IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 19-0838

STATE OF IOWA,
Plaintiff-Appellee

vs.

ZACHARY TYLER ZACARIAS,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY, JUDGE ROBERT B. HANSON

APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Rules

Other Authorities

STATEMENT OF ISSUES

I. Jury instruction No. 28, which defined an "object" under Iowa Code § 708.2(5), was not supported by law, and allowed the jury to convict Zacarias on a theory not permitted by the statute.

Alcala v. Marriott Int'l, Inc., 880 N.W.2d 699 (Iowa 2016)

Maguire v. Fulton, 179 N.W.2d 508 (Iowa 1970)

State v. Caskey, 539 N.W.2d 176 (Iowa 1995)

State v. Hanes, 790 N.W.2d 545 (Iowa 2010)

State v. Johnson, 217 N.W.2d 609 (Iowa 1974)

State v. King, No. 16-1615, 2017 WL 6039990 (Iowa Ct. App. Dec. 6, 2017)

State v. Leedom, 938 N.W.2d 177 (Iowa 2020)

State v. Monk, 514 N.W.2d 448 (Iowa 1994)

State v. Vulich, No. 15-1851, 2017 WL 363234 (Iowa Ct. App. Jan. 25, 2017)

Iowa Code § 702.17

Iowa Code § 708.1

Iowa Code § 708.2

Iowa Code § 709.1

Iowa Code § 709.4

Sex Offenses – Admission of Evidence – Prior Criminal Offenses, 2003 Ia. Legis. Serv. Ch. 132 (S.F. 402)

"Object," Mirriam-Webster Dictionary, 2020

"Object," Miriam-Webster Thesaurus, 2020

Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 33 (2012)

II. Under a proper reading of Iowa Code § 708.2(5), the evidence was insufficient to convict Zacarias of assault by penetration of the genitalia with an object.

In re Winship, 397 U.S. 358 (1970)

State v. Truesdell, 679 N.W.2d 611 (Iowa 2004)

U.S. Const. amend. V.

Iowa Code § 708.2

III. Zacarias was impermissibly restricted in impeaching the credibility of the complaining witness, in violation of his due process right to present a defense and Iowa R. Evid. 5.613.

State v. Berry, 549 N.W.2d 316 (Iowa Ct. App. 1996)

State v. Hensley, 534 N.W.2d 379 (Iowa 1995)

State v. Huston, 825 N.W.2d 531 (Iowa 2013)

State v. Parker, 747 N.W.2d 196 (Iowa 2008)

State v. Simpson, 587 N.W.2d 770 (Iowa 1998)

State v. Turecek, 456 N.W.2d 219 (1990)

Washington v. Texas, 388 U.S. 14 (1967)

U.S. Const. amend. VI

Iowa Const., art. I, § 10

Iowa R. Evid. 5.607

Iowa R. Evid. 5.613

IV. Zacarias received ineffective assistance of trial counsel when trial counsel failed to impeach C.G. on cross examination.

Bierkamp v. Rogers, 293 N.W.2d 577 (Iowa 1980)

Glenn v. Carson, 3 Greene 529 (Iowa 1852)

In re Johnson, 257 N.W.2d 47 (Iowa 1977)

Lichau v. Baldwin, 39 P.3d 851 (Or. 2002)

Millam v. State, 745 N.W.2d 719 (Iowa 2008)

People v. Benevento, 697 N.E.2d 584 (N.Y. Ct. App. 1998)

People v. Rivera, 525 N.E.2d 698 (N.Y. Ct. App. 1988)

State v. Baldon, 829 N.W.2d 785 (Iowa 2013)

State v. Clay, 824 N.W.2d 488 (Iowa 2012)

State v. Hensley, 534 N.W.2d 379 (Iowa 1995)

State v. Jones, 759 P.2d 558 (Alaska Ct. App. 1988)

State v. Macke, 933 N.W.2d 226 (Iowa 2019)

State v. Martin, 704 N.W.2d 665 (Iowa 2005)

State v. Ondayog, 722 N.W.2d 778 (Iowa 2006)

State v. Pals, 805 N.W.2d 767 (Iowa 2011)

State v. Senn, 882 N.W.2d 1 (Iowa 2016)

State v. Short, 851 N.W.2d 474 (Iowa 2014)

State v. Smith, 712 P.2d 496 (Ha. 1986)

State v. Straw, 709 N.W.2d 128 (Iowa 2006)

State v. Tonn, 195 N.W. 530 (1923)

State v. Vaimili, 353 P.3d 1034 (Ha. 2015)

State v. Young, 863 N.W.2d 249 (Iowa 2015)

Strickland v. Washington, 466 U.S. 668 (1984)

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)

U.S. Const. amend. VI

Iowa Const. art. I, § 10

Iowa Code § 814.7

Iowa R. Evid. 5.613

V. Zacarias received ineffective assistance of trial counsel when trial counsel failed to object to instances of prosecutorial misconduct, including commenting on Zacarias' right to remain silent in violation of the Fifth Amendment and disparaging defense counsel.

State v. Coleman, 907 N.W.2d 124 (Iowa 2018)

State v. Graves, 668 N.W.2d 860 (Iowa 2003)

State v. Ondayog, 722 N.W.2d 778 (Iowa 2006)

State v. Porter, 283 N.W.2d 351 (Iowa 1979)

State v. Straw, 709 N.W.2d 128 (Iowa 2006)

Iowa Code 814.7

VI. In light of the cumulative effect of the above errors, Zacarias was denied his right to a fair trial.

State v. Clay, 824 N.W.2d 488 (Iowa 2012)

State v. Simpson, 587 N.W.2d 770 (Iowa 1998).

