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

APPLICATION FOR FURTHER REVIEW

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QUESTIONS PRESENTED FOR REVIEW

I.

Does the scope of the "constitutional rights exception" to Iowa's "Rape Shield Law" include allowing a defendant who is accused of sexual contact with a child to offer evidence that another person, rather than the defendant, perpetrated the alleged sexual acts against the same child during the same period in order to show that the defendant was not the perpetrator, to show the child's source of knowledge of the sexual acts, and to show the child's motive to fabricate the allegations?

II.

Should the Iowa Supreme Court overturn *State v. Pearson*, 514 N.W.2d 452 (Iowa 1994) and find that the district court erroneously failed to instruct the jury that Iowa's sexual abuse statute requires, as an element of the offense, that Defendant commit the prohibited act with the intent, motive, or purpose to sexually gratify himself or the victim?

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STATEMENT SUPPORTING FURTHER REVIEW

Question no. 1

The court of appeals acknowledged that "the scope of the 'constitutional rights' exception contained in Iowa R. Ev. 5.412 is not yet clear." Opinion, pg. 14. This case presents this court with the opportunity to provide clarity to our courts on the scope of the "constitutional rights" exception to Iowa's "Rape Shield Law." Here, there was no dispute that another person committed the same sexual acts against the child during the same period S.V. alleged the defendant committed the acts. Evidence existed the child did not want to get that person in trouble and did not want to get herself in trouble giving her a motive to fabricate the allegations against Defendant, but the district court disallowed Defendant to offer such evidence.

The court of appeals decided a substantial question of constitutional law that should be settled by this court because the court of appeals, in its decision to affirm the district court's denial of the defendant's offer of proof, failed to follow the constitutional principles and reasoning decided in *Chambers v. Mississippi*, 410 U.S. 284 (1973) and, more particularly, the holding of *Davis v. Alaska*, 415 U.S. 308 (1974). Therefore, Iowa R. App. P. 6.1103(1)(b)(1) applies and are grounds to review this decision.

Question no. 2

The court of appeals chose to refrain from examining whether *State v. Pearson*, 514 N.W.2d 452 (Iowa 1994) should be overruled as requested by the defendant because the court of appeals rightly held that it did not have the authority to overturn supreme court precedent. *See* Opinion, pg. 5. Thus, this case "presents an issue of broad public importance that the supreme court should ultimately determine." *See* Iowa R. App. P. 6.1103(1)(b)(4).

The appellant/defendant in this case was acquitted of lascivious acts with a child but was convicted of sexual abuse in the second degree. The difference between the two offenses is that lascivious acts with a child specifically requires that the defendant act with the intent to arouse or satisfy the sexual desire of himself or the victim. Sexual abuse in the second degree does not contain that specific language in the sex abuse statute.

Instead, for sexual abuse, a jury is required to find that the acts were "sexual in nature" as announced in *Pearson*. The "sexual in nature" standard announced in *Pearson* is vague and makes no requirement that a defendant act with a sexual desire. This standard permits juries to convict persons of sexual abuse for innocent contact which is what happened in this case.

During deliberations, the jury asked the district court to provide clarification as to the instruction that the jury could consider the type of contact and

surrounding circumstances to determine whether the act was sexual in nature. Over the objection of the defendant the court refused to provide any further instruction to the jury on that issue.

In *State v. Martens*, 69 N.W.2d 482 (Iowa 1997) this court held that it is the duty of the court to give additional instructions when requested when failure to do so would be prejudicial to the defendant. *Id.* at 485. The court of appeals affirmed the district court's refusal to provide additional instructions. Opinion pp. 10-12. The court of appeals opinion conflicts with this court's holding in *Martens*. Thus, this case should be reviewed by this court based on Iowa R. App. P. 6.1103(1)(b)(1).

The court of appeals also held that Defendant did not preserve error on this issue because he did not specifically cite to *Pearson* and list all the *Pearson* factors in his objection. Opinion pp. 11-12. This decision by the court of appeals conflicts with this court's decision on error preservation in *Summy v. City of Des Moines*, 708 N.W.2d 333, 338 (2006). *See* Iowa R. App. P. 6.1103(1)(b)(1).

BRIEF IN SUPPORT OF REQUEST FOR FURTHER REVIEW

Factual Background

S.V. is the granddaughter of Defendant. Trial tr. Day 1, pg. 150. S.V. claimed that while she was in the third and fourth grade, she would stay overnight

by her grandparents in Hospers, Iowa and the defendant would touch her sexually. *Id.*

S.V. gave many different ages as to when she claimed the abuse started. She testified in her deposition to four different ages: 7, 8, 9, and 10. *See* Trial tr., Day 1, pg. 161. S.V. told her friend, A.P., that it began when she was ages 3-5. *See* Trial tr., Day 2, pg. 22. S.V. claimed that the defendant committed these acts, which included licking her vagina while her grandmother was also in the bed. Trial tr., Day 1, pp. 164-65.

Prior to Defendant's arrest he voluntarily submitted to an interview with Sioux County Sheriff deputies. Defendant denied committing any sexual acts with S.V. Defendant informed the deputies that on one occasion, S.V. crawled into bed next to him in the middle of the night with Defendant and his wife, S.V.'s grandmother, and while lying next to the defendant, S.V. grabbed Defendant's hand and placed it on her "crotch area." Defendant immediately withdrew his hand and scolded S.V. Moments later S.V. did the same thing and Defendant again immediately removed his hand and ordered S.V. out of the bed and to her room. *See* video interview of Defendant with Sioux County Sheriff deputies marked State's exhibit 5.

L.V. is the step-brother of S.V. About 5 years prior to the trial S.V. and her mother moved in with L.V's father at their farm. *See* testimony of L.V., trial tr. Day 2, pp. 26 line 10 – 27 line 13. At the time of his trial testimony L.V. was 16. *See* trial tr. Day 2, pg. 26 line 1-4.

S.V. testified that sexual abuse from L.V. committed upon her began when she was age 9. Trial tr. Day 1, pg. 195 line 10 – 17. S.V. reported to the CAC forensic interviewer that the abuse from L.V. continued until 4-5 days before her interview with the CAC interviewer. *See* offer of proof, pg. 1 (App12). *See also* Summary of CAC forensic interview, pg. 28 of minutes of testimony (App5).

S.V. also reported to the CAC forensic interviewer that she felt bad that she was going to tell on her brother. *See* Offer of proof, pg. 2 (App13) citing Summary of CAC forensic interview, pg. 28 of minutes of testimony (App5). S.V. also claimed to the CAC interviewer that when Defendant began the abuse she told L.V. about it and S.V. "thinks that is why [L.V.] started doing it to her." *See* Offer of proof, pg. 2 (App12) citing Summary of CAC forensic interview, pg. 27 of minutes of testimony (App4). All of this was confirmed by S.V. at the trial. Trial tr. Day 1, pp. 195 – 196. S.V. also testified that she reported to the CAC worker that the acts committed by L.V. were the same type and kind that were committed upon her by her grandpa, the defendant. Trial tr. Day 1, pg. 195 line 18-22.

