IN THE SUPREME COURT OF IOWA

SUPREME COURT NO 19-1613

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL D. MONTGOMERY,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT FOR SIOUX COUNTY
THE HONORABLE JULIE SCHUMACHER
Sioux County District Court No. FECR016562

APPELLANT'S AMENDED REPLY BRIEF IN FINAL FORM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Supreme Court Cases:

Iowa Cases:

Statutes and Constitutional Provisions:

Rules:

Other Cases:

Other Authorities:.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I.

Whether the verdicts were inconsistent because logic and sound reasoning demand that a "sex act" requires the actor possess a sexual motive. *State v. Pearson*, 514 N.W.2d 452 (Iowa 1994) was wrongly decided and the court should abandon *Pearson's* "sexual in nature" criteria. Furthermore, error was adequately preserved on defendant's argument to overrule *Pearson*.

Iowa Cases:

In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368, 375 (1970)

Kersten Co. v. Dep't of Soc. Servs., 207 N.W.2d 117, 121 (Iowa 1973)

Kiesau v. Bantz, 686 N.W.2d 164, 173 (Iowa 2004)

Montanick v. McMillin, 225 Iowa 442, 459, 280 N.W. 608, 616 (1938)

State v. Brustkern, 170 N.W.2d 389, 393, 394 (Iowa 1969)

State v. Davis, 584 N.W.2d 913 (Iowa Ct. App. 1998)

State v. Halstead, 791 N.W.2d 805, 815 (Iowa 2010)

State v. Iowa Dist. Ct. Black Hawk County, 616 N.W.2d 575, 578 (Iowa 2000)

State v. Johnson, 257 Iowa 1052, 1056, 135 N.W.2d 518, 521 (1965)

State v. Machovec, 236 Iowa 377, 382, 383, 17 N.W.2d 843, 846 (1945)

State v. Miller, 841 N.W.2d 583, 584, fn. 1 (Iowa 2014)

State v. Pearson, 514 N.W.2d 452 (Iowa 1994)

State v. Williams, 895 N.W.2d 856, 872, fn. 2 (Iowa 2017)

Stuart v. Pilgrim, 247 Iowa 709, 714, 720, 74 N.W.2d 212, 216, 219 (1956)

Statutes and Constitutional Provisions:

Iowa Code § 4.4(3)

Iowa Code § 702.17

Iowa Code § 709.1

Iowa Code § 709.8(1)

North Carolina law, N.C.G.S. § 14-202.1

Other Cases:

In re J.F., 766 S.E.2d 346 (N.C. App. 2014)

State v. Holle, 379 P.3d 179 (Az. 2016)

State v. Ludlum, 281 S.E2d 159, 160 (N.C. 1981) citing N.C.G.S. 14-27.4

State v. Rhodes, 361 SE2d 578, 580 (N.C. 1987)

Other Authorities:

https://www.merriam-webster.com/dictionary/cunnilingus

Iowa Criminal Jury Instruction 900.8

Iowa State Bar Association (2017)

II.

Whether Montgomery adequately preserved error on his argument that the trial court should have provided the jury with supplemental instructions when the jury sought clarification as to what "sexual in nature" means. The court erroneously declined to do so.

Iowa Cases:

Clinton Land Co. v. M/S Assocs., Inc., 340 N.W.2d 232, 234 (Iowa 1983)

Lynch v. Saddler, 656 N.W.2d 104, 107 (Iowa 2003)

Sanders v. Ghrist, 421 N.W.2d 520, 522 (Iowa 1988)

State v. Foley, No. 17-0043, *2 (Iowa Ct. App. Sept 27, 2017)

State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978)

State v. Kellogg, 542 N.W.2d 514, 516 (Iowa 1996)

State v. Pearson, 514 N.W.2d 452 (Iowa 1994)

State v. Watkins, 463 N.W.2d 15 (Iowa 1990)

Statutes and Constitutional Provisions:

Iowa R. Civ. P. 1.924

Iowa R. Crim. P. 2.19(5)(f)

III.

Whether the defendant was denied his constitutional right to present a defense to the crimes charged when the trial court refused to allow the defendant to offer evidence of the sexual acts committed by L.V. upon S.V. as an exception to Iowa's "rape shield law."