Washington v. Texas, 388 U.S. 14 (1967)

ROUTING STATEMENT

Regarding Issue I, Zacarias appeals after he was convicted on the basis of an improper jury instructions that misstated the law regarding Iowa Code § 708.2(5). This is a substantial issue of first impression, requiring the enunciation of legal issues (i.e., the meaning and scope of a criminal statute) and involving issues of broad public importance that will require ultimate determination by the Iowa Supreme Court. *See* Iowa Rs. App. P. 6.1101(2)(a), (c)-(d), (f).

Issues IV and V involve the constitutionality and validity of recently amended Iowa Code § 814.7, which provides "[a]n ineffective assistance of counsel claim . . . shall not be decided on direct appeal from the criminal proceedings." These are substantial issues of first impression and fundamental issues of broad public importance that require ultimate determination by the Iowa Supreme Court. *See* Iowa Rs. App. P. 6.1101(2)(a), (c)-(d), (f).

Issues II, III and VI involve the routine application of existing legal principles and are appropriate for transfer to the Iowa Court of Appeals. Iowa R. App. P. 6.1101(3)(a).

CASE STATEMENT

Zachary Zacarias appeals the guilty verdict and judgment against him because it was based on an improper and illegal jury instruction: it allowed the jury to convict him of assault by penetration of genitalia with an object, based on a definition of object that was not supported by law. Under a correct interpretation of the law, the evidence is not sufficient to sustain a conviction for assault by penetration of genitalia with an object. This basis alone is sufficient to overturn the judgment against Zacarias; however, Zacarias was also prejudiced by erroneous evidentiary rulings which prevented him from fully impeaching the complaining witness's testimony, and by ineffective assistance of counsel for failing to object to prosecutorial misconduct. These cumulative errors deprived Zacarias of his right to a fair trial.

COURSE OF PROCEEDINGS

Zacarias was charged by trial information with one count of assault – penetration of genitalia or anus with object, in violation of Iowa Code §§ 708.1 and 708.2(5). (App. p. 6). The Minutes of Testimony alleged that Zacarias, then aged 21, was hosting a party

at his home in May of 2017 when he had a non-consensual sexual encounter with C.G., who was 17. (Min. of Testimony, Nov. 13, 2018). Zacarias pled not guilty, and a jury trial was eventually scheduled for April 1, 2019. This case represents the second time that Zacarias was charged for the acts occurring in May of 2017. Zacarias was initially charged on August 1, 2017, in Polk County Crim. No. FECR306652, with sex abuse in the third degree in violation of Iowa Code §§ 709.1 and 709.4(1)(a) and/or 709.4(1)(d). (Trial info. FECR306652, Aug. 1, 2017).[1] On August 22, 2018, defense counsel filed a motion to dismiss for a speedy trial violation. (Mot. FECR306652, Aug. 22, 2018). The motion was granted the following day. (Ord. Dismissal FECR306652, Aug. 23, 2018). The present case

[1] Judicial notice may be taken on appeal pursuant to Iowa R. Evid. 5.201(f). "The rule permits a court to take judicial notice of adjudicative facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Iowa R. Evid. 5.201(a)-(b). *State v. Washington*, 832 N.W.2d 650, 655-56 (Iowa 2013). Although "[t]he general rule is that it is not proper for the court to consider or take judicial notice of the records of the same court in a different proceeding without an agreement of the parties," *see Leuchtenmacher v. farm Bureau Mut. Ins. Co.*, 460 N.W.2d 858, 861 (Iowa 1990), these records are referenced only for context and they are not determinative of the outcome in this case.

was refiled by criminal complaint shortly after the first one was dismissed. (App. p. 3 Complaint, Oct. 1, 2018).

Zacarias was found guilty after trial. (Crim. Verdict April 5, 2019). Judgment entered and he was sentenced to an indeterminate term of 10 years imprisonment. (App. p. 12). As part of his sentence, he was also required to register as a sex offender. *Id.* This notice of appeal followed (App. p.17).

FACTS

Zacarias maintained from the moment he was questioned by police officers that the encounter was consensual. As Officer Dyer testified, consent does not have to be vocal. *Id.* at 47:2-11. Zacarias informed police officers that he and C.G. began making out. (TT III 27:8-15). Zacarias stated that C.G. fell asleep, but that after she woke up, they cuddled and began making out again. *Id.* at 28:3-5. He stated that C.G. was an active participant in removing her clothing. *Id.* at 45:3-15. He stated that C.G. moved her body in a way that was consistent with consent. *Id.* at 47:8-48:1. Zacarias' position has consistently been that this was a consensual encounter.

The state argued that C.G. was too intoxicated to consent. However, Officer Dyer did not observe her to be intoxicated when he questioned her shortly after she left the party. (TT III 38:23-39:9). At trial, multiple inconsistencies between the various witnesses' accounts of the night were brough to light. Specifically, C.G. testified that she drank vodka and orange juice. (TT IV 22:19-23). But Meghan Storlie testified that the only alcohol present was Natural Ice. (TT III 7:11-23). C.G. testified that there was a variety of drugs at the party – cocaine, marijuana – but Storlie testified that the people at the house were just drinking. (TT II 95:8-12; TT IV 35:17-36:7).