O'Brien County deputy Steven Vander Veen conducted an investigation of the allegations that S.V. made concerning sexual abuse committed upon her by L.V. During deputy Vander Veen's interview with L.V. he admitted to committing the sexual acts with S.V. *See* trial tr. Day 3, pp. 2-4. *See also* exhibit 109 (App33) and 110 (App36).

Dr. Rosanna Jones – Thurman also testified at trial. Dr. Thurman is a clinical psychologist who practices in Omaha and Council Bluffs. About half of her practice is devoted to treating and evaluating children. Over the course of her career she has interviewed thousands of children who have made allegations of sexual abuse. Trial tr. Day 2, pp. 77-80.

Dr. Thurman testified during the offer of proof that based on her review of the materials and statements that S.V. made concerning the conduct with L.V. that she believed L.V. engaged in grooming behavior with S.V. Dr. Thurman also testified that she believed that S.V.'s memory was contaminated with what was going on with L.V. with what she could have conceived happening with the defendant. Dr. Thurman also testified that she has seen in her practice children accuse someone else of abuse so that they won't get the real perpetrator in trouble. Dr. Thurman's review of S.V.'s statements showed that S.V. stated that she didn't want to get L.V. in trouble and also that she, herself, didn't want to get in trouble. Trial tr. Day 2, pp. 107-109. Prior to the trial, Defendant supplemented its offer of

proof with an email from Dr. Thurman setting forth her opinions. *See* Supplement to Offer of Proof (App23).

Procedural background

The defendant was charged by way of trial information (App7) with sexual abuse in the second-degree and with lascivious acts with a child. Prior to trial commencing, the defendant filed a timely motion to admit evidence (App10) and Offer of Proof (App12) requesting that he be allowed to offer evidence regarding the sexual abuse committed by L.V. upon S.V. that was described above. The court entered a ruling denying the motion to admit evidence. *See* Ruling on State's First Motion in Limine and Defendant's Motion to Admit Evidence Pursuant to Iowa Rule of Evidence 5.412 (App25).

Trial by jury commenced on July 9, 2019. *See* trial tr. Day 1, pg. 1. While the jury was deliberating, they sent a note to the court which stated, "We would like clarification of Instruction No. 16 in regards to the final sentence." *See* Jury Question No. 1 (App38); *See* Jury Instruction No. 16 (App44). A record was made and the Defendant asked the court to provide clarification to the jury and specifically requested the court to instruct the jury that for the act to be sexual in nature it must have been committed for the purpose of satisfying the sexual desire of the defendant. *See* Trial tr. Day 3, pg. 113 line 1-22. The court entered an order which read as follows, "The court finds no clarification is necessary in regard to

Instruction No. 16 and would direct the jury to review the instructions as a whole in reaching their verdict and follow the instructions previously given by the court." *See* Trial tr. Day 3, pg. 114 line 2-13.

Later the jury advised the court that it had reached a verdict on count II, lascivious acts with a child, but the jury was unable to reach a unanimous verdict on count I, sexual abuse in the second-degree. The court instructed the jury to continue deliberations. Trial tr. Day 3 pp. 115 line 15 – 116 line 13. Approximately 30 minutes later the jury returned its verdict. *Id.* at 117. The jury found the defendant guilty on count I, sexual abuse in the second-degree and found the defendant not guilty on count II lascivious acts with a child. *See* Verdict of the Jury (App45).

ARGUMENTS

I.

Defendant was denied his constitutional right to present a defense when the district court excluded evidence that another person committed sexual acts against S.V. during the same period as the allegations for which he was being tried. Said evidence was relevant to show the defendant was not the real perpetrator, to show the child's source of knowledge of the sexual acts, and to show the child's motive to fabricate the allegations

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

The court of appeals found, and the state agrees, that Defendant preserved error on this issue by following the procedure set forth in Iowa R. Ev. 5.412(c)(1). Opinion, pg. 12.

C. Discussion

The court of appeals held that "the scope of the 'constitutional rights' exception is not yet clear." Opinion, pg. 14. The right to present a defense is a fundamental right that is essential to a fair trial. *State v. Clark,* 814 N.W.2d 551, 561 (Iowa 2012). In *State v. Russell*, 897 N.W.2d 717, 731 (Iowa 2017) the court held as follows:

> Compulsory Process. The United States Constitution recognizes that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. Likewise, the Iowa Constitution recognizes the right "to have compulsory process for his witnesses." Iowa Const. art. I, § 10.
>
> The right to compulsory process includes the right to compel a witness's presence in the courtroom and the right to offer testimony of witnesses. *State v. Weaver,* 608 N.W.2d 797, 802 (Iowa 2000). The Supreme Court has described the right to compulsory process as follows:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.
>
> *Taylor v. Illinois*, 484 U.S. 400, 409, 108 S.Ct. 646, 653, 98 L.Ed.2d 798 (1988) (quoting *Washington v. Texas,* 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967)).

Russell at 731. The Sixth Amendment and due process underpinnings for Defendant's argument comes primarily from two United States Supreme Court cases, *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) and *Davis v. Alaska*, 415 U.S. 308 (1974). Both cases held that, under those circumstances, state rules of evidence must give way to an accused's Sixth Amendment right to offer a defense.

Most relevant, factually, to the case at bar is *Davis*, where, like Iowa's "rape shield law," Alaska had a rule of evidence that shielded a witness' juvenile court record from being used to protect the privacy witnesses. *Davis* at 320. Our supreme 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 Defendant's vital constitutional right to effective cross-examination of S.V. by disallowing him to question her about the acts committed by L.V. to show her source of knowledge of the sexual acts, 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 case rested almost entirely 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 possible contamination of her thoughts relating to the defendant and L.V. as well as L.V.'s grooming behavior of S.V. was crucial to Defendant's defense and he was denied this fundamental right guaranteed him by the U.S. and Iowa Constitutions.

The court of appeals concluded that "It was not necessary to admit evidence that the boy perpetrated sex acts on S.V. to explain her knowledge, as there was evidence introduced at trial that S.V. had seen or been exposed to pornography." Opinion, pg. 15 citing *State v. Walker*, 935 N.W.2d 874, 877 (Iowa 2019) ("It is certainly true 'that a child victim's sexual knowledge [that] resulted from an

encounter with someone other than the defendant may be relevant and material to a defendant's defense of mistaken identity or false accusation.'"). But as the court of appeals found, S.V. described Defendant's penis as "textured" and "muscly." Opinion, pg. 4. Merely viewing pornography would not account for S.V.'s ability to describe how Defendant's penis felt.

The statement by S.V. that when Defendant began his abuse she told L.V. about it and S.V. "thinks that is why [L.V.] started doing it to her" is important to show her bias and motive to fabricate the allegations against Defendant. Clearly, S.V.'s statement shows she was trying to cast blame for L.V.'s abuse on Defendant and it can certainly be inferred that the alleged abuse by Defendant was fabricated for that reason and further shows S.V.'s bias against Defendant. That is the type of evidence *Davis* requires a defendant be allowed to present to the jury despite any state shield law to the contrary.

