interest of justice. They satisfied the residual hearsay exception.

B. The district court could have admitted the videos of KW's CPC interviews under the medical diagnosis hearsay exception.

The videos of KW's CPC interviews were also admissible under the medical diagnosis exception to the hearsay rule. Because this Court can affirm evidentiary rulings on any basis appearing in the record, it does not matter that the State did not assert this ground below. *DeVoss v. State*, 648 N.W.2d 56, 62 (Iowa 2002).

A statement meets the medical diagnosis exception when it "[i]s made for—and is reasonably pertinent to—medical diagnosis or treatment; and [] [d]escribes medical history, past or present symptoms or sensations, or the inception or general cause of symptoms or sensations." Iowa R. Evid. 5.803(4). This Court applies

a two-part test to decide if a "child-declarant's identification of an abuser during treatment with a healthcare professional" meets the exception: (1) was "the declarant's motive in making the statement … consistent with the purposes of promoting treatment," and (2) was the statement "of the type 'reasonably relied on by a physician in treatment or diagnosis.'" *State v. Walker*, 935 N.W.2d 874, 879 (Iowa 2019) (quoting *State v. Tracy*, 482 N.W.2d 675, 681 (Iowa 1992)). KW's CPC interviews satisfy the rule.

To begin, a child's statements—like KW's—made to a social worker or CPC interviewer after disclosing sexual abuse have repeatedly satisfied the medical diagnosis exception. *E.g. State v. Hildreth*, 582 N.W.2d 167, 169 (Iowa 1998); *Neitzel*, 801 N.W.2d at 621–22. KW making her statements about the abuse to a CPC interviewer does not, therefore, prevent admitting them under the medical diagnosis hearsay exception.

KW's statements in her CPC interviews satisfy the exception's first requirement: her motive in talking about the defendant abusing her with the CPC interviewer was "consistent with the purposes of promoting treatment." *See Walker*, 935 N.W.2d at 879. The CPC interviewer emphasized that KW would not get in trouble for her

answers and that KW needed to tell the truth. Ex.3 (redacted) 8:55 to 9:40. The interviewer asked open-ended questions and tried to ferret out any coaching by asking for details about KW's answers. *E.g.*, *id.* at 10:18, 16:31, 17:33, 26:20. The interviewer had a master's degree with a focus in substance abuse counseling and had conducted over 5000 interviews with children. *Cf. Hildreth*, 582 N.W.2d at 169 (holding child victim's statements met medical diagnosis exception when social workers conducting interviews had considerable experience in the field and master's degrees). The interview's purpose was fact finding and she confirmed at trial that she had no position on whether KW suffered abuse. Trial Tr. (3/13/2019) 53:19–22, 67:3–6. And after KW's interview, the interviewer met with a doctor, law enforcement, and DHS to make recommendations about counseling and "provide an abuse assessment." *Id.* at 54:9–18; *cf. Neitzel*, 801 N.W.2d at 622 (approving admission of a child's interview with a social worker at a child advocacy center under the medical diagnosis exception when the social work had considerable experience, a master's degree, the social worker interviewed the child to find out what happened and assess the child's needs, and told the child about

the need to tell the truth). KW's CPC interviews therefore met the first prong of the medical diagnosis hearsay exception.

They also satisfy the second requirement because medical providers reasonably rely on children's statements about who is abusing them, especially when the abuser "is a member of the victim's immediate household." *State v. Smith*, 876 N.W.2d 180, 186 (Iowa 2016). Here, KW lived with her abuser—her dad—at least every other weekend. Thus, KW's statements in her CPC interviews were of the type relied on by medical providers in diagnosis and treatment.

Because KW's CPC interviews satisfy both prongs of the medical diagnosis hearsay exception, they were admissible.

C. Any error from admitting the CPC interview videos was harmless because they duplicated other evidence and the State overwhelmingly proved the defendant's guilt.

Even if KW's CPC interviews were not admissible, the error was harmless. That is true both because the State offered other evidence duplicating KW's statements in her CPC interviews and because it offered overwhelming evidence of the defendant's guilt.

1. Other evidence duplicated what KW said in her CPC interviews.

In KW's CPC interviews she said that she awoke from sleeping on the defendant's chest while sitting on a chair in the living room. Ex.3 (redacted) at 11:20 to 12:02. The defendant took his "wiener" out of his pants and "wiggled" it and asked her to touch it. *Id.* at 17:00, 17:40. She made a stroking motion to show what her father had done. *Id.* at 17:00. Then he put his hand inside KW's clothes and touched her vagina. *Id.* at 10:53, 11:38, 12:51 to 13:12. He told her to keep this conduct a secret. *Id.* at 13:30.

KW's testimony duplicated her CPC interviews. She said that she was "in the living room, on the chair," where she "fell asleep on [the defendant's] chest." Trial Tr. (3/12/2019) 145:5–11. He "showed me his private," meaning his "wienie," then "said wiggle it." *Id.* at 145:13–17, 146:1. KW "indicat[ed]" as she said wiggle. *Id.* at 145:15–17. The defendant also "touched [her] … [o]n [her] privates … [in] between [her] legs" "under [her] clothes." *Id.* at 149:1–10. The defendant told KW "that this was our secret." *Id.* at 150:11–13.