At various times, C.G.'s explanation of which substances she ingested changed. She testified to the jury that she had taken Trazadone before going to Zacarias' house. (TT IV 23:5-16). She testified that she had taken hits of marijuana wax. (TT IV 34:-21-35:10). She did not tell the sexual assault nurse about using marijuana or drinking alcohol. (TT III 120:21-121:12). She did not tell the investigating officers that she had taken any drugs that night. (TT IV 91:5-7). Later, she told the detective that she had not taken her Trazadone that night at all. (TT IV 75:8-11). The jury did not get

to hear the full scope of these inconsistencies as a result of the trial court's evidentiary rulings that the defense could not admit inconsistent hearsay statements without confronting C.G. with those statements. (TT IV 64:10-72:9).

C.G.'s testimony regarding why she went to Zacarias' house and how she left the house was also inconsistent. C.G. testified that she went to Zacarias' house because he had offered to give her a ride home. (TT IV 18:3-9). However, Zacarias' house was only a block or two away from her boyfriend's house. (TT IV 48:17-21). C.G. testified that she woke up in Zacarias' room, pushed him off of her by hitting his jaw so hard he fell to the floor, and then escaped his room by pushing aside a dresser that had blocked the door. (TT IV 28:19-30-13). However, the police officer who questioned Zacarias that night did not see any indication that his face had been injured by a blow. (TT III 98:19-99:3). Storlie, who saw C.G. run out of Zacarias' bedroom, did not hear any sounds consistent with Zacarias being knocked to the floor or furniture being moved. (TT III 5:14-21).

At trial, C.G. testified that she grabbed her bag and her shorts and swimsuit bottoms and ran out of Zacarias' room with her bottom

half naked (TT IV 4:14-16), leaving her flip flops behind (TT IV 32:4-12), and only stopping to put on clothes when she was at the top of the basement stairs or outside of the house. (TT IV 46:15-25). During deposition, she testified that she woke up fully naked (TT IV 46:11-14), and did not get dressed until she reached the mailbox or her boyfriend's house. (TT IV 44:17-45:24). Storlie testified that C.G. was clothed when she ran from the basement. (TT III 5:10-13).

The police did not investigate many aspects of C.G.'s story. They never got a warrant (or asked for consent) to search Zacarias' home to investigate whether there were alcohol or drugs consistent with C.G.'s report, or whether her flip flops were in Zacarias' bedroom, or there was evidence of furniture being moved. (TT 101:25-102:2). Although C.G.'s underwear was tested for DNA, the test was unable to positively confirm that the DNA was from Zacarias. (TT IV 63:1-64:5). Nevertheless, the state proceeded on the theory that C.G. was intoxicated such that she was incapable of consent during the encounter with Zacarias. (TT V 5:20-25). Ultimately, the consent issue came down to credibility: whether the jury believed Zacarias,

that C.G. had consented to the encounter, or they believed C.G.'s version, which lacked consent.

Prior to trial, Zacarias' counsel filed proposed jury instructions defining an "object" under Iowa Code § 708.2(5) as follows: "The term 'object' means a material thing other than any portion of the defendant's body or organs." (App. p. 9). The State opposed this instruction and argued for the dictionary instruction that was ultimately provided to the jury: "An 'object' means anything that is visible or tangible and is relatively stable in form." (TT IV 84:1-10 (state's argument in response to motion for judgment of acquittal based on definition of an object); TT IV 99:9-15 (state's argument regarding the final jury instruction); (App.p. 11). Throughout the trial, there was no evidence that Zacarias used an "object" – other than his finger – to penetrate or attempt to penetrate the genitalia.

ARGUMENT

I. Jury instruction No. 28, which defined an "object" under Iowa Code § 708.2(5), was not supported by law, and allowed the jury to convict Zacarias on a theory not permitted by the statute.

A. Standard of Review and Error Preservation

Error was preserved where trial counsel requested a correct jury instruction defining object (App. p. 9), objecting to the state's proposed jury instruction, and receiving a ruling adopting the state's proposed definition of object. (TT IV 98:11-100:2). Zacarias also relied on his proposed definition of "object" in arguing the motion for judgment of acquittal, which was denied. (TT IV 80:4-10).

The standard of review for challenges to jury instructions is for correction of errors at law. *Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 707 (Iowa 2016). The court must "Determine whether the challenged instruction accurately states the law and is supported by substantial evidence." *State v. Hanes*, 790 N.W.2d 545, 548 (Iowa 2010). Where the erroneous jury instruction affects a defendant's constitutional rights, prejudice is presumed unless the state shows "beyond a reasonable doubt that the error did not result in prejudice." *Id.* at 550 (citation omitted).

B. Argument

Zacarias was charged with assault – penetration of genitalia or anus with object, in violation of Iowa Code §§ 708.1 and 708.2(5).[2] "Object" has not been defined by Iowa law, by the drafters of the Iowa Criminal Model Jury Instructions, or by any appellate court in Iowa.[3] The state requested an instruction defining object as "anything that is visible or tangible and is relatively stable in form." (Jury Inst. No. 28). During closing argument, the state argued that "object" included

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[2] This charging decision was significant – the state had previously charged Zacarias with sex abuse in the third degree in violation of Iowa Code §§ 709.1 and 709.4(1)(a) and/or 709.4(1)(d). (Trial info. FECR306652, Aug. 1, 2017). That case was dismissed due to a speedy trial violation, and the state was not permitted to re-file the same charges under existing precedent. *State v. Johnson*, 217 N.W.2d 609, 612 (Iowa 1974). The state was required to file this case under the "object" statute to avoid speedy trial issues, but ultimately its definition of "object" allowed it to proceed as if it had actually charged Zacarias under the sex abuse statute.