U.S. Supreme Court Cases:

Bruton v. United States, 391 U.S. 123, 135-37 (1968)

Chambers v. Mississippi, 410 U.S. 284, 302 (1973)

Davis v. Alaska, 415 U.S. 308 (1974)

Dutton v. *Evans*, 400 U. S. 74, 89 (1970)

Iowa Cases:

State v. Alvey, 458 N.W.2d 850, 852 (Iowa 1990)

State v. Jones, 490 N.W.2d 787 (Iowa 1992)

State v. McKettrick, 480 N.W.2d 52, 55 (Iowa 1992)

State v. Pearson, 514 N.W.2d 452 (Iowa 1994)

Statutes and Constitutional Provisions:

Iowa R. Cr. P. 2.24(2)(b)(9)

Iowa R. Ev. 5.412

Rule 5.412(b)(1)

Rule 5.412(b)(1)(A)

Iowa R. Ev. 5.412(c)(1)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court. The appellant/defendant was acquitted of lascivious acts with a child, but was convicted of sexual abuse in the second degree. The defendant is requesting that this court overturn the holding of *State v. Pearson*, 514 N.W.2d 452 (Iowa 1994) and find that a "sex act" be defined to require that the defendant act with the intent to sexually gratify himself or the victim.

This court should follow the directive of Justice Carter in his partial dissent opined in *Pearson,* 514 N.W.2d at 457 ("…by not recognizing sexual gratification as an element of sexual contact, the majority prohibits a defendant from attempting to negate the charge by urging lack of such intent. I believe that this is unrealistic and unfair.") (J. Carter concurring in part and dissenting in part.). Thus, this case presents a substantial question of enunciating or changing legal principles. *See* Iowa R. App. P. 6.1101(2)(f).

The record in this case shows that the jury was confused about the definition of a sex act and, in particular, sought clarification on the "sexual in nature" standard announced in *Pearson* which the trial court failed to provide to the jury. This confusion produced an inconsistent verdict and juries all across Iowa continue to be confused when considering sex abuse charges because there is no clear direction from this court or the legislature as to whether the definition of a sex act

requires that the act be committed with the intent to sexually gratify one's self or the victim. The "sexual in nature" standard announced in *Pearson* is vague and actually permits juries to convict persons of sexual abuse for innocent contact. Thus, this case presents a fundamental and urgent issue of broad public importance requiring prompt or ultimate determination by the supreme court. *See* Iowa R. App. P. 6.1101(2)(d).

STATEMENT OF THE CASE

Defendant/Appellant appeals his conviction and sentence for sexual abuse in the second degree claiming the jury's verdict was inconsistent, the trial court erroneously refused to instruct the jury, the trial court erroneously disallowed material evidence to be presented, the trial court failed to order a new trial due to prosecutorial misconduct, and that there was insufficient evidence produced to sustain the conviction of the defendant or the verdict was otherwise contrary to the weight of the evidence.

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

Defendant/Appellant refers the court to its opening brief for an outline of the facts and proceedings relevant to this appeal.

ARGUMENT

I.

The verdicts were inconsistent because logic and sound reasoning demand that a "sex act" requires the actor possess a sexual motive. *State v. Pearson*, 514 N.W.2d 452 (Iowa 1994) was wrongly decided and the court should abandon *Pearson's* "sexual in nature" criteria. Furthermore, error was adequately preserved on defendant's argument to overrule *Pearson*.

A. Standard of Review

An inconsistent jury verdict has constitutional implications because a jury verdict involving compound inconsistency insults the basic due process requirement that guilt must be proved beyond a reasonable doubt. *See State v. Halstead*, 791 N.W.2d 805, 815 (Iowa 2010) citing *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368, 375 (1970). Thus, because constitutional issues are raised, review is de novo. *Halstead*, 791 N.W.2d at 807.

B. Preservation of Error

Contrary to the State's assertion that the defendant has not preserved error on his claim that *State v. Pearson* should be overruled (State's brief, pg. 20), the record shows that error was adequately preserved on this claim. In the defendant's written motion for new trial, motion in arrest of judgment and motion for judgment of acquittal, defense counsel specifically argued as follows:

> Furthermore, it is time that Iowa courts follow the directive of Justice Carter in his partial dissent opined in *Pearson* and require that the state prove that the act be committed with an intent of sexual gratification of the defendant or victim. *See Pearson* at 457. (J. Carter concurring in part and dissenting in part, "…by not recognizing sexual gratification as an element of sexual contact, the majority prohibits a defendant from attempting to negate the charge by urging lack of such intent. I believe that this is unrealistic and unfair.").

See Defendant's Motion for New Trial, pg. 8 (App 45). Later in the motion, defense counsel also argued the defendant's position as follows:

> It is the defendant's position that proof of sexual abuse requires the defendant to act with a sexual purpose and motive despite any caselaw to the contrary and this court should recognize such as an element to prove sexual abuse. *See Pearson* at 457 (J. Carter concurring in part and dissenting in part, "…by not recognizing sexual gratification as an element of sexual contact, the majority prohibits a defendant from attempting to negate the charge by urging lack of such intent. I believe that this is unrealistic and unfair.").

See Defendant's Motion for New Trial, pg. 15 (App 46).