Other witness testimony duplicated KW's CPC interviews, too. KW's mom testified that KW told her "that she was getting touched by her dad, … that he wanted her to put her hand on it … [and] that he

was touching her insides." *Id.* at 162:7–12. The defendant elicited testimony from the CPC doctor who examined KW that KW told her "her dad touched her." Trial Tr. (3/13/2019) 11:20–22. The nurse who treated KW at the ER testified that KW told her that KW "fell asleep on the chair and then I woke up and [the defendant] touched me. … After he touched me … [h]e tried making me touch his privates. He said … [k]eep it a secret." *Id.* at 25:13–19.

Plus, if the Court finds that only one CPC interview was admissible, they both contained the same allegations by KW. She said that the defendant touched her vagina, tried to get her to touch his penis, and said to keep this conduct a secret in both interviews. *Compare* Ex.3 (redacted) at 10:53, 11:38, 12:51 to 13:12, 16:45 to 17:40, *with* Ex.4 (redacted) 6:30 to 9:30.

Because other evidence duplicated KW's CPC interviews, the defendant suffered no prejudice from admitting it. *State v. Newell*, 710 N.W.2d 6, 19 (Iowa 2006) (citing *Hildreth*, 582 N.W.2d at 170).

2. The State offered overwhelming evidence to prove the defendant's guilt.

The district court entered judgment on three convictions: second degree sexual abuse, enticing a minor, and indecent exposure.

Verdict (3/14/2019); App.59; J. & Sentence (6/6/2019) at 1; App.76. The State offered overwhelming evidence to prove each charge.

Specifically, the testimony from KW, her mom, the CPC doctor, the ER nurse, and an ER record overwhelmingly proved the charges. KW testified that she woke up, her dad took out his "wienie," "wiggled it," and asked her to touch it. Trial Tr. (3/12/2019) 145:12 to 146:1 Then the defendant touched her vagina under her clothes. *Id.* at 149:1–23. KW told her mom, an ER nurse, and the CPC doctor the same thing. *Id.* at 162:7–12; Trial Tr. (3/13/2019) 25:13–19, 11:20–22. A medical record from KW's ER visit supported her account—it showed that she had a scratch on mucosal tissue near her urethra. Ex. 2 (ER note) at 3; C.App.14. That physical evidence was especially compelling because child sex cases often lack physical evidence to support the verdict. *Cf. State v. Brown*, 856 N.W.2d 685, 689 (Iowa 2014) (rejecting an overwhelming-evidence argument in a child sex abuse case because "[t]here is no physical evidence".) Also, KW and her mom both testified she was seven at the time the defendant touched her vagina.

Examining the elements of second-degree sexual abuse, this evidence overwhelmingly proved that charge. To convict the

defendant of second-degree sexual abuse the State had to prove that "the Defendant performed a sex act with [KW] … while [KW] was under the age of 12 years." Instr. No. 11; App.54. Sex act was defined as "[c]ontact between the finger or hand of one person and the genitalia or anus of another person." Instr. No. 12; App.55. The evidence overwhelmingly proved that the defendant committed a sex act by touching KW's vagina. And it overwhelmingly proved she was seven at the time.

The evidence also overwhelmingly proved that the defendant enticed a minor. To convict the defendant of enticing a minor the State had to prove that "the Defendant enticed or attempted to entice [KW]," that he "did so with the intent to commit sexual abuse … upon [KW]," he "committed an overt act evidencing his purpose to entice [KW]," and "[KW] was a minor under the age of 13." Instr. No. 14; App.56. The court defined entice as "wrongfully invite, tempt, solicit, lure, coax, seduce, or persuade a person to do a thing." Instr. No. 15; App.57. The evidence showed that the defendant enticed KW by inviting her to touch his penis, which showed his intent to commit sexual abuse because having a seven-year-old child touch a penis is

sexual abuse. The defendant committed an overt act "evidencing his purpose" by removing his penis from his pants. Again, KW was seven.

Finally, the State overwhelmingly proved that the defendant committed indecent exposure. To convict him of indecent exposure the State had to prove that he "exposed his genitals … to [KW] … with the specific intent to arouse or satisfy the sexual desire of the Defendant or [KW,] [KW] was offended by the Defendant's conduct[, and t]he Defendant knew or reasonably should have known the act was offensive to [KW.]" Instr. No. 17; App.58. The evidence overwhelmingly proved that the defendant committed indecent exposure by showing his penis to KW with the intent to arouse himself because he tried to get KW to "wiggle" it, KW was offended because she told her mom and was scared, and the defendant knew that trying to get his daughter to touch his penis would offend her. That the defendant tried to keep what he had done a secret also shows that he knew his conduct was offense.

* * *

Because the State offered evidence to duplicate KW's CPC interviews and overwhelmingly proved all three convictions, any error

from admitting videos of the interviews was harmless. This Court should affirm.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the defendant's convictions.

REQUEST FOR NONORAL SUBMISSION

This case is appropriate for nonoral submission.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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