[3] Counsel was only able to find two cases where a conviction for assault by penetration of genitalia or anus with an object were appealed. In *State v. King*, No. 16-1615, 2017 WL 6039990 (Iowa Ct. App. Dec. 6, 2017), the allegation involved penetration of genitalia with a vibrator. In *State v. Vulich*, No. 15-1851, 2017 WL 363234 (Iowa Ct. App. Jan. 25, 2017), the allegation involved penetration of genitalia with ice cubes. In both cases, the defendants challenged the sufficiency of the evidence to support a finding that they intended to assault the victim, and not whether "object" was properly defined.

body: "So a finger is an object. A tongue is an object."[4] (TT V 8 7:8). The defense requested an instruction defining object as "a material thing other than any portion of the defendant's body or organs," (Statement of the Case and Jury Instructions at 19) or else that no instruction be given at all. (TT IV 98:16-21).

Zacarias' proposed instruction was the correct instruction. It is supported by canons of statutory construction, and consistent with the history of the statute in other jurisdictions. Instructing the jury that a part of Zacarias' body or organs was an "object" under Iowa law allowed the jury to convict him of a crime that, under any view of the evidence, did not occur.

1. Plain meaning of the word "object."

[4] The mention of a tongue and related argument was independently problematic because there was no allegation or evidence that Zacarias committed assault using his tongue at all. The version of the story presented to the jury was that Zacarias first committed penetration using his fingers, and then attempted to commit penetration using his penis, but was unable to do so. (TT III 29:15-30:19). No one testified that Zacarias performed an oral sex act. The officer who interviewed Zacarias denied that Zacarias claimed he performed oral sex. (TT III 31-32.)

The word "object" in § 708.2(5) should be defined by its plain and rational meaning. *State v. Caskey*, 539 N.W.2d 176, 177 (Iowa 1995) ("When a statute's terms are unambiguous and its meaning plain, there is no need to apply principles of statutory construction."). Mirriam-Webster defines an object as "something material that may be perceived by the senses." Mirriam-Webster Dictionary, 2020.[5] The thesaurus lists "thing", "article," and "item," as the first three synonyms for object. Mirriam-Webster Thesaurus, 2020.[6]

The state argued that an object should be defined as "any tangible thing" and that a tangible thing includes body parts. However, the state's inclusion of body parts in this definition of object is not supported by common sense usage of the word "object" and is not a "fair reading" of the statute. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 33 (2012) (defining "Fair Reading method" as "determining the application of a governing text to given facts on the basis of how a reasonable reader,

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[5] https://www.merriam-webster.com/dictionary/object.

[6] https://www.merriam-webster.com/thesaurus/object.

fully competent in the language, would have understood the text."). A person would not refer to themselves or their body parts as "objects" in ordinary speech. The word "object" does not imply the kind of agency that a person has over their own body.

The state's closing argument reveals that there was no "object" used in the ordinary sense in this case – Zacarias was alleged to have used his finger to penetrate C.G.'s genitalia. (TT V 8:7-8). The prosecutor explicitly argued that the finger, or any body part, was an object. But, no other appellate case considering this statute has involved a body part. In *King*, the "object" at issue was a vibrator. 2017 WL 6039990 at *2. In *Vulich*, the object at issue was ice cubes. 2017 WL 363234 at *1-2. Both defendants were also alleged to have committed sex abuse using their bodies. But those separate acts were not charged as assault by penetration of the genitalia with an object under § 708.2(5), because a common-sense, ordinary definition of the word "object" does not include bodies.

2. Context Clues.

Other Iowa Statutes criminalizing sexual assault provide further clues to the meaning of the word "object" in § 708.2(5). Iowa

law defines a "sex act" or "sexual activity" as "sexual contact between two or more persons" by:

> 1. Penetration of the penis into the vagina or anus.
>
> 2. Contact between the mouth and genitalia or by contact between the genitalia of one person and the genitalia or anus of another person.
>
> 3. Contact between the finger or hand of one person and the genitalia or anus of another person, except in the course of examination or treatment by a person licensed pursuant to chapter 148, 148C, 151, or 152.
>
> 4. Ejaculation onto the person of another.
>
> 5. By use of artificial sexual organs or substitutes therefor in contact with the genitalia.

Iowa Code § 702.17. Unlike sex abuse under Iowa Code Chapter 709, which requires proof of a sex act, assault by penetration of the genitalia with an object does not require proof that the defendant's actions were sexual in nature.

The requirement that an act be sexual in nature to prove sex abuse under Chapter 709 creates an unfortunate gap in coverage for Iowa victims. This gap was revealed in *State v. Monk*, 514 N.W.2d 448 (Iowa 1994). In *Monk*, the male victim was stripped from the waist-down while two men held him down, and a third penetrated his anus

with a lubricated broom handle. 514 N.W.2d at 449. The defendants and the victim testified that there was nothing "sexual going on" that night. *Id.* Ultimately, the guilty verdict was overturned because the jury had not been required to find that the defendant's actions were sexual in nature.[7] *Id.* at 451. Justice Snell dissented, highlighting the difference between legislation criminalizing sex abuse and legislation criminalizing standard assault:

> 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.

Id. at 452 (Snell, J., dissenting).

Contact between a defendant's body and the complaining witness's genitalia may constitute a sex act under § 702.17(5). Defining a defendant's hand as an object under Iowa Code § 708.2(5) would create substantial and unnecessary overlap between the two

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[7] As noted by Justice Ternus in a concurring opinion, the jury certainly could have found that what the defendant did was indeed sexual in nature. *Id.* at 451-52. The case undoubtedly seems clearer 26 years after it was decided.

statues, and further blur the line between sex abuse and assault that merely involves genitalia.

