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 APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED NOVEMBER 4, 2020

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CERTIFICATE OF SERVICE

On November 23, 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.

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE GUARDIAN AD-LITEM'S CRIMINAL TRIAL PARTICIPATION EXCEEDED STATUTORY AUTHORITY UNDER IOWA CODE § 915.37(1) AND IMPEDED SKAHILL'S RIGHT TO DUE PROCESS AND A FAIR TRIAL.?

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?

III. WHETHER 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?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

The Court of Appeals erred in failing to address the merits of Skahill's claim that his attorney was ineffective for failing to object to a guardian ad-litem exceeding statutory regulations under Iowa Code §915.37(1) during the criminal trial proceedings.

The Court of Appeals determination that the record needs to be expanded to find ineffective assistance of counsel is erroneous because the failure to object to an obvious and clear violation of the statute governing guardian ad-litem's could not be related to a sound strategic decision.

The Iowa Supreme Court should find that the record in this case is sufficient to determine that counsel was effective and further the court should utilize this case to establish precedent concerning the guardian ad-litem participation in a criminal proceeding. The Iowa Supreme Court should clarify the parameters set forth in Iowa Code for a guardian ad-litem.

Finally, the Iowa Supreme Court should determine agree with the Iowa Court of Appeals that the CPC video was

unnecessary but should find that error was not harmless, which is different from the Court of Appeals.

ARGUMENT

I. THE GUARDIAN AD-LITEM'S CRIMINAL TRIAL PARTICIPATION EXCEEDED STATUTORY AUTHORITY UNDER IOWA CODE § 915.37(1) AND IMPEDED SKAHILL'S RIGHT TO DUE PROCESS AND A FAIR TRIAL.

A. **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). 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.

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 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.

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). 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.

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. (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.

(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). (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). 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. (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. (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. (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 against allowing the testimony. (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, L1-19). (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).

(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 Cont.)(App. pp. 47-50). The GAL again resisted the request. (3/11/19 M. Tr. p. 7, L13-p.9, L15; 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.

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. (5/21/19 M. Tr. p. 8, L8-p.9, L1; 5/13/19 GAL Resist. New Trial)(App. pp. 70-71).

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).

2. Skahill was prejudiced by counsel's failure to object.

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). Skahill's lack of objection was prejudicial because the GAL often based arguments on legal evidentiary standards not linked to the representation of K.W, and ones that resulted in unfavorable rulings for the defendant. The defense attorney should have ensured that the GAL's role in this trial was 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). Trial counsel should have known that 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.

It was clear during the trial that 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 Harrison, 24 P.3d 936 (Utah 2001). Because of this transformation, it was clear that the GAL became a de-facto prosecutor consistently arguing in lock-step with the State. The Court also relied on the GAL's argument to make rulings. (3/8/19 Order; 3/11/19 Motion Tr. p.3, L19-25)(App. pp. 47-50).

The trial attorney also should have noticed the prejudice 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). The GAL argued legal merits in partnership with the State against defense exhibits, witness testimony, and arguments. This created "burden-sharing" schematic amd was a hardship for Skahill because he faced dual prosecutors and often received unfavorable rulings based on those dual arguments. Skahill's counsel should have known the GAL was acting as a prosecutor and allowing the participation should not be deemed a legal strategy.

II. 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.

A. 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).

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, 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: (1) identifying an asserted right and (2) determining if it is fundamental. State v. Miner, 331 N.W.2d 683, 688 (Iowa 1983). If it is a fundamental right strict scrutiny analysis applies, which requires a determining "whether the government action infringing the right is narrowly tailored to serve a compelling government interest." Id. If 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.

Skahill's right is easily identifiable because he's challenging the right to a fair trial. Because due process requires fundamental fairness in judicial proceedings under the

Iowa and United States constitutions, the right is fundamental, and the second prong is satisfied. See More v. State, 880 N.W.2d 487, 499 (Iowa 2006). The Court must evaluate the constitutionality of the statute under strict scrutiny analysis.

Iowa Code § 915.37(1) allows a GAL to assist the State 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 a defendant to create trial strategy against two prosecutors with competing obligations. Thirdly, the statute creates a burden-sharing schematic because a private attorney can help the State establish elements of the crime, 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 GAL hired to represent the victim, to act as the State the compelling interest of the government is outweighed. The interest is not narrowly

tailored and the statute is unconstitutional.

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

A. Discussion: "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).

Iowa rule of Evidence 5.807, provides an exception to the hearsay rule:

> 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).

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).

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.

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 and jurors were able to evaluate her demeanor and credibility. Therefore, the addition of the recorded interview was not in the interest of justice.

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.

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). 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).

CONCLUSION

For all the above reasons, the defendant requests his conviction, sentence, and judgment be vacated and remanded.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $2.88, 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 FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 5,075 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

Dated: 11/23/20

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