Even though the defendant did not specifically ask the district court to overrule the holding in *Pearson* (something the trial court has no legal authority to do), the above arguments are as close as one can legally get and was clearly adequate to preserve error for this court to consider. *See State v. Williams*, 895 N.W.2d 856, 872, fn. 2 (Iowa 2017) ("it would make little sense to require a party

to argue existing law should be overturned before a court without the authority to do so"). *See also State v. Miller*, 841 N.W.2d 583, 584, fn. 1 (Iowa 2014) ("Generally, it is the role of the supreme court to decide if case precedent should no longer be followed").

C. Discussion

1. *Pearson* was wrongly decided.

This court has not been reluctant in the past to overrule prior decisions when it concludes they are wrong. *Kersten Co. v. Dep't of Soc. Servs.*, 207 N.W.2d 117, 121 (Iowa 1973). "Stare decisis is a valuable legal doctrine which lends stability to the law, but it should not be invoked to maintain a clearly erroneous result simply because that's the way it has been in the past. Certainly we should be as willing to correct our own mistakes as we are those of others." *See id*. citing the following authorities: *State v. Brustkern*, 170 N.W.2d 389, 393, 394 (Iowa 1969); *State v. Johnson*, 257 Iowa 1052, 1056, 135 N.W.2d 518, 521 (1965); *Stuart v. Pilgrim*, 247 Iowa 709, 714, 720, 74 N.W.2d 212, 216, 219 (1956); *State v. Machovec*, 236 Iowa 377, 382, 383, 17 N.W.2d 843, 846 (1945); *Montanick v. McMillin*, 225 Iowa 442, 459, 280 N.W. 608, 616 (1938). "More important, the doctrine of stare decisis should not deprive a litigant of a legal right or defense because of a clearly erroneous past decision." *Kiesau v. Bantz*, 686 N.W.2d 164, 173 (Iowa 2004).

In discussing Iowa Code § 702.17 (sex act definition) and Iowa's sexual abuse statute, the state argues that "the legislature's choice to omit a sexual intent element was reasonable" (State's brief, pg. 26). However, the state is incorrect in making the assertion that the legislature chose to omit a sexual intent element.

When the legislature enacted its statutes defined as "sexual abuse" it required the perpetrator to commit a "sex act" with the victim as defined in section 702.17. *See* section 709.1 (defining sexual abuse as "Any sex act between persons is sexual abuse by either of the persons when the act is performed with the other person in any of the following circumstances: …"). As discussed in the defendant's opening brief, the common and ordinary understanding of the word "sex" when associated with one's acts means actions that are sexually motivated. (*See* defendant's brief in final form, pp. 28-29 citing authorities) Thus, when enacting the statutes prohibiting sexual abuse there was no need for the legislature to spell out a separate element that the acts committed required them to be for the purpose of sexual gratification. The ordinary understanding of the phrase "sex act" already contains a requirement that a sexual motive and purpose exist.

It makes sense then, that when the legislature enacted the statutes making lascivious acts with a child and indecent contact with a child to be sex offenses, the legislature chose to spell out a separate element that the acts be committed with the

intent to sexually gratify the perpetrator or the victim. This is because those statutes do not require that the perpetrator commit a "sex act" with the victim.

Iowa Code § 709.8(1) defines lascivious acts with a child as follows:

> 1. It is unlawful for any person sixteen years of age or older to perform any of the following acts with a child with or without the child's consent unless married to each other, for the purpose of arousing or satisfying the sexual desires of either of them:
>
> a. Fondle or touch the pubes or genitals of a child.
>
> b. Permit or cause a child to fondle or touch the person's genitals or pubes.
>
> c. Cause the touching of the person's genitals to any part of the body of a child.
>
> d. Solicit a child to engage in a sex act or solicit a person to arrange a sex act with a child.
>
> e. Inflict pain or discomfort upon a child or permit a child to inflict pain or discomfort on the person.

Subparagraphs *a-c* and *e* simply describe the prohibited contact and do not refer to a "sex act." The above statute only refers to a "sex act" in subparagraph *d* regarding solicitation of a child or someone else to commit a sex act with a child in the future. Therefore, because the legislature in the above statute merely described the prohibited physical contact and did not refer to that contact as a "sex act", our lawmakers found it necessary to require that the contact be committed with the requisite sexual desire in order for the conduct to be a considered a sex offense.

Likewise, the same holds true for indecent contact with a child set forth in section 709.12.

This same purpose of the legislature, i.e., that there be a requisite sexual desire in the commission of the act, is accomplished in Iowa's sexual abuse statutes by the legislature's requirement that the prohibited acts committed be a "sex act." Thus, the legislature was acting consistently when it did not spell out an element of sexual desire when it enacted the sexual abuse statutes, but did spell out a sexual desire element when it enacted the statutes defining lascivious acts with a child and indecent contact with a child.