The course of proceedings in *Vulich* demonstrates the need for the two statutes to remain separate so as not to blur the line between assault involving genitalia and sex abuse. In *Vulich*, the defendant was even initially charged with two counts of sex abuse (one count for contact between his hand and the victim's vagina, and one count for contact between the ice cubes and the victim's genitalia), but the second count was later amended, 2017 WL 363234 at *2, presumably because the use of ice cubes would not be a sex act as defined by § 702.17. Had the count involving the ice cubes remained as a sex abuse count, the state would have had to deal with interpretive issues as to whether the use of ice cubes was a sex act under § 702.17. The context for the two separate crimes reveals that the legislature intended to create a separate crime for assault, and not to duplicate crimes for sex abuse.

3. Construction against surplusage.

Interpreting "object" to include a portion of the body would also violate the construction against surplusage. "Effect must be given, if

possible, to every word, clause and sentence of a statute. It should be construed so that effect is given to all its provisions and no part will be inoperative or superfluous, void or insignificant." *Maguire v. Fulton*, 179 N.W.2d 508, 510 (Iowa 1970) (citations omitted).

If "object" in § 708.2(5) includes the body, then the word object becomes meaningless surplus. The statute may as well read "a person who commits an assault . . . and who penetrates the genitalia or anus of another person, is guilty of a class 'C' felony." It would not be necessary to use the word "object" if the body was also an object. It would not be necessary to add § 708.2(5) to the assault statute if a defendant's body was also an object under the statute, because then § 708.2(5) itself would just be surplusage of the sex abuse statutes, it would cover no additional ground.

4. Legislative history.

Assault by penetration of the genitalia with an object was added to § 708.2(5) in 2003. Sex Offenses – Admission of Evidence – Prior Criminal Offenses, 2003 Ia. Legis. Serv. Ch. 132 (S.F. 402). The purpose of the act was to expand liability (filling the gap created by cases such as *Monk*) by adding penalties for certain types of assaults

not previously covered by the sex abuse statutes: S.F. 402 was described as "An act relating to sexual assault offenses by affecting the admissibility of prior criminal offenses into evidence in the prosecution of certain sexual offenses and by modifying the penalties for certain assaults." Defining "object" to include body would not expand liability for various types of assaults, because contact between a defendant's body and the victim's genitalia is already criminalized as a sex act under § 702.17.

Because the jury was given an improper instruction, Zacarias is entitled to a new trial. *Alcala*, 880 N.W.2d at 710. However, as discussed in the following section, under a proper interpretation of § 708.2(5), the evidence against Zacarias is not sufficient to support a conviction.

II. Under a proper interpretation of § 708.2(5), the evidence is not sufficient to support the conviction.

A. Standard of Review and Error Preservation

Error was preserved when counsel made a motion for judgment of acquittal arguing for the proper definition of Iowa Code § 708.2(5) and arguing that there was no evidence that Zacarias penetrated

genitalia using an object other than a part of his body. (TT IV 79:18-83:12). *See State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004).

The appeals courts review claims of insufficient evidence for correction of errors at law. *Id.* "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 doubt." *Id.* (citation omitted). The appeals court must "view the evidence in the light most favorable to the verdict, including all reasonable inferences that may be deduced from the record." *Id.* (citation omitted). Proof beyond a reasonable doubt is required to establish guilt of a criminal charge. *In re Winship*, 397 U.S. 358, 361-62 (1970) (relying on the Due Process Clause); U.S. Const. amend. V.

B. Argument

The proper definition of "object" under § 708.2(5) is a thing, article, or item, excluding the body. Under a proper interpretation of the statute, Zacarias' conviction must be overturned because there was not a shred of evidence that Zacarias committed penetration with anything other than his body. The state admitted as much in its closing argument, when it repeated that a body part such as a finger

or a tongue could be an object and did not make an argument that C.G. was penetrated by anything other than Zacarias' body. Even viewing all the evidence in the light most favorable to the verdict, and resolving reasonable inferences in the state's favor, the judgment against Zacarias should be reversed, and the case must be remanded for dismissal.

III. Zacarias was impermissibly restricted in impeaching the credibility of the complaining witness, in violation of his due process right to present a defense and Iowa R. Evid. 5.613.

A. Standard of Review and Error Preservation

A district court's evidentiary rulings are reviewed for abuse of discretion. *State v. Huston*, 825 N.W.2d 531, 536 (Iowa 2013). Prejudice is presumed, unless it is affirmatively established that the error is harmless. *State v. Parker*, 747 N.W.2d 196, 209 (Iowa 2008). Where the evidentiary error is constitutional in nature – as it was here, because it affected his due process right to present a defense– the state must establish that the error was harmless beyond a reasonable doubt. *State v. Hensley*, 534 N.W.2d 379, 383 (Iowa 1995).

Error on this issue was preserved when trial counsel asked Detective Anderson and Officer Gallaher about C.G.'s inconsistent statements, the state's objection to the method of impeachment was sustained, (TT IV 65:1-72:3) and trial counsel made an offer of proof as to what the inconsistent statements were outside of the presence of the jury. (TT IV 74:23-75:19 (Detective Anderson) and TT IV 90:17-91:14 (Officer Gallaher)).

B. Argument

The trial court erred when it would not let Zacarias impeach C.G. by inconsistent statements made to the investigating officers. At the behest of the prosecution, the court excluded the impeaching statements under Iowa R. Evid. 5.613(b) and *State v. Turecek*, 456 N.W.2d 219 (1990). This was error.

1. Rule 5.613(b)

Rule 5.613(b) provides:

> *Extrinsic evidence of a prior inconsistent statement.* Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires.