Other jurisdictions have held that in appropriate circumstances *Davis* requires the yielding of their state's "rape shield law" to allow a defendant to offer evidence of other sexual acts committed upon a victim. *See State v. Pulizzano,* 155 Wis.2d 633, 456 N.W.2d 325, 335 (1990) (holding that the defendant's constitutional right to present a defense under *Davis* was violated by the trial court's exclusion of defense evidence that the child complainant's sexual

knowledge resulted from a previous sexual assault); *State v. Jalo,* 27 Or.App. 845, 557 P.2d 1359, 1362 (1976) (concluding that the defendant's confrontation rights were violated when the rape shield law prevented him from proving the complainant's motive to lie about her sexual activity with the defendant); *State v. DeLawder*, 344 A.2d 446 (Md. 1975) (Defendant's constitutional right to confrontation under *Davis* was violated when trial court disallowed questioning of complainant's prior sexual history to show ulterior motive for allegations against defendant); *Commonweatlh v. Joyce*, 415 N.E.2d 181 (Mass. 1981) (Rape-shield statute does not sweep so broadly as to render inadmissible evidence of specific instances of a complainant's sexual conduct in situations when that evidence is relevant to show the complainant's bias); *State v. Budis*, 593 A.2d 784 (N.J. 1991) (prior sexual abuse by step-father relevant to complainant's knowledge of sexual acts and could not, constitutionally, be excluded under *Davis*).

Likewise, relying on *Davis*, our U.S. Supreme Court subsequently held that a defendant's right to present a defense was violated where he was disallowed from questioning a rape accuser of her other sexual relationship with someone else to show her bias against the defendant. *See Olden v. Kentucky*, 488 U.S. 227 (1988). The error was not harmless because, much like the case at bar, the prosecution's case rested largely on the complainant's testimony. *Id.* 488 U.S. at 233. Here, the

court of appeals made no analysis of how *Davis* applies in this case. *Davis* compels this court to reverse and remand for a new trial.

The sex acts committed by L.V. upon S.V. are relevant to show S.V.'s source of knowledge of the sexual acts, the proximity in time to the allegations made against Defendant, and S.V.'s motive to fabricate the allegations because she did not want to get L.V. or herself in trouble. These facts were crucial to Defendant's defense and his constitutional right to present a defense as set forth in *Davis* was violated.

II.

Sound reasoning and statutory interpretation demands this court overrule *State v. Pearson*, 514 N.W.2d 452 (Iowa 1994) and interpret Iowa's sexual abuse statute to require that, in order to commit a sex act, the person act with the intent, motive or purpose to sexually gratify himself or the victim. The district court's failure to instruct the jury as requested produced an inconsistent verdict showing that the defendant is not guilty of sexual abuse in the second degree.

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.

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

In response to the jury's question that the court provide clarification on the meaning of the "sexual in nature" standard, Defendant asked the court to provide clarification and specifically requested the court to instruct that for the act to be sexual in nature it must have been committed for the purpose of satisfying the sexual desire of Defendant. *See* Trial tr. Day 3, pg. 113 line 1-22. Defendant did not specifically reference overturning *Pearson* in his objection on the record, something the district court has no authority to do. *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"). Defendant did specifically argue that *Pearson* be overturned in his motion for new trial and motion for judgment of acquittal. (App 45 and 46).

As it relates to the court's failure to provide additional instructions to the jury. The court of appeals found the defendant did not preserve error on his argument that the court should have responded to the jury's question informing them that the *Pearson* factors are to be considered, in particular, the factor espoused in *Pearson* of whether the act was committed for the purpose of arousing the sexual desire of the defendant or victim. Opinion pp. 11-12.

This finding by the court of appeals conflicts with *Summy v. City of Des Moines*, 708 N.W.2d 333, 338 (2006) ("Error preservation does not turn, however, on the thoroughness of counsel's research and briefing so long as the nature of the error has been timely brought to the attention of the district court."). Although it would have been helpful to the district court had the defendant cited *Pearson* and requested every factor listed in that decision, that was not required to alert the court to the issue and preserve error. *Id.*

C. Discussion

In *State v. Pearson*, 514 N.W.2d 452 (Iowa 1994) the issue in the case centered around whether contact of the specified body parts described in the sex abuse statute that occurred while clothing covered those body parts could be considered sexual contact. *Id.*, 514 N.W.2d at 455.

In *Pearson*, the court established the requirement that, for an act that is perpetrated on a victim to be considered a "sex act" for purposes of the sexual abuse statute, the act must be "sexual in nature." *Pearson*, 514 N.W.2d at 455. The court then went on to describe this "sexual in nature" requirement and provided a non-exhaustive list of circumstances which a jury can take into account when attempting to determine if a particular act is "sexual in nature". *Id.*

Such circumstances include whether the contact was made to arouse or satisfy the sexual desires of the defendant or the victim. *Id.* However, the court noted that 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. *Id.* Other circumstances include, but are not limited, to the relationship between the defendant and the victim; whether anyone else was present; the length of the contact; the purposefulness of the contact; whether there was a legitimate, nonsexual purpose for the contact; where and when the contact took place; and the conduct of the defendant and victim before and after the contact. *Id.*

It is the defendant's position that the reasoning in *Pearson* is unsound, confusing, and unworkable. This court should overrule *Pearson* to the extent that *Pearson* holds that a lack of sexual motivation can permit a finding of sexual abuse

and further hold that a jury must be instructed that "sexual contact" requires that the defendant act with the intent or motive to sexually gratify himself or the victim.

The majority's unsound reasoning in *Pearson* was criticized from the very beginning. Justice Carter issued a partial dissent to the decision in *Pearson* and explained how the criteria used by the majority to determine whether an act is "sexual in nature" was illogical. Justice Carter's critique was as follows:

> I believe that it is axiomatic that any time two persons are moving about in close proximity to one another innocent contact may occur between sexual parts. The majority recognizes this and attempts to distinguish prohibited sexual contact from innocent contact. The majority includes, as a criterion for determining sexual contact, "the purposefulness of the contact." At the same time, it disavows any requirement that there be an intent to act based on sexual gratification of either the perpetrator or the victim. The circumstances that the majority would consider in determining whether sexual contact has occurred would also be relevant to show an intent to act based on sexual gratification. However, 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, 514 N.W.2d at 457 (J. Carter, concurring in part and dissenting in part).