This court "construes statutes that relate to the same or a closely allied subject together so as to produce a harmonious and consistent body of legislation." *State v. Iowa Dist. Ct. Black Hawk County*, 616 N.W.2d 575, 578 (Iowa 2000). Therefore, the fact that the lascivious acts with a child statute and the indecent contact with a child statute contain an express element of sexual desire actually supports the defendant's position that a "sex act" for the purposes of sexual abuse was intended to be interpreted to require a sexual desire.

To interpret Iowa's statutory scheme in chapter 709 another way is not reasonable. Why would the legislature require sexual desire to commit lascivious acts with a child, but not require sexual desire to commit sexual abuse with a

child? Why would the legislature make it harder to prove a defendant committed the less serious offense of lascivious acts with a child and easier to prove that the defendant committed the more serious offense of sexual abuse with a child? This court presumes that when the legislature enacts a statute that it intends "[a] just and reasonable result." Iowa Code § 4.4(3). Interpreting chapter 709 as the State argues does not lead to a just and reasonable result.

However, *Pearson* is contrary to this reasonable and just interpretation of chapter 709 with its "sexual in nature" criteria. Most notably, *Pearson* runs contrary to what the legislature intended a "sex act" to be because *Pearson* expressly allows for a finding of sexual abuse where sexual motive is lacking. *See Pearson* at 455.

The State wrongly asserts that Montgomery's urged interpretation of a sex act would have absolved the defendant in *State v. Davis*, 584 N.W.2d 913 (Iowa Ct. App. 1998) (State's brief, pg. 28). The acts committed by Davis in that case could have easily been found to have been committed for the purpose of gratifying his sexual desire. Sexual desire does not need to be the *sole* motivation for a person's conduct. Davis may very well have also been motivated by anger, but the record in that case shows that a jury could have inferred his acts to have been committed to satisfy his sexual desire as well. This is particularly true because the

record showed that Davis came home and asked his girlfriend to have sex with him and she refused. *Davis* at 915. The court of appeals made special note of this. *Davis* at 918.

Acts committed by an individual can serve more than one purpose. One can desire to cause harm to another and cause sexual gratification to himself by the same act. However, in order for the act to be a "sex act", there must be a motive to gratify oneself or the other sexually, although such motive doesn't have to be the sole motivating factor for the person's actions. Simply because a defendant, such the one in *Davis*, makes a claim that he was motivated by something other than sexual gratification doesn't make it so. Juries are able to use common sense and reason to determine from the evidence whether an individual's acts were motivated by sexual desire in addition to other motivating factors.

But *Pearson*, although claiming that its criteria will protect innocent persons from an arbitrary perversion of the sexual abuse laws (*Pearson* at 456), does just the opposite. This is because it permits a jury to determine on its own what "sexual in nature" means without any standards whatsoever instructed to the jury, the least of which is that the defendant commit the act with the intent to gratify himself or the other sexually. No instruction to the jury is given to guide them as

to the sexual in nature standards set forth in *Pearson* and in the case at bar, the jury specifically requested guidance on that issue which the court denied.

2. *Pearson's* vagueness

The State misunderstands Montgomery's arguments relating to vagueness. Mr. Montgomery is not claiming that Iowa's sex abuse statute is void for vagueness as the State suggests (State's brief, pg. 31). The "sexual in nature" standard announced in *Pearson* is what is vague. The *Pearson* decision created this vagueness by not requiring that a sex act be interpreted to include a sexual motive and simply provided a laundry list of factors for the jury to consider which are never instructed to the jury. *See* Iowa Criminal Jury Instruction 900.8, Iowa State Bar Association (2017).

As argued in the defendant's opening brief, this court in *Pearson* did not follow the appropriate rules of statutory interpretation and construction when considering Iowa's sex abuse statute. Rather than applying the words as commonly understood in ordinary language, the court applied an extraordinary meaning to the words which cannot reasonably be expected to be known to the average juror.

3. The jurisdictions of North Carolina and Arizona do not support continuing the *Pearson* standards.

The State relies on a decision from the North Carolina Court of Appeals to support its argument that the *Pearson* criteria should be maintained and that Iowa's sex abuse statute should not be interpreted to require a sexual motive element. (State's brief, pg. 37). In the case of *In re J.F*., 766 S.E.2d 346 (N.C. App. 2014) the North Carolina Court of Appeals found that its first degree sexual offense statute nor its crime against nature statute contains a sexual purpose element. However, closer examination of North Carolina's statutory scheme reveals why it was not necessary for the North Carolina court to interpret two of its sex offense statutes to include a separate sexual purpose element.