Rule 5.613(b) is essentially a rule of foundation. It was enacted to further the rule that when a witness's prior inconsistent statements are admitted, the proper foundation to demonstrate that the statement is actually inconsistent has already been laid:

> The acceptable procedure for impeachment by use of a prior inconsistent statement generally is to ask the witness if the prior statement was made, give its substance, identify the time and place of the statement, and identify the person to whom it was made. *See* John W. Strong, McCormick on Evidence § 37 (4th ed. 1992). If the witness admits to making the prior statement, no further testimony is necessary and the impeachment is successful. *State v. Wolfe*, 316 N.W.2d 420, 422 (Iowa App. 1981). If the statement is not admitted or specifically denied, however, extrinsic evidence of the statement is necessary to impeach. In this situation, the witness must also be given an opportunity to explain or deny the statement. Iowa R. Evid. 613(b); *State v. Oshinbanjo*, 361 N.W.2d 318, 321-22 (Iowa App. 1984).

State v. Berry, 549 N.W.2d 316, 318-19 (Iowa Ct. App. 1996).

There does not appear to be an authoritative Iowa case interpreting what is meant by Rule 5.613(b)'s "interests of justice" exception. However, the "interests of justice" are met when the purposes of the rule are not frustrated by admitting extrinsic evidence of impeachment despite non-compliance with the rule, and when a defendant's constitutional rights are at stake. The purpose of

Rule 5.613(b) is to "avoid unfair surprise by giving the opposing counsel an opportunity to draw out an explanation from the witness on further examination, give the witness an opportunity to explain the apparent discrepancy, and save time." *Berry*, 549 N.W.2d at 319 (citing *United States v. Bibbs*, 564 F.2d 1165, 1169 (5th Cir. 1977)). The defendant's constitutional rights involved in impeaching a witness include the right of confrontation under the Sixth Amendment and Article I, § 10, and the due process right to present a defense as recognized in *Washington v. Texas*, 388 U.S. 14 (1967), and *State v. Simpson*, 587 N.W.2d 770 (Iowa 1998).

2. *State v. Turecek*.

State v. Turecek was a case about when the prosecution is permitted to impeach its own witnesses. As a starting point, Iowa R. Evid. 5.607 generally provides that any party, including the party that called the witness, may attack the witness's credibility. In *Turecek*, a case involving a sensational story of sexual assault, the prosecution sought to call the defendant's young child to impeach him about his knowledge of sexually explicit material in the defendant's home. 465 N.W.2d at 224. The sexually explicit material

in the home and the child's knowledge of it were not relevant to the case. *Id.* The court held that the state could not call the son for the sole purpose of impeaching him to put on evidence of the defendant's sexually permissive characters:

> [T]he record clearly reveals that the State knew, and made affirmation on the record prior to the child was going to testify exactly as he did with respect to (1) denying conversations he allegedly had with peace officers in which he used sexually explicit language to describe the occurrences on July 24, 29187; (2) the child's professed lack of understanding of sexual terms; and (3) the child's denial of using *The Joy of Sex* as a coloring book and having access to other sexually explicit materials. The right given to the State to impeach its own witnesses under Iowa Rule of Evidence 607 and our decision in *State v. Trost*, 244 N.W.2d 556, 559-60 (Iowa 1976), is to be used as a shield and not as a sword. The State is not entitled under rule 607 to place a witness on the stand who is expected to give unfavorable testimony and then, in the guise of impeachment, offer evidence which is otherwise inadmissible. To permit such bootstrapping frustrates the intended application of the exclusionary rules which rendered such evidence inadmissible on the State's case in chief.

Id. at 224-25. *Turecek* was a case about the state claiming it was impeaching its own witness when it was really putting on otherwise collateral and inadmissible evidence. *See id.* at 225 (citing *United States v. Miller*, 664 F.2d 94, 97 (5th Cir. 1981), *cert. denied*, 459 U.S.

854 (1982) ("[T]he prosecutor may not use such a statement under the guise of impeachment for the *primary* purpose of placing before the jury substantive evidence which is not otherwise admissible.")).

Here, before the district court, Zacarias argued that the *Turecek* rule only applied to the state, and the prosecutor argued that the *Turecek* rule meant that the defense could not call C.G. for the sole purpose of impeaching her. (TT IV 66:19-23 (state's argument); 67:4-11 (defense counsel's argument)). Both arguments were wrong. The focus of *Turecek* was the *reasoning* behind the impeachment of the six-year-old child. The state wanted to show that there was sexually explicit material in the home – the fact that the child lied to the police about that material was not relevant to the prosecution of the child's parents. The rule in *Turecek* is that a party cannot call a witness and use its ability to impeach that witness to backdoor in otherwise inadmissible evidence, not that a party cannot call a witness for the sole purpose of impeaching them. Calling a witness and impeaching them is permissible when the evidence is material to the trial.

3. What should have happened at trial.

At trial, Zacarias should have been permitted to impeach C.G.'s testimony through the statements that she made to the police because it was in the interests of justice to permit him to do so, and because his due process right to put on a defense depended on it. *Holmes*, 547 U.S. at 324-25, . In the alternative, Zacarias should have been permitted to recall C.G. for impeachment under a correct reading of the *Turecek* rule.

This was a case that depended on C.G.'s credibility. However, law enforcement conducted virtually no investigation to confirm the parts of C.G.'s story that were certainly verifiable. They did not seek to search Zacarias' room to determine whether furniture had been moved or her flip flops were present. They did not search the basement of the home to determine whether there was orange juice and vodka present, or any illegal drugs. There was no toxicology screen done to determine whether C.G. was drunk, or had consumed Trazadone, or marijuana, or any other controlled substances. Zacarias had a right to present a defense by challenging C.G.'s credibility, and the jury should have heard about these inconsistencies.