On the same day *Pearson* was decided, the court also issued its opinion in *State v. Monk*, 514 N.W.2d 448 (Iowa 1994). In *Monk*, the defendant was convicted of sexual abuse when he engaged in "horse play" by inserting a broom

handle into the rectum of one of his friends while at a party with others, however, no evidence existed of a sexual motivation. *Monk*, 514 N.W.2d at 451. The court reversed Monk's conviction because the trial court did not instruct the jury that the prohibited contact was required to be "sexual" contact. *Id.* Since, the jury could have concluded that Monk's behavior was not sexual in nature, the jury should have been instructed that the contact was required to be sexual contact. *Id.* The court remanded the case for a new trial for failure to correctly instruct the jury but did not find Monk's motion for judgment of acquittal should have been granted because the court found there was sufficient evidence to submit the charge to the jury. *Id.*

However, in *Monk*, two justices dissented criticizing the *Pearson* "sexual in nature" standard. Justice Carter dissented arguing that Monk's motion for judgment of acquittal should have been granted because no sexual motivation had been established as he advocated should be a required element of a sex act in *Pearson*. *See Monk*, 514 N.W.2d at 452 (J. Carter, dissenting).

Justice Snell also dissented arguing that Monk's motion for judgment of acquittal should have been granted. Justice Snell offered a more critical analysis of the holding in *Pearson* for its "sexual in nature" rationale. Justice Snell stated the following:

> The majority relies on *State v. Pearson,* decided this month, from which I dissented, as authority for its result. In *Pearson,* where no one disputed that sex was involved, the majority found that because the act was sexual in nature, contact occurred. A gratuitous statement of law was then adopted, although completely extraneous to the facts of the case and without any supporting authority, that a sexual motivation is not necessary for a sex act to occur. Thus, the aura of sex controls the meaning of "contact" and causes motivation to disappear.
>
> In the instant case, the antithesis of *Pearson,* it is undisputed that sex is not involved. Nevertheless, a sexual abuse is held to be possible because under *Pearson,* a sexual motivation is not required. The unfounded dicta of *Pearson* is now bootstrapped into a holding of law that decides the instant case.
>
> The holdings in *State v. Pearson* and *State v. Monk* have transformed our sex abuse statutes into general assault statutes where the assault has some effect on the reproductive or excretory organs of the victim or defendant. I believe these constructions of our statutes are unwise and go well beyond any recognizable legislative intent to protect victims against sex abuse.

Monk, 514 N.W.2d at 452 (J. Snell, dissenting).

Justice Carter and Justice Snell understood what is obvious. That is, for conduct to be considered a "sex act" the act must be motivated by sexual desire. *Pearson* expanded the definition of a "sex act" beyond what the legislature intended from the commonly understood meaning of "sex" by imposing this vague "sexual in nature" standard that permits a jury to find that a sex act has occurred without Defendant having any sexual motive whatsoever. Such a liberal

interpretation does not comport with the court's presumption that when the legislature enacts a statute it intends "[a] just and reasonable result." Iowa Code § 4.4(3).

Instruction No. 16 in this case was based on the definition of a sex act found in Iowa Code § 702.17. Although "sex act" is defined in the statute, the word "sex" is not defined nor is the word "sexual" defined. The statute focuses its attention on defining the "act" as opposed to defining the meaning of "sex." This court relies on the dictionary as one source to determine the meaning of a word left undefined in a statute. *McGill v. Fish*, 790 N.W.2d 113, 119 (Iowa 2010).

One common dictionary meaning of "sex" is "sexually motivated phenomena or behavior" *See* https://www.merriam-webster.com/dictionary/sex?src=search-dict-hed, Noun, entry 2. It is clear that the legislature intended that a "sex act" be one that is motivated by sexual desire.

Other jurisdictions have made similar conclusions. *See Flink v. State*, 683 P.2d 725, 733 (Alaska Ct. App. 1984) ("We therefore conclude that genital contact in order to be 'sexual contact' must be intended to result in either the sexual arousal or sexual gratification of the actor or the victim"). *See also State v. Tobin*, 602 A.2d 528 (R.I. 1992) (trial court committed reversible error in refusing to instruct the jurors that they were required to find that the defendant's contact with

his niece was for the purpose of the defendant's sexual arousal, gratification, or assault, in order to convict under the second-degree sexual-assault statutes where statute prohibited "sexual contact").

Since the jury acquitted Defendant of lascivious acts with a child which requires a finding that Defendant act with the specific intent to sexually gratify himself or the victim, this court should acquit Defendant of sexual abuse in the second degree because committing a sex act requires acting with the same sexual motivation.

Even if this court will not overturn *Pearson*, the trial court in this case erred and should have provide the jury with supplemental instructions in response to the jury's question seeking clarification on the "sexual in nature" standard. The trial court should have provided the jury with all of the *Pearson* factors to consider. At the very least, the court should have instructed the jury to consider whether the acts were committed for the purpose of satisfying the sexual desire of the defendant as requested by Defendant.

In *State v. Martens*, 69 N.W.2d 482 (Iowa 1997), this court held as follows:

> According to the rule generally accepted, the court may, at the request of the jury, give further instructions, since the interest of justice requires that the jury have a full understanding of the case. It is usually said **to be the duty**

> **of the court to give additional instructions when requested** and a prejudicial refusal to do so has been held reversible error.

Martens at 485 (emphasis added) citing 89 C.J.S. *Trial* § 475, at 118-19 (1955); also citing *Stacks v. Rushing,* 518 S.W.2d 611, 614 (Tex.Civ.App.1974) (court's *failure to clarify issue when requested by the jury* was reversible error where failure to do so resulted in prejudice because of misinterpretation of issue by jury) (emphasis added).

This was a very close case as shown by Defendant's acquittal on lascivious acts and the fact that the jury was deadlocked at one point. The district court's failure to provide additional instructions was prejudicial and in violation of this court's pronouncement in *Martens*.

CONCLUSION

For all the reasons stated in this brief, Defendant prays this court vacate the court of appeals decision, reverse Defendant's conviction and sentence and enter a judgment of acquittal. Alternatively, Defendant prays the court remand his case for a new trial where the relevant evidence of L.V.'s acts upon S.V. can be introduced and so that the jury can be provided with adequate instructions on the meaning of the "sexual in nature" standard.

ORAL ARGUMENT REQUESTED

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

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2-22-2021
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IN THE COURT OF APPEALS OF IOWA

No. 19-1613
Filed February 3, 2021

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL D. MONTGOMERY,
Defendant-Appellant.

Appeal from the Iowa District Court for Sioux County, Julie Schumacher, Judge.

The defendant appeals from his conviction of second-degree sexual abuse.

AFFIRMED.

Michael J. Jacobsma of Jacobsma Law Firm, P.C., Orange City, for appellant.

Thomas J. Miller, Attorney General, and Sheryl Soich, Assistant Attorney General, for appellee.

Considered by Bower, C.J., and Vaitheswaran and Greer, JJ. Schumacher, J., takes no part.

GREER, Judge.