In re J.F. interpreted North Carolina's first-degree sexual offense statute. To convict a defendant of a first-degree sexual offense with a child of twelve years or less, the State need only prove (1) the defendant engaged in a "sexual act," (2) the victim was at the time of the act twelve years old or less, and (3) the defendant was at that time four or more years older than the victim. *See State v. Ludlum*, 281 S.E2d 159, 160 (N.C. 1981) citing N.C.G.S. 14-27.4. A "sexual act" is defined as "cunnilingus, fellatio, anilingus, or anal intercourse ... [or] the penetration, however slight, by any object into the genital or anal opening of another's body ... [except for] accepted medical purposes." *Id*. citing N.C.G.S. 14-27.1(4).

Thus, a sexual act under North Carolina law is one that is already assigned a sexual meaning by the assigned word's very definition. For example, in *Ludlum*, the sexual act at issue under the statute was cunnilingus. *See id*. at 160. The North Carolina Supreme Court consulted Webster's Dictionary for the definition of cunnilingus which was "*stimulation* of the vulva or clitoris with the lips or tongue." *Ludlum* at 162 (emphasis added). In present day Webster's Dictionary that authority provides an even fuller definition of cunnilingus which is, "the act of stimulating a woman's sexual organs with the mouth for sexual pleasure." *See* https://www.merriam-webster.com/dictionary/cunnilingus. English Language Learner's Definition. Therefore, it is not necessary that the North Carolina Legislature spell out a separate element of a sexual purpose for first-degree sexual offense because the sexual purpose is contained in the definition of the acts that are identified as a sexual act.[1]

Like Iowa's offenses of lascivious act with a child and indecent contact with a child, North Carolina's indecent liberties with a minor statute does not require

[1] Likewise, the full definition of fellatio is "the act of stimulating a man's penis with the mouth for sexual pleasure." *See* https://www.merriam-webster.com/dictionary/fellatio. English Language Learner's Dictionary. The definition of anilingus is "erotic stimulation achieved by contact between mouth and anus." *See* https://www.merriam-webster.com/dictionary/anilingus.

the perpetrator commit a "sexual act" as defined under North Carolina law.[2] Thus, it was necessary for the North Carolina Legislature to impose a sexual purpose element for that offense.

The State's reliance on the Arizona decision of *State v. Holle*, 379 P.3d 179 (Az. 2016) (State's brief, pg. 38) does not support its argument that sexual motivation is unnecessary for one to be convicted of sexual abuse. The Arizona legislative scheme is set up to where a defendant can avoid conviction of child molestation and sexual abuse if he can prove an affirmative defense that the defendant was not motivated by a sexual interest. *See Holle*, 379 P.3d at 200.

It is clear from the statutory scheme that the Arizona legislature, when enacting its sexual abuse statutes, was concerned that innocent contact, not motivated by sexual desire, could be used as a basis for unjustly convicting persons accused of sexual abuse. The Arizona legislature put in place a mechanism to

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[2] As to the charge of taking indecent liberties with a minor under North Carolina law, N.C.G.S. § 14-202.1 provides in part:

(a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

....

See State v. Rhodes, 361 SE2d 578, 580 (N.C. 1987).

guard against that injustice by creating an affirmative defense based on a lack of sexual interest.

Contrary to the State's argument that *Pearson's* "sexual in nature" requirement accomplishes the same result as Arizona's affirmative defense (State's brief, pg. 38), it does just the opposite. *Pearson* takes away a defendant's ability to avoid conviction by showing he was not motivated by sexual interest. This was recognized by Justice Carter in his dissent in *Pearson* where he warned that "…by not recognizing sexual gratification as an element of sexual contact, the majority prohibits a defendant from attempting to negate the charge by urging lack of such intent. I believe that this is unrealistic and unfair." *Pearson* at 457 (J. Carter dissenting). Under *Pearson*, even if a defendant proves beyond all reasonable doubt that he was not motivated by sexual interest, the jury is still allowed to convict him of sexual abuse. *See Pearson* at 455 ("the lack of such motivation would not preclude a finding of sexual abuse where the context in which the contact occurred showed the sexual nature of the contact").

4. <u>The verdicts were inconsistent</u>.

The State incorporates the argument of the prosecutor in his resistance to the defendant's motion for new trial and claims that it was legally possible for the defendant to have committed a sex act with S.V. by his mouth contacting S.V's

genitals, thus making him guilty of sexual abuse, while still not engaging in lascivious acts with S.V. (State's brief, pp. 40-42). This is not possible. The jury was instructed as to lascivious acts as follows:

1. On or between February 1, 2015 and August 16, 2016, Michael Montgomery with or without S.V.'s consent:

    a. Fondled or touched the pubes or genitals of S.V.; or

    b. Permitted or caused S.V. to fondle or touch Michael Montgomery's pubes or genitals;

    …

See Jury Instruction No. 15 (App 43). Licking S.V.'s vagina, as argued by the State, obviously constitutes touching of her genitals as the above instruction states. The jury was not instructed that the "touched the pubes or genitals of S.V." element was limited only to hand or finger touching as the State appears to be arguing in order to try and distinguish sexual abuse from lascivious acts.

