

IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 19-1878
Osceola County No. FECR006380

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KURT ALLEN KRAAI,
Defendant-Appellant.

On Appeal from the Iowa District Court for Osceola County
The Honorable Don E. Courtney, District Judge

APPLICATION FOR FURTHER REVIEW
Decision Date: April 14, 2021

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in concluding that the erroneous jury instruction was harmless when the instruction favored the testimony of the complainant over that of the defendant?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

COMES NOW, the Defendant-Appellant and, pursuant to Iowa Rule of Appellate Procedure 6.1103 (2021), hereby makes application for further review of the April 14, 2021 en banc decision of the Iowa Court of Appeals in State of Iowa v. Kurt Allen Kraai, Supreme Court Number 19-1878. In support thereof, Appellant states:

1. The Iowa Court of Appeals erred by finding that the jury's verdict was "surely unattributable" to the erroneous instruction which unfairly bolstered the testimony of the complaining witness over the defendant's own testimony.
2. The instructional error was not harmless beyond a reasonable doubt given that the case turned on whether the jury believed the complainant or the defendant.
3. This case presents a substantial question of law regarding the proper standard to be applied in reviewing whether erroneous jury instructions violative of Iowa code are harmless beyond a reasonable doubt that should be settled by this Court. Iowa R. App. P. 6.1103(b)(2).

STATEMENT OF THE CASE

Nature of the Case: This is an application for further review after a decision by the Iowa Court of Appeals which held that the instruction given to the jury was erroneous but found the error in instruction was harmless.

Course of Proceedings and Disposition in the District Court:

Kraai was convicted at jury trial of Sexual Abuse in the Second Degree in violation of Iowa Code §§ 702.17(3), 709.1(3), and 709.3(1)(b), a Class B Felony. Timely Notice of Appeal was filed on November 8, 2019. (Notice of Appeal) (App. 75). The Iowa Court of Appeals concluded that the jury was improperly instructed in violation of Iowa Code § 709.6 which prohibits any instruction that cautions jurors to use a different standard for evaluating the testimony of an alleged sexual abuse victim than for any other witness. (Opinion at 7). Nevertheless, it held that the errant instruction bolstering the complainant's testimony over that of other witnesses, including Mr. Kraai, was harmless. (*Id.* at 17).

STATEMENT OF THE FACTS

Kurt Allen Kraai was charged with Sexual Abuse in the Second Degree for an act alleged to have occurred in February, 2017. (Trial Information) (App. 26). The case proceeded to jury trial in August, 2019. Thirteen-year-old N.F. testified on behalf of the State. (Trial Transcript II p.

15). N.F. testified that Kraai would make her touch his “private parts.” (*Id.* at 24). N.F. testified that she did not remember the last time that the touching had happened. (*Id.* at 52). She told a friend at school and then her teacher about touching. (*Id.* at 60). Others were sometimes present in the residences when she visited her father. (*See, e.g., Id.* at 20, 27, 33,70). The others who were sometimes present were not interviewed by the investigating officer. (*Id.* at 116). Kraai testified and denied the sexual abuse described by N.F. (*Id.* at 190).

The jury was instructed that “There is no requirement that the testimony of a complainant of sexual offenses be corroborated.” (Jury Instructions p. 7) (App. 56). Counsel for Kraai objected to the instruction. (Trial Transcript II p. 218). Counsel for Kraai argued for the inclusion of language that would provide the same standard should be applied to the testimony of the Defendant. (*Id.* at 219). The trial court denied the requested language. (*Id.* at 222). The State emphasized in closing argument that the jury did not need more evidence than “what N. told you.” *Id.* at 237, 238, 244, 273).

Kraai was convicted of Sexual Abuse in the Second Degree. (Verdict) (App. 58). Kraai was sentenced to ten years imprisonment and a lifetime parole. (Judgment and Sentence) (App. 72-73). This timely appeal followed

on November 8, 2019. (Notice of Appeal) (App. 75). The Court of Appeals issued an opinion affirming the conviction on April 14, 2021.

ARGUMENT

I. Did the Court of Appeals err when it concluded that the erroneous noncorroboration jury instruction was harmless when the instruction favored the testimony of the complainant over that of the defendant?

The jury was provided with the following instruction:

There is no requirement that the testimony of a complainant of sexual offenses be corroborated.
(Jury Instruction #16) (App. 56). Kraai objected and argued that the instruction unfairly highlighted the testimony of the complainant over his own testimony. (Trial Transcript II p. 218, Motion for New Trial)(App. 59). Trial counsel pointed out that Defendant's testimony also did not require corroboration to be believed by the jury. "[I]f they believe the defendant's testimony standing alone, that should be sufficient for a not guilty verdict. So then we should have an instruction that says that." (Trial Transcript II p. 225). The trial court refused to include the additional language requested by Kraai. (Trial Transcript II p. 229-230). The trial court clearly favored the

testimony of the complainant over the testimony of the Defendant in its instructions to the jury.

The instruction given here violated Iowa Code 709.6 which provides as follows:

No instruction shall be given in a trial for sexual abuse cautioning the jury to use a different standard relating to a victim's testimony than that of any other witness to that offense or any other offense. The Court of Appeals held "Section 709.6 prohibits any instruction that cautions jurors to use a 'different' standard for evaluating the testimony of an alleged sexual-abuse victim than for any other witness." (Opinion at 7). The trial court's instructions in this case suggested that while the complainant's testimony did not require anything to strengthen or add credibility to it, testimony of the Defendant was to be treated differently.