A jury convicted Michael Montgomery of second-degree sexual abuse and acquitted him of lascivious acts with a child. He appeals from his conviction, arguing (1) the jury rendered inconsistent verdicts and the court should overrule *State v. Pearson*, 514 N.W.2d 452, 455 (Iowa 1994), which provides that finding contact constitutes a "sex act" requires that the contact be "sexual in nature" but not that the act was done with the intent of sexual gratification; (2) the court erred in refusing to give a supplemental instruction after the jury asked for clarification on a jury instruction; (3) the court abused its discretion in excluding evidence under the rape-shield law; (4) the prosecutor engaged in misconduct by vouching for the complaining witness's credibility during the State's closing argument; and (5) the evidence presented at trial is insufficient to support his conviction and is contrary to the weight of the evidence.

Background Facts and Proceedings.

S.V., who is a young female relative of Montgomery, went to her guidance counselor in May 2018 and reported Montgomery had been touching her sexually. The guidance counselor alerted authorities, and S.V. was interviewed at a local child protection center (CPC).

Montgomery voluntarily spoke to police. While he denied inappropriately touching S.V., Montgomery told the police S.V. was probably "misconstruing" other incidents, such as the time she crawled into bed with him and his wife and then took his hand and placed it "between her legs" or the time she climbed into the shower while he was showering.

Montgomery was charged with sexual abuse in the second degree and lascivious acts with a child. He entered pleas of not guilty.

Leading up to the August 2019 trial, Montgomery moved to admit evidence pursuant to Iowa Rule of Evidence 5.412—also known as the rape-shield law. Montgomery sought to introduce evidence "S.V. was sexually victimized by another individual during the same time period that S.V. claims she was sexually abused by the defendant." Montgomery argued the evidence was admissible under exceptions to the rape-shield law in Iowa Rule of Evidence 5.412(b)(1)(A) and (C).[1] The court denied Montgomery's request, concluding rule 5.412(b)(1)(A) did not apply because there was no evidence of semen, injury, or other physical evidence. It also concluded Montgomery's "constitutional rights to confrontation and due process do not require [the evidence] be presented to the jury" and denied his request under rule 5.412(b)(1)(C).

S.V., who was then eleven years old and getting ready to enter sixth grade, testified at trial. She testified Montgomery "touched [her] sexually inappropriately" during sleepovers at his home when she was in third and fourth grade. She testified Montgomery and his wife "would want to watch TV with us in their bed

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[1] In a criminal proceeding involving alleged sexual abuse, rule 5.412 generally prohibits the introduction of evidence of "a victim's other sexual behavior." That said, the rules provides some specific exceptions in cases of criminal trials (when the defendant uses the proper procedure to determine admissibility prior to trial). The exceptions at issue here are

> (A) Evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence.
>
> . . . .
>
> (C) Evidence whose exclusion would violate the defendant's constitutional rights.

Iowa R. Evid. 5.412(b)(1)(A), (C).

before bed" and she would often fall asleep while lying there. S.V. testified Montgomery "licked [her] back," "[t]ried sticking fingers in [her] mouth," and touched her vagina with his finger and tongue. She also testified he would remove her pajamas and made her touch his penis, which she described as "textured" and "[m]uscly." Three other witnesses, two children and S.V.'s mother, testified S.V. first told them Montgomery was touching her sexually years before she reported it to her guidance counselor. Another witness, Teresa, who was a family friend of Montgomery, testified she confronted Montgomery after she heard about the allegations and "he said that he didn't do anything that [S.V.] didn't initiate first."

The jury acquitted Montgomery of lascivious acts with a child but convicted him of sexual abuse in the second degree. He was later sentenced to twenty-five years in prison. He appeals.

Analysis.

Inconsistent Verdicts. Montgomery claims the jury rendered inconsistent verdicts by acquitting him of lascivious acts with a child while finding him guilty of second-degree sexual abuse. His main focus, though, is urging us to overrule *Pearson* and hold that a conviction for sexual abuse requires a determination that contact that constitutes a sex act must be done with the intent for sexual gratification. *See* Iowa Code § 709.1(3) (2015)[2] ("Any sex act between persons is sexual abuse . . . when the act is performed with the other person [and] [s]uch other person is a child"); *see also Pearson*, 514 N.W.2d at 455 (providing that

[2] The jury was instructed it had to find Montgomery committed these acts between February 1, 2015, and August 16, 2016, so it is unclear whether the 2015 or 2016 Code is in force. As there have been no amendments to the pertinent sections, we refer to the 2015 Code.

whether contact constitutes a "sex act" depends on whether the contact was "sexual in nature," which includes the consideration of, but does not require a finding that, the contact was made to arouse or satisfy sexual desires of the defendant or the victim").

Considering Montgomery's second argument first, it is not clear it is preserved for our review. Montgomery did not raise overruling *Pearson* until he filed a combined motion in arrest of judgment and motion for new trial. In other words, he never raised the issue before or during his trial.[3] "Objections should be raised at the earliest time at which error became apparent in order to properly preserve error. Motion for new trial ordinarily is not sufficient to preserve error where proper objections were not made at trial." *State v. Steltzer*, 288 N.W.2d 557, 559 (Iowa 1980); *but see State v. Williams*, 895 N.W.2d 856, 859 n.2 (Iowa 2017) ("[I]t would make little sense to require a party to argue existing law should be overturned before a court without the authority to do so."). Still, even if we assume Montgomery preserved error by filing his post-trial motions, we lack the authority to overturn supreme court precedent. *See Figley v. W.S. Indus.*, 801 N.W.2d 602, 608 (Iowa Ct. App. 2011) (refusing to consider a claim because it was not properly raised in an appellate brief and "more critically, we are not at liberty to

[3] We recognize that during deliberation, the jury submitted a question for clarification over this sentence in an instruction, "You may consider the type of contact and the circumstances surrounding it in deciding whether the contact was sexual in nature." Montgomery then told the court he believed the jury should be instructed, "'[S]exual in nature' means that the action has to be for the purpose of satisfying the sexual desire of the defendant." But is not clear Montgomery realized he was asking the court to overturn precedent by providing such an instruction, and he made no argument why a change in law would be appropriate. Montgomery did not submit a proposed jury instruction before the trial on the issue.

overturn precedent of our supreme court"); *see also State v. Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990) ("We are not at liberty to overturn Iowa Supreme Court precedent.").

The State does not dispute, and we agree, Montgomery's claim the jury rendered inconsistent verdicts is preserved for our review. *See State v. Scholtes*, No. 16-1967, 2017 WL 3525296, at *1 (Iowa Ct. App. Aug. 16, 2017) (concluding error was preserved on an inconsistent-verdicts claim because defendant raised it in a motion in arrest of judgment and motion for new trial); *cf. Brooks v. State*, No. 16-0710, 2017 WL 2461504, at *6 n.3 (Iowa Ct. App. June 7, 2017) (finding inconsistent-verdicts issue was preserved by first raising the issue in a motion for new trial when the parties had agreed to a sealed verdict, so the jury could not be polled or sent back for further deliberations).