But there is no distinction. If the jury found that the defendant licked S.V.'s vagina, that means he touched her genitals which means he would be guilty of lascivious acts, unless the jury found that he did not do so with the intent to gratify himself or S.V. sexually. It strains credulity to believe that the jury found the defendant licked S.V.'s vagina, but that he did not do so for the purpose of arousing his sexual desire. Rather, what is most reasonable and likely is that the

jury rejected the claim that Montgomery had any contact with his mouth and S.V's genitals. That's why Montgomery's acquittal of lascivious acts with a child is inconsistent with his conviction of sexual abuse.

II.

Montgomery adequately preserved error on his argument that the trial court should have provided the jury with supplemental instructions when the jury sought clarification as to what "sexual in nature" means. The court erroneously declined to do so.

A. Standard of Review.

The supreme court reviews the trial court's refusal to give a requested instruction for correction of errors at law. *Lynch v. Saddler,* 656 N.W.2d 104, 107 (Iowa 2003). "As long as a requested instruction correctly states the law, has application to the case, and is not stated elsewhere in the instructions, the court must give the requested instruction." *State v. Kellogg,* 542 N.W.2d 514, 516 (Iowa 1996).

B. Preservation of Error

The State argues that error has not been adequately preserved on this issue (State's brief, pp. 43-44). The State argues that Montgomery did not make the request he presents on appeal until his motion for new trial and the State believes that is not adequate to preserve error (State's brief, pg. 43). The State is mistaken.

Iowa R. Crim. P. 2.19(5)(f) provides that "the rules relating to the instruction of juries in civil cases shall apply to the trial of criminal cases." Iowa R. Civ. P. 1.924 addresses instructions to the jury and provides in part:

> Before jury arguments, the court shall give to each counsel a copy of its instructions in their final form, noting this fact of record and granting reasonable time for counsel to make objections, which shall be made and ruled on before arguments to the jury. Within such time, all objections to giving or failing to give any instruction must be made in writing or dictated into the record, out of the jury's presence, specifying the matter objected to and on what grounds. No other grounds or objections shall be asserted thereafter, or considered on appeal. *But if the court thereafter revises or adds to the instructions, similar specific objection to the revision or addition may be made in the motion for new trial, and if not so made shall be deemed waived* (emphasis added).

Under the above provision, to preserve error on objections regarding additional instructions to the jury after closing arguments have been made, a specific objection can be made in a motion for new trial. The unpublished court of appeals case that the State relies upon even appears to suggests that the defendant's failure to object to the trial court's supplemental instruction based on the same argument he advanced on appeal could have been preserved had he made the argument in a motion for new trial. *See State v. Foley*, No. 17-0043, *2 (Iowa Ct. App. Sept 27, 2017) ("Nor did Foley raise this argument in a motion for a new trial" citing Rule 1.924 and quoting the above language).

Regardless, Montgomery adequately preserved error during the trial. The jury was asking for clarification as to the meaning of "sexual in nature." When asked by the trial court if defense counsel wished to make any record on the request, defense counsel stated "Well, your honor, I do think that perhaps some clarification should be given to the jury as to what 'sexual in nature means'…" Trial Tr. Day 3, pg. 113 line 6-9. Defense counsel then specifically requested the factor that the action must be for the purpose of satisfying the sexual desire of the defendant be instructed. *Id*. line 9-10. When defense counsel requested that the jury should be given clarification as to what "sexual in nature" means, clearly that request by defense counsel was sufficient to alert the trial court to the basis of his objection that the court was choosing not to provide clarification to the jury as to the meaning of "sexual in nature."

Furthermore, defense counsel's specific request relating to the act being for the purpose of satisfying the sexual desire of the defendant is a particular factor that is outlined by the court in *Pearson* to be taken into consideration in determining whether an act is, in fact, sexual in nature. *See Pearson* at 455 ("Such circumstances certainly include whether the contact was made to arouse or satisfy the sexual desires of the defendant or the victim" and "the purposefulness of the contact"). Thus, at the very least, error was clearly preserved as to whether the trial court should have provided an additional instruction to the jury to consider

that factor in determining whether the acts of the defendant were "sexual in nature."