The purposes of Rule 5.613(b) would have been satisfied without allowing C.G. further opportunity to explain her inconsistent statements. C.G. had already been impeached regarding inconsistencies between her trial testimony and her deposition testimony. The state was aware of the inconsistent statements made to the police officer and would not have been surprised by them. Further, the prosecutor could have recalled C.G. on rebuttal to offer an explanation of the inconsistencies.

Finally, Zacarias was wrongfully prevented from calling C.G. himself by the court's misinterpretation of the rule in *Turecek*. Unlike in the *Turecek* case, the impeachment evidence that Zacarias wished to rely on was imminently material to the case at hand. If C.G. was not asleep as a result of ingesting Trazadone, as she reported, this would affect the validity of Zacarias' conviction. It would be evidence from which the jury could infer that the encounter was consensual, rather than assaultive. By preventing the jury from hearing this evidence, the court denied Zacarias his due process right to put on a defense. *See Washington*, 388 U.S. 14; *Simpson*, 587 N.W.2d 770.

Because the trial court's erroneous interpretations of *Turecek* prevented Zacarias from putting on critical impeachment evidence in his defense, resulting in a due process violation, prejudice is presumed and reversal is required unless the state proves that the error was not harmless beyond a reasonable doubt. Zacarias put on an offer of proof demonstrating that C.G.'s statements to the police following the alleged assault were very different from her testimony at trial. She had ingested marijuana, not a prescription medication. Had the jury heard this information, it could have concluded that she had not blacked out. The state cannot prove that the error did not contribute to Zacarias' conviction.

IV. Zacarias received ineffective assistance of trial counsel when trial counsel failed to impeach C.G. on cross examination.

A. Standard of Review and Error Preservation

Ineffective assistance of counsel claims are reviewed de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). Such claims are not subject to normal error preservation rules. *State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006). "The defendant may raise the ineffective assistance claim on direct appeal if he or she has

reasonable grounds to believe the record is adequate to address the appeal." *Straw*, 709 N.W.2d at 133 (citing Iowa Code § 814.7(2) (2005)).[8]

B. Argument

During C.G.'s testimony she testified that she drank vodka and orange juice, had taken Trazadone, and had also taken hits of marijuana wax. However, as discussed above, she told Officer Anderson that she had not taken her medication prior to drinking that night. (TT IV 75:8-11). She told Officer Gallaher that she had not used any drugs that night. *Id.* at 91:5-7. If the Trazadone and hits of marijuana wax are omitted, the evidence indicates that C.G. had one drink.

Under Rule 5.613, counsel should have first asked C.G. whether she made these statements to the Officers – e.g., counsel should have asked C.G. whether she told Officer Anderson that she

[8] Zacarias' conviction became final when the judgment and sentence were entered on May 19, 2019. As a result, the 2019 amendments to Iowa Code § 814.7, providing that a defendant may no longer bring an ineffective assistance of counsel claim on direct appeal, do not apply to his case. *State v. Macke*, 933 N.W.2d 226, 235 (Iowa 2019).

had not taken her medication prior to drinking that night, and whether she told Officer Gallaher that she had not used any drugs that night. These were prior inconsistent statements by C.G. that were inconsistent with her trial testimony. If C.G. said "yes," the impeachment would have been complete and there would have been no reason to recall any of the witnesses. If C.G. had said "no," counsel could have proceeded to introduce the evidence through the officers.

The failure to impeach C.G. violated Zacarias' right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and article I, § 10 of the Iowa Constitution. Trial counsel was also ineffective for failing to ask that the proffer evidence as to C.G.'s inconsistent statements to the police be provided to the jury (TT IV 74:23-75:19, 90:17-91:14), because after the proffer it was clear that justice required the admission of the impeaching evidence under Rule 5.613(b).

1. Ineffective assistance of counsel – Sixth Amendment

To prove a claim of ineffective assistance of counsel under the Sixth Amendment, Zacarias must show by a preponderance of the

evidence that his trial counsel failed to perform an essential duty, and that prejudice resulted. *State v. Martin*, 704 N.W.2d 665, 669 (Iowa 2005).

To show that counsel failed to perform an essential duty, Zacarias must present "evidence his trial counsel's representation fell below an objective standard of reasonableness." *Ondayog*, 722 N.W.2d at 785. The issue is whether a "reasonably competent attorney" would have made the same decision under the circumstances. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984) for the proposition that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.").

The prejudice prong is met if a reasonable probability exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

2. An independent Iowa Constitutional standard

So far, Iowa has followed the course laid out by the federal courts in resolving claims of ineffective assistance of counsel under *Strickland*. However, Iowa should interpret its constitution to provide greater protections in this field.

"The Iowa Constitution is the cornerstone of governing in Iowa." *Varnum v. Brien*, 763 N.W.2d 862, 875 (Iowa 2009). The Iowa Supreme Court has recognized that its "right under principles of federalism to stand as the final word on the Iowa Constitution is settled, long-standing, and good law." *State v. Baldon*, 829 N.W.2d 785, 790 (Iowa 2013) (citing *State v. Ochoa*, 792 N.W.2d 260 (2010); *Bierkamp v. Rogers*, 293 N.W.2d 577 (Iowa 1980); *State v. Tonn*, 195 N.W. 530 (1923)). Because "state constitutions have been a crucial font of equality, civil rights, and civil liberties from the incipience of our republic," and particularly in Iowa, the Iowa Supreme Court has recognized that "the Supreme Court's jurisprudence regarding . . . any . . . fundamental, civil, or human right . . . makes for an admirable floor, but it is certainly not a ceiling." *Id.* at 791 (citation omitted).