Other states have held that similar jury instructions regarding corroboration in a sexual abuse case are improper. *See, e.g., State v. Stukes*, 787 S.E.2d 480, 483 (S.C. 2016); *Gutierrez v. State*, 177 So.3d 226, 229-30 (Fla. 2015); *Veteto v. State*, 8 W.W.3d 805, 816 (Tex. Crim. App. 2000)(abrogated on other grounds by *State v. Crook*, 248 S.W.3d 172(Tex. Crim. App. 2013)); and *Ludy v. State*, 784 N.E.2d 459, 461 (Ind. 2003). As the Indiana court noted:

In performing this fact-finding function, the jury must consider *all* the evidence presented at trial. To expressly direct a jury that it may find

guilt based on the uncorroborated testimony of a single person is to invite it to violate its obligation to consider all the evidence. . . .

In addition, the meaning of the legal term “uncorroborated” in this instruction is likely not self-evident to the lay juror. Jurors may interpret this instruction to mean that baseless testimony should be given credit and that they should ignore inconsistencies, accept without question the witness’s testimony, and ignore evidence that conflicts with the witness’s version of events. Use of the word “uncorroborated” without a definition renders this instruction confusing, misleading, and of dubious efficacy.

Ludy, 784 N.E.2d at 461-62.

In *State v. Milliken*, the court considered whether jury instructions unfairly emphasized some evidence over other evidence for the jury’s consideration in the record. 204 N.W.2d 594 (Iowa 1973). “The court should not emphasize or give undue prominence to evidentiary facts, the existence or nonexistence of which must be settled by the jury.” *Id.* at 596 (quoting *State v. Proost*, 225 Iowa 628, 281 N.W. 167 (1938)). The instruction given in this case bolstered the credibility of a single witness over other testimony in the record, including that of the Defendant. The Defendant was prejudiced by the favoritism shown by the trial court to the complainant in Instruction 16.

As Kraai argued below, his accuser’s testimony should not have been promoted by the trial court through its instructions over that of the other witnesses. This problem was particularly acute in this case as guilt or innocence turned on the conflict in the testimony of Kraai versus the

complainant. Kraai was entitled to exercise his right to testify and to have his testimony heard and fairly considered by the jury. The use of this instruction prejudiced his right to a fair consideration of his evidence.

Yet the Court of Appeals concluded that the guilty verdict was “surely unattributable” to the erroneous instruction. (Opinion at 17). The opinion referenced *Ludy v. State* and stated that the “State offered evidence to corroborate the child’s testimony.” (Opinion at 16 (citing 784 N.E.2d 459, 463 (Ind. 2003))). In *Ludy*, the jury heard the testimony of the victim, an eye and ear witness to the assault, and a nurse who examined injuries consistent with the victim’s description of the assault. *Id.* at 462-63. Here, even though others may have been present in the residence there was no witness who corroborated the complainant as to the assault alleged. This erroneous instruction is the equivalent of a directed verdict for the State as it told the jury whose testimony to favor.

“Once instructional error is established, prejudice is presumed, and the state must prove a lack of prejudice.” *State v. Shorter*, 945 N.W.2d 1, 9 (Iowa 2020). At trial, the State emphasized N.F.’s credibility over that of Mr. Kraai. The State’s closing argument included the following:

1. “Your job is to determine whether or not you believe the little girl that came in here and did a very grown-up thing and told you what he did to her.” Trial Transcript II p. 231-232.
2. “And you do not need more than [N.]’s word to convict.” *Id.* at 237.
3. “So what does this really come down to? It comes down to credibility.” *Id.*
4. “But it does come down to she said it happened, he said it didn’t.” *Id.* at 238.
5. “You decide which one to believe.” *Id.* at 238-239.
6. “I mean, again, this does come down to, Do you believe this child or not?” *Id.* at 271.
7. “If you believe her, then you don’t have reasonable doubt.” *Id.* at 273.
8. “If you believe N., he’s guilty.” *Id.* at 275.

The State recognized at trial that the test of the credibility of the two witnesses was key to the jury’s decision. Kraai asked for equivalency, not favor, which is what was given to the State’s witness in violation of Iowa Code § 709.6. As Kraai argued below, his accuser’s testimony should not have been promoted by the trial court through its instructions over that of the

other witnesses. Beyond the complainant's testimony, there was no evidence Kraai committed the act alleged. In his testimony, Kraai admitted having holes in his pants, pornography and a penis ring. (Trial Transcript II 166, 171,176). These circumstances did not rise to such proof that would make the error below harmless beyond a reasonable doubt. The use of this instruction prejudiced Kraai's right to a fair consideration of his evidence and the error was not harmless.

CONCLUSION

For all of the reasons discussed above, Defendant-Appellant Kurt Allen Kraai respectfully requests that further review be granted and the decision of the Iowa Court of Appeals upholding this conviction be reversed so that the case can be remanded for a new trial to a properly instructed jury.

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE
REQUIREMENTS**

1. This Application for Further Review complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

This Application for Further Review contains 2,414 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Application for Further Review complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

This Application for Further Review has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point font size, Times New Roman style.

/s/ Pamela Wingert
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