C. Discussion

Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. *State v. Freeman,* 267 N.W.2d 69, 71 (Iowa 1978). The district court has a duty to ensure the jury understands the issues it must decide. *Clinton Land Co. v. M/S Assocs., Inc.,* 340 N.W.2d 232, 234 (Iowa 1983). The district court also has a duty to ensure the jury understands the law it must apply. *Sanders v. Ghrist,* 421 N.W.2d 520, 522 (Iowa 1988).

Here, the jury did not understand the law it was required to apply because it sought clarification as to what "sexual in nature" means. The district court refused to provide additional instructions and such refusal prejudiced the defendant.

The State claims Montgomery cannot show that just because the jury made a request for clarification that does not prove that an additional instruction would have had any effect (State's brief, pp. 47-48). The State seems to be making a harmless error argument. Even if there is an abundance of evidence for a charged offense, a defendant can still be prejudiced. *See e.g. State v. Watkins*, 463 N.W.2d 15 (Iowa 1990) (Supplemental instructions that expanded the state's theory and

provided an alternative means of guilt prejudiced the defendant despite abundance of evidence of assault).

Here, the prejudice to Montgomery was that the jury was not provided with factors the law requires under *Pearson* to consider before determining whether an act is sexual in nature. This was a very close case. The jury communicated to the judge that they were deadlocked on the sexual abuse charge. The jury acquitted the defendant on the lascivious acts with a child charge which specifically required a finding of an intent to sexually gratify the defendant or victim. The defendant lost the benefit of the jury at least being instructed to consider the same factor it found lacking on the lascivious acts with a child offense. The prejudice to Montgomery is obvious.

III.

The defendant was denied his constitutional right to present a defense to the crimes charged when the trial court refused to allow the defendant to offer evidence of the sexual acts committed by L.V. upon S.V. as an exception to Iowa's "rape shield law."

A. Standard of Review

When reviewing a trial court's rulings on admissibility of evidence, the supreme court uses an abuse-of-discretion standard. *State v. Alvey*, 458 N.W.2d 850, 852 (Iowa 1990). However, review of constitutional questions is de novo. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992).

B. Preservation of Error

Iowa R. Ev. 5.412 prohibits use of evidence of a victim's other sexual behavior. However, Rule 5.412(b)(1) does provide for some exceptions in a criminal case. Iowa R. Ev. 5.412(c)(1) sets forth the procedure to determine the admissibility of such evidence that requires the defendant to file a motion and offer of proof describes the evidence and states the purpose for which the evidence is being offered. The defendant in this case filed a timely pretrial motion to admit evidence (App 10) and offer of proof (App 12).

Throughout the trial the defendant also presented offers of proof outside the presence of the jury at various times and renewed his motion to admit after each offer of proof. *See* trial tr. Day 1, pp. 194 – 200; trial tr. Day 2, pp. 106 – 110; trial tr. Day 3, pp. 2 – 4. The defendant also filed a motion for new trial pursuant to Iowa R. Cr. P. 2.24(2)(b)(9) arguing that the trial court's refusal to admit such evidence denied him his constitutional right to present a defense on his own behalf. *See* Motion for New Trial (App38). Error has been preserved.

C. Discussion

The State contends that the court properly excluded the evidence that L.V. committed sex acts upon S.V. and that the exception to Rule 5.412 found in subsection A of Rule 5.412(b)(1) did not apply (State's brief, pg. 55). State's

Exhibit 4 was introduced into evidence which was the medical report of Nurse Karin Ward. *See* Trial Tr. Day 2, pg. 145. The report contained redactions of the history wherein S.V. described to Nurse Ward that L.V. committed sex acts upon her. The unredacted report is found in the minutes of testimony, pg. 42. Exhibit 4 did not redact the portions of the history wherein S.V. alleged that her grandpa committed sex acts upon her.

Defense counsel objected to the admission of Exhibit 4 in the form it was admitted which contained the parts identifying the defendant as a perpetrator, but redacted the parts that described L.V. as a perpetrator. *See* Trial Tr. Day 2, pg. 145 line 10-14; see also Trial Tr. Day 2, pp. 60 line 21 – 62 line 17. The court overruled the objection. *See* Trial Tr. Day 2, pp. 63 line 12 – 64 line 7. As argued in his opening brief, Nurse Ward stated in her report that penetration and trauma may occur in the genital area without leaving definite physical signs. *See* Exhibit 4.

The State argues that because no visible physical signs of trauma were found, then there was no injury and that exception to the rape shield law does not apply (State's brief, pg. 55). However, it is fundamentally unfair and is a manifest injustice to allow the State the benefit of having a medical professional conduct an exam where the alleged victim claims penetration into her vagina occurred and

then have that medical professional bolster that victim's claim by opining that trauma and penetration can occur without showing physical signs, but only allow the victim's statement to that medical examiner identifying the defendant as the perpetrator of that penetration when the victim also identified another person as the perpetrator of that penetration.