Iowa Courts have departed from federal jurisprudence in interpreting the Iowa Constitution where (a) there are textual differences, although textual differences are not strictly required;[9] (b) the opinions of other courts or commentary within secondary materials are more persuasive than federal jurisprudence;[10] (c) Iowa's strong history of protecting individual liberties, including its "Bill of Rights" in article I of the Iowa constitution, suggest greater protections are appropriate;[11] and (d) there is a need to compensate for diminishing or eroding federal rights.[12] In the context of ineffective

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[9] *See, e.g. State v. Pals*, 805 N.W.2d 767, 771 (Iowa 2011) ("While these provisions use nearly identical language and were generally designed with the same scope, import, and purpose, we jealously protect this court's authority to follow an independent approach under our state constitution.").

[10] *See, e.g. State v. Short*, 851 N.W.2d 474, 481 (Iowa 2014) ("We may, of course, consider the persuasiveness of federal precedent, but we are no means bound by it. We may look to the caselaw of other states, to dissenting opinions of state and federal courts, and to secondary materials for their persuasive power." (collecting cases)).

[11] *See, e.g. Short*, 851 N.W.2d at 482-83 (analyzing historical sources).

[12] *See, e.g. Baldon*, 829 N.W.2d at 813 ("In the period following the incorporation revolution ending with *Mapp*, there is no doubt the

assistance of counsel claims, the bar to relief set by *Strickland's* interpretation of the "prejudice" prong requires a closer look under the Iowa Constitution. Each of the above factors support interpreting Iowa's Constitution to provide greater rights to defendants.

The guarantee of "assistance of counsel" under article I, section 10 is stronger than the Sixth Amendment's guarantee for at least two reasons: First, Iowa's tradition of the right to counsel is broader than that represented by the Sixth Amendment. *State v. Young*, 863 N.W.2d 249, 280 (Iowa 2015). The text of article I, § 10 contains two clauses that do not appear in the Sixth Amendment. *State v. Senn*, 882 N.W.2d 1, 7 (Iowa 2016). Unlike the Sixth Amendment, article I, § 10 is double-breasted: it contains an "all criminal prosecutions" clause and a "cases" clause involving the life or liberty of an individual. *Young*, 863 N.W.2d 256-57.

Second, the Iowa Supreme Court has already interpreted the guarantees under article I, § 10 independently from federal precedent

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strength and scope of the Fourth Amendment's protection has been dramatically reduced by the United States Supreme Court.").

interpreting the Sixth Amendment in other contexts. *See Young*, 863 N.W.2d at 258 (article I, § 10 should not be interpreted in a fashion similar to federal precedent that requires a poor person suffer "actual imprisonment" before being entitled to the appointment of counsel in misdemeanor cases). Iowa courts have also developed their own practice when addressing the cumulative effect of counsel's errors to determine whether the defendant satisfied the prejudice prong of the *Strickland* test. *State v. Clay*, 824 N.W.2d 488, 500-02 (Iowa 2012) (setting out the proper practice when dealing with multiple ineffective assistance claims).

As this case involves state and federal constitutional claims regarding ineffective "assistance of counsel," this Court should first examine whether Zacarias received ineffective assistance of counsel as guaranteed under article I, § 10 of the Iowa Constitution. The Iowa Constitution "is a living and vital instrument. Its very purpose is to endure for a long time and to meet conditions neither contemplated nor foreseeable at the time of its adoption." *In re Johnson*, 257 N.W.2d 47, 50 (Iowa 1977). Considering Zacarias' claim first under the Iowa Constitution and then, only if necessary, under the Federal

Constitution, will ensure that the Iowa Constitution does not merely sit on a shelf collecting dust.

Under the Iowa Constitution, the *Strickland* prejudice prong is simply insufficient to protect an Iowan's right to effective assistance of counsel. This insufficiency was recognized from the day that *Strickland* was decided. Justice Marshall wrote, in dissent:

> I object to the prejudice standard adopted by the Court for two independent reasons. First, it is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel. In view of all these impediments to a fair evaluation of the probability that the outcome of a trial was affected by ineffectiveness of counsel, it seems to me senseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice.
>
> Second and more fundamentally, the assumption on which the court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will

> be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures. The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree. Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer. A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not, in my opinion, constitute due process.

Strickland, 466 U.S. at 710-11 (Marshall, J., dissenting).

Other states have rejected the prejudice prong under *Strickland* for similar reasons as proposed here. As a result, in New York a showing of prejudice is not always necessary to establish ineffectiveness. Instead, "To prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant [merely] to demonstrate the absence of strategic or other legitimate explanations for counsel's failure." *People v. Rivera*, 525 N.E.2d 698, 700 (N.Y. Ct. App. 1988). This standard focuses on "the fairness of the process as a whole rather than its particular impact on the outcome of the case." *People v. Benevento*, 697 N.E.2d 584, 588 (N.Y. Ct. App. 1998).

In Alaska, the courts nominally follow the two-part *Strickland* test, but the prejudice prong is "significantly less demanding" for a

defendant to meet: it "requires only that the accused create a reasonable doubt that counsel's incompetence contributed to the conviction." *State v. Jones*, 759 P.2d 558, 572 (Alaska Ct. App. 1988) (citations omitted). In Hawaii, a defendant must show that the challenged "errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." *State v. Smith*, 712 P.2d 496, 500 (Ha. 1986). "A defendant need not prove actual prejudice." *State v. Vaimili*, 353 P.3d 1034, 1041 (Ha. 2