Here, the jury was instructed that to convict Montgomery of lascivious acts with a child, it had to find the following:

> 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 genitals or pubes.
> 2. Michael Montgomery did so with the specific intent to arouse or satisfy the sexual desires of himself or S.V.
> 3. Michael Montgomery was then 18 years of age or older.
> 4. S.V. was then under the age of 14 years.
> 5. Michael Montgomery and S.V. were not then married to each other.

In contrast, to convict Montgomery of second-degree sexual abuse, the jury only had to find that "[o]n or between February 1, 2015, and August 16, 2016, Michael Montgomery did commit a sex act with S.V." and "Michael Montgomery performed

the sex act while S.V. was under the age of 12 years." The jury was also instructed that "sex act" means any sexual contact:

> Between the mouth of one person and the genitals of another;
> or
> Between the finger or hand of one person and the genitals or anus of another person.
> You may consider the type of contact and the circumstances surrounding it in deciding whether the contact was sexual in nature.

While lascivious acts with a child requires a finding Montgomery acted "with the specific intent to arouse or satisfy the sexual desires of himself or S.V.," second-degree sexual abuse contains no such element.[4]

Montgomery uses imprecise language, but we understand his argument to be that it is factually inconsistent for the jury to conclude Montgomery committed one of the outlined sex acts while also finding he did so without the intent to sexually gratify himself or S.V. *See State v. Halstead*, 791 N.W.2d 805, 807 (Iowa 2010) (noting the term "'inconsistent verdicts' is often used in an imprecise manner and may include a wide variety of related, but nonetheless distinct, problems" including factual inconsistencies or legal inconsistencies). In his appellate reply brief, Montgomery argues it "strains credulity" to believe the jury concluded Montgomery made contact with S.V.'s vagina but did so without the intent of arousing his sexual desires.

First, we note that this is a not a case of "true" or "compound inconsistency." *See id.* at 808 (labeling a case that involves a single defendant who is convicted of a compound crime and acquitted of the predicate crime in a single proceeding

[4] The other elements of lascivious acts with a child were not in dispute. At the trial in 2019, S.V. was only eleven; Montgomery is her adult relative; and the two have never been married.

as "true inconsistency" or "compound inconsistency"). It is not impossible as a matter of law to find Montgomery committed second-degree abuse, which shares some elements of lascivious acts with a child but not all of them, while concluding he did not commit lascivious acts with a child. And lascivious acts with a child is not a predicate offense of second-degree sex abuse. *Cf. id.* at 816 (reversing defendant's conviction for assault while participating in a felony because the jury acquitted the defendant of the felony, making his assault conviction "truly inconsistent"). Thus, in determining whether these verdicts were inconsistent, we consider "whether the verdict is so logically and legally inconsistent as to be irreconcilable within the context of the case." *State v. Merrett*, 842 N.W.2d 266, 275–76 (Iowa 2014) (citation omitted).

Based on its acquittal of Montgomery of lascivious acts with a child, it seems the jury did not credit all details of S.V.'s testimony. *See State v. Doorenbos*, No. 19-1257, 2020 WL 3264408 at *4 (Iowa Ct. App. June 17, 2020) ("While it may be surprising for jurors to credit only part of a witness's testimony, that is their function."). Still the jury had Montgomery's own admissions to weigh. After S.V. alleged to her guidance counselor that Montgomery touched her sexually, the local police interviewed Montgomery. The jury viewed the video of this interview, during which Montgomery told officers that one time, when she was about seven years old, S.V. climbed into bed with Montgomery and his wife and, after doing so, took his hand and "put it down between her legs." According to what he told officers, Montgomery took his hand away, but then S.V. placed his hand between her legs

a second time.[5] Montgomery told the officers he believed S.V. was exploring herself with his hand. In a similar vein, Teresa—Montgomery's family friend—testified Montgomery told her "[h]e didn't do anything that [S.V.] didn't initiate first."

While Montgomery intended for his statements to the police to serve as a defense against the allegations made by S.V., the jury could still rely on them to find Montgomery's hand made contact with S.V.'s vagina and the contact was sexual in nature, without finding he undertook the action as a means of sexual gratification. We think this theory is bolstered by the fact seven-year-old S.V. could twice put the hand of her adult relative between her legs, suggesting Montgomery—for all his statements about putting a stop to it—did not resist the placement or use of his hand.

Without conceding these facts properly support a second-degree sexual abuse conviction, the thrust of Montgomery's argument seems to be that conviction for such an action is unduly harsh. But, "[s]tatutes regarding sex offenses are common examples of employment of strict liability intended to protect the public welfare." *State v. Tague*, 310 N.W.2d 209, 211 (Iowa 1981). They are used to "put the burden upon the person standing in a responsible relation to a public danger even though he might otherwise be innocent." *Id.* Montgomery allowing his hand to be used by a young relative to explore herself sexually is one such danger. *See Smothers v. State*, No. 01-0452, 2002 WL 700959, at *4 (Iowa Ct. App. Apr. 24, 2002) (finding the sexual nature of hand to genital contacts occurring in bed at nighttime could not be disputed if the child was believed).

[5] At other times during this same interview, the area Montgomery's hand touched was described as S.V.'s "groin" and "crotch."

The jury's verdicts of acquitting Montgomery of lascivious acts with a child while convicting him of second-degree sexual abuse are not irreconcilable.

Jury Instruction. Montgomery maintains the court erred "when it refused to provide proper instructions to the jury in response to the jury's request." But Montgomery did not object to the jury instructions for second-degree sexual abuse or instruction number 16, which provided that "sex act" as used in the instruction on second-degree sexual abuse, means

> . . . any sexual contact:
> Between the mouth of one person and the genitals of another;
> or
> Between the finger or hand of one person and the genitals or anus of another person.
> You may consider the type of contact and the circumstances surrounding it in deciding whether the contact was sexual in nature.

After deliberating for a few hours, the jury submitted a question, "We would like clarification of Instruction No. 16 in regards to the final sentence." At that point, Montgomery told the court, "I do think that perhaps some clarification should be given to the jury as to what 'sexual in nature' means in that the action has to be for the purpose of satisfying the sexual desire of the defendant." The court told the jury further clarification was unnecessary and instructed it to review the instructions as whole.

For the first time in his motion for new trial, Montgomery argued the court "was obligated" to inform the jury of the other relevant circumstances listed by the court in *Pearson* as proper considerations when determining whether contact was sexual in nature. *See* 514 N.W.2d at 455 (listing "other relevant concerns" as "the relationship between the defendant and the victim; whether anyone else was present; the length of the contact; the purposefulness of the contact; whether there

was a legitimate, nonsexual purpose for the contact; where and when the contact took place; and the conduct of the defendant and victim before and after the contact"). Montgomery echoes the argument on appeal.

We conclude Montgomery's argument the court should have instructed the jury on the *Pearson* factors is not preserved for our review. "A motion for a new trial ordinarily is not sufficient to preserve error where proper objections were not made at trial." *State v. Constable*, 505 N.W.2d 473, 477 (Iowa 1993). And "timely objection to jury instructions in criminal proceedings is necessary to preserve alleged error for appellate review." *State v. Ondayog*, 722 N.W.2d 778, 785 (Iowa 2006) (proving ineffective assistance as an exception to the general rule). "Normally, objections to giving *or failing to give* jury instructions are waived on direct appeal if not raised before counsel's closing arguments, and the instructions submitted to the jury become the law of the case." *State v. Fountain*, 786 N.W.2d 260, 262 (Iowa 2010) (emphasis added). While Montgomery urged the court to give the jury a different answer than the court gave, Montgomery did not ask the court to do what he is now claiming it must have done. *See Olson v. Sumpter*, 728 N.W.2d 844, 848–49 (Iowa 2007) ("Even a timely objection to jury instructions will not avoid waiver of error if the objection is not sufficiently specific. . . . The objection must be 'sufficiently specific to alert the trial court to the basis of the complaint so that if error does exist the court may correct it before placing the case in the hands of the jury.'" (altered for readability) (citations omitted)); *see also* Iowa

R. Crim. P. 2.19(5)(f) ("The rules relating to the instruction of juries in civil cases shall apply to the trial of criminal cases.").[6]

We do not consider this further.

Rape-Shield Law. Montgomery contends the district court abused its discretion in refusing to admit evidence S.V. was being sexually abused by someone else during the same period she alleged Montgomery did so. *See State v. Walker*, 935 N.W.2d 874, 877 (Iowa 2019) (reviewing trial court's ruling under rule 5.412 for an abuse of discretion).

Through his offer of proof, attached to his motion to admit evidence pursuant to Iowa Rule of Evidence 5.412, and continuing through his several offers of proof at trial, Montgomery established there was evidence the son of S.V.'s mother's boyfriend, who is about four and a half years older than S.V., "licked [her] vagina" when she nine or ten years old. S.V. told the forensic interviewer at the CPC that she told the boy about Montgomery's actions and then the boy started doing those acts to her. Montgomery met his burden to show the evidence he wished to introduce—that another person perpetrated sexual acts on S.V.—actually existed. *Cf. id.* (noting the defendant "failed to make an offer of proof establishing there was in fact an encounter between" the complaining witness and another person; his claim there was an encounter was "simply speculation"). The

[6] Montgomery cites Iowa Rule of Criminal Procedure 2.24(2)(b)(5) and (7), which allows a defendant to raise in a motion for new trial the argument the court has misdirected the jury in a material matter of law and has refused to properly instruct the jury. But just because a defendant may raise a claim in a motion for new trial does not mean that defendant is not required to first object during trial or that a motion for new trial is the appropriate way to preserve error for appellate review.

question is whether this evidence was admissible under an exception to the rape-shield law.

Rule 5.412(b)(1)(A). One of the exceptions to the general prohibition against introducing evidence of a victim's "other sexual behavior" is "[e]vidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence." Montgomery concedes there was no evidence of physical injury introduced to corroborate S.V.'s claims but argues this exception applies because "Nurse [Karin] Ward reported that trauma and penetration can occur without leaving physical signs" and he "should have been allowed to offer evidence that someone other than he was the source of penetration and trauma reported to Nurse Ward by S.V."

Like the district court, we understand rule 5.412(b)(1)(A) to first require evidence of "semen, injury, or other physical evidence" before the defendant can introduce evidence someone else was the cause.[7] Here, it is undisputed there was no evidence of semen or other physical evidence. And, contrary to Montgomery's assertion, Nurse Ward's report makes no finding of injury. Even if we were persuaded by Montgomery's argument that "trauma" can be a non-physical injury, Nurse Ward's report makes no finding of trauma. She simply points out that lack of physical evidence does not establish penetration or trauma did not occur. Put another way, her report does not say S.V. suffered trauma and

[7] We agree with the State that the phrase "the source of semen, injury, or *other* physical evidence" presupposes the existence of physical evidence. *See* Iowa R. Evid. 5.412(b)(1)(A) (emphasis added).

someone must have caused it—as Montgomery suggests. Rather, it conveys that she found no evidence of trauma but that does not preclude S.V.'s claims from being reliable. We agree with the district court that this exception does not apply here.

Rule 5.412(b)(1)(C). Montgomery also challenges the district court's ruling under the exception to the rape-shield law that allows the court to admit "[e]vidence whose exclusion would violate the defendant's constitutional rights." Under this exception, Montgomery focuses on evidence the boy perpetrated sex acts against S.V. combined with evidence he wished to offer from Dr. Rosanna Jones-Thurman, a clinical psychologist who opined during an offer of proof:

> I believe that [S.V.] stated a lot of things about the contact with [the boy], which was fairly extensive and ongoing. . . . And, yes, I believe she's contaminated some of her memories about what was going on with [the boy] with what she could have conceived happening with [Montgomery].

Montgomery contends excluding this evidence violated his constitutional right to present a defense. *See State v. Simpson*, 587 N.W.2d 770, 771 (Iowa 1998) (providing the right to present a defense "stems from the Sixth Amendment right to compulsory process" and because it "is incorporated in the Due Process Clause" of the Fourteenth Amendment, "the right is binding on the states").

The scope of the "constitutional rights" exception is not yet clear. Laurie Kratky Doré, *Iowa Practice Series: Evidence* § 5.412 (Nov. 2020 update). At a minimum, the evidence the defendant seeks to introduce has to be relevant and the probative value must outweigh the danger of unfair prejudice. *See* Iowa R. Evid. 5.412(c)(2)(C); Doré, *Iowa Practice Series: Evidence* § 5.412 ("Iowa courts have repeatedly indicated that an accused does not have a constitutional right to

admit evidence of a victim's other sexual behavior that is irrelevant or whose probative value is outweighed by unfair prejudice."), *see also State v. Smith*, No. 18-1500, 2020 WL 1307693, at *2 (Iowa Ct. App. Mar. 18, 2020) (finding constitutional right to present a defense was not violated by excluding evidence of alleged abuse by defendant's son meant to show confused memories).

Here, we recognize the evidence Montgomery sought to admit had some relevance. It was not necessary to admit evidence the boy perpetrated sex acts on S.V. to explain her knowledge, as there was evidence introduced at trial that S.V. had seen or been exposed to pornography. *See Walker*, 935 N.W.2d at 877 ("It is certainly true 'that a child victim's sexual knowledge [that] resulted from an encounter with someone other than the defendant may be relevant and material to a defendant's defense of mistaken identity or false accusation.'" (citation omitted)). But Dr. Jones-Thurman opined that S.V.'s memories involving the boy "contaminated . . . what she could have conceived happening with Montgomery." Assuming the psychologist's testimony was reliable, it has a "tendency to make a fact more or less probable than it would be without the evidence." *See* Iowa R. Evid. 5.401.

But Dr. Jones-Thurman's testimony—as offered during the offer of proof—was inadmissible. It would have been impermissible commenting on S.V.'s credibility if the psychologist was allowed to tell the jury she determined the sex acts allegedly committed by Montgomery were just false or contaminated memories from the sex acts perpetrated by the boy. *See State v. Dudley*, 856 N.W.2d 668, 677 (Iowa 2014) (reaffirming that expert testimony cannot "comment[], directly or indirectly, on a witness's credibility, [because] the expert is

giving his or her scientific stamp of approval [or disapproval] on testimony even though an expert cannot accurately opine when a witness is telling the truth."). Even if evidence is not excluded for falling under the general prohibition of the rape-shield law, it is still "subject to all other applicable evidentiary requirements and considerations." *State v. Alberts*, 722 N.W.2d 402, 410 (Iowa 2006); *see also* Iowa R. Evid. 5.412(c)(2) (providing that if the court determines that the defendant's offer of proof contains evidence described [in the exceptions to the rape-shield law], the court *must conduct a hearing in camera to determine if such evidence is admissible*." (emphasis added)).

Further, the probative value of evidence of the boy's perpetration of sex acts along with more general testimony from Dr. Thurman-Jones about memory contamination would have been substantially outweighed by a danger of unfair prejudice. *See* Iowa R. Evid. 5.403. S.V. testified during an offer of proof that Montgomery's actions preceded the actions of the boy; she told the boy about what Montgomery was doing and she thought that is why the boy started doing those same acts to her.[8] Additionally, there was no evidence to explain how or why S.V., who knew both the boy and Montgomery well, would have confused the two and their actions. The boy was a teenager, and the acts were said to occur at their shared home; Montgomery is a man with grandchildren who lives in a different town than S.V. S.V. remembered Montgomery's wife being in the bed while

[8] In an email Dr. Jones-Thurman wrote, included in Montgomery's offer of proof before trial, she opined, "Memory does not improve with time but in fact becomes more blurred and possibly contaminated with other events and history. Her prior sexual abuse *is important because it also sounds as though it was concurrent with her alleged abuse by Mr. Montgomery*." (Emphasis added.)

Montgomery touched her; she also remembered falling asleep in the bed after watching movies with Montgomery and his wife.

Finally, like *Walker,* the "analysis under Iowa Rule of Evidence 5.403 and harmless error tend to merge" when the pretrial incriminating statements of Montgomery are considered. *See* 935 N.W.2d at 883 (Appel, J., specially concurring) (acknowledging harmless error where there was no prejudice by excluding past evidence of sexual abuse when defendant made admissions of sexual contact). Based on the video evidence where Montgomery described touching the vagina of S.V. to police officers, it does not appear Montgomery's rights were substantially affected or that there was a miscarriage of justice. *See State v. Traywick*, 468 N.W.2d 452, 454 (Iowa 1991) ("When an alleged error is not of constitutional magnitude, 'the test of prejudice [for harmless error] is whether it sufficiently appears that the rights of the complaining party have been injuriously affected or that the party has suffered a miscarriage of justice.'" (alteration in original) (quoting *State v. Massey*, 275 N.W.2d 436, 439 (Iowa 1979))).

Because the probative value of the evidence Montgomery sought to admit does not outweigh the danger of unfair prejudice, the district court did not abuse its discretion in excluding the evidence.

Prosecutorial Misconduct. Montgomery alleges the prosecutor engaged in prosecutorial misconduct by vouching for S.V.'s credibility during the prosecutor's closing argument. But again, Montgomery did not object when the alleged error occurred. He waited to raise his complaint until after he was convicted by a jury, first bringing up the issue in a post-trial motion. Montgomery recognizes he may have an issue regarding error preservation for this claim and

asks us to consider it under the framework of ineffective assistance if we conclude it was not preserved.

Montgomery's failure to object over prosecutorial misconduct when it allegedly occurred means he failed to preserve error. *See State v. Krogmann*, 804 N.W.2d 518, 526 (Iowa 2011) (concluding defendant failed to preserve claim of prosecutorial misconduct because, while he objected at the time, "[h]e objected only that the question was argumentative" and "asked for no further relief such as a mistrial"), *see also State v. Graves*, 668 N.W.2d 860, 868 (Iowa 2003) ("Because objection was not made at trial, Graves' claim of prosecutorial misconduct is raised on appeal in the context of an ineffective-assistance-of-counsel claim.").

But we also cannot consider it under the framework of ineffective assistance (even if it was sufficiently developed). Disposition was not entered in Montgomery's case until September 2019. So Iowa Code section 814.7 (Supp. 2019), which took effect on July 1, 2019, controls. *See State v. Damme*, 944 N.W.2d 98, 103 n.1 (Iowa 2020) (providing it is the date of the judgment and sentence were entered when determining whether the amended statutes apply). Section 814.7 prohibits us from deciding claims of ineffective assistance on direct appeal. Montgomery can raise this claim in action for postconviction relief, if he chooses. *See* Iowa Code § 814.7. We do not consider it further.

Sufficiency and Weight of the Evidence. Montgomery asserts the evidence introduced against him is insufficient to support his conviction for second-degree sexual abuse and the weight of the credible evidence is contrary to his conviction.

We review claims of insufficient evidence to support a conviction for correction of errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). Substantial evidence exists to support a verdict when the record reveals evidence that a rational trier of fact could find the defendant guilty beyond a reasonable ddoubt. *Id.* In evaluating this claim, "[w]e view the evidence in the light most favorable to the verdict," including all reasonable inferences that may be deduced from the record. *State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995).

Review of the trial court's denial of a motion for new trial is for an abuse of discretion. *State v. Nitchter*, 720 N.W.2d 547, 559 (2006). The district court is to weigh the evidence and consider the credibility of the witnesses when deciding this motion. *Id.* If the court determines the verdict is contrary to the weight of the evidence and a miscarriage of justice may have occurred, it is within the court's discretion to grant a new trial. *Id.* But in our review, we consider only whether the district court abused its discretion in its ruling on the motion. *State v. Ary*, 877 N.W.2d 686, 706 (Iowa 2016).

In attacking the sufficiency of the evidence, Montgomery focuses on the lack of physical evidence to corroborate S.V.'s claims and argues Teresa perjured herself and therefore lacks credibility. He also refers to S.V.'s claims as "outlandish." First, we reiterate that we review the evidence in a light favorable to upholding the verdict when considering claims of insufficient evidence. *State v. Schiebout*, 944 N.W.2d 666, 670 (Iowa 2020). In doing so, "we do not resolve conflicts in the evidence, pass upon the credibility of witnesses, or weigh the evidence." *State v. Hutchison*, 721 N.W.2d 776, 780 (Iowa 2006). And second, even if we did as Montgomery suggests and disregarded the testimony of S.V. and

Teresa, Montgomery's own videotaped statements to the police officers that S.V. twice took his hand and placed it between her legs so she could explore herself with it constitutes substantial evidence to convict him of second-degree sexual abuse. Montgomery does not question the credibility of his own statements to police, so the weight of the evidence also supports his conviction.

AFFIRMED.

State of Iowa Courts

Case Number	**Case Title**
19-1613	State v. Montgomery

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