The reason for the exception set for in Rule 5.412(b)(1)(A) is to allow the defendant to offer evidence that someone other than him perpetrated the acts claimed to have happened by the victim. The medical report offered by the State in this case served the exact same purpose as would evidence of a medical report showing the presence of semen or physical bruising. It was medical confirmation of physical trauma, i.e., penetration of the vagina. Had the medical report showed the presence of semen or genital bruising, then certainly Rule 5.412(b)(1)(A) would have allowed the admission of the evidence where S.V. described the acts that L.V. committed upon her. But there is no substantive difference when the medical examiner is reporting that the victim claims physical trauma has occurred and then opines it is possible for that trauma to have taken place without physical signs, thus corroborating the victim's allegation.

The above is further evidence supporting Montgomery's argument that his due process right to offer a defense was violated when he was disallowed to offer

the evidence that L.V. committed sex acts on S.V. during the same time frame she alleged that the defendant committed sex acts upon her.

This case is not similar to *State v. Jones*, 490 N.W.2d 787 (Iowa 1992) as the State argues (State's brief, pp. 56-57). In *Jones*, the defendant claimed that sexual abuse that was committed upon the victim 5 years before the allegations in his case occurred were relevant to show the victim was confusing the acts that she alleged he committed. *Jones* at 791. The court rejected those claims because the proximity was too remote (5 years earlier) and the abuse committed was different types of acts so there was no likelihood the victim confused the acts. *Id*.

Here, the acts committed by L.V. upon S.V. occurred during the same time frame as S.V's allegations against the defendant. Secondly, the acts alleged were the same type of acts for L.V. and for the defendant. The relevance is not marginal, but very probative.

State rules of evidence "may not be applied mechanistically to defeat the ends of justice." *See Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). This is particularly true "where constitutional rights directly affecting the ascertainment of guilt are implicated." *Id*.

In *Chambers*, the defendant was charged with murdering a police officer and was denied the right to offer evidence that another person had confessed to the shooting based on a state hearsay grounds that did not allow an exception for declarations against penal interest and also on a state rule disallowing a party to impeach his own witness. *Id*. at 285-91. The supreme court held that, "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.'" *Id*. at 295 citing *Dutton* v. *Evans,* 400 U. S. 74, 89 (1970); *Bruton v. United States*, 391 U.S. 123, 135-37 (1968).

In reversing Chambers' conviction, the U.S. Supreme Court held that "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers* at 302. The court reasoned as follows concerning the trial court's denials of Chambers' opportunity to present evidence:

> The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Id. Here, the evidence of L.V. committing sex acts upon S.V. were not merely trustworthy, it was admitted to by S.V. and L.V. There was no doubt as to its truth.

Montgomery's right to present a defense by offering evidence that it was L.V. and not he who was the actual perpetrator of the acts alleged by S.V. directly affected the ascertainment of his guilt. In this case, Rule 4.12 was applied mechanistically to defeat the ends of justice.

Likewise, in *Davis v. Alaska*, 415 U.S. 308 (1974) our U.S. Supreme Court reversed a conviction of a defendant (Davis) charged with burglary when he was disallowed by a state rule to offer evidence of a key witness' (Green) juvenile burglary adjudication and probation to show his bias and prejudice. The court reasoned as follows:

> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof . . . of petitioner's act." (citation omitted) The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, (citation omitted) as well as of Green's possible concern that he might be a suspect in the investigation.

Davis at 317-18. The court concluded that:

> The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness.

Davis at 320.

Here, protecting the confidentiality of S.V's other sexual behavior in these circumstances cannot require yielding of Montgomery's vital constitutional right to effective cross-examination of S.V. by questioning her about the acts committed by L.V., the time frame those acts occurred, her desire not to get her step-brother in trouble, and her desire not to get herself in trouble. The State's entire case rested on the strength of S.V.'s statements accusing the defendant of committing sex acts upon her. Being able to question S.V. about the acts of L.V. coupled with the testimony of Dr. Thurman relating to S.V.'s contamination of her thoughts relating to the defendant and L.V. was crucial to Montgomery's defense and he was denied this fundamental right guaranteed him by the U.S. and Iowa Constitutions.

CONCLUSION

For all the foregoing reasons stated in this brief, defendant/appellant, Michael Montgomery prays that this honorable court reverse the judgment and sentence entered herein and direct a judgment of acquittal based on inconsistent verdicts.

Alternatively, the defendant requests the court order a new trial with proper instructions to the jury and allow the defendant to offer the material evidence requested.

ORAL ARGUMENT REQUESTED

The defendant/appellant requests oral argument on all issues raised in this brief.

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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 6,652 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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Signature

9-16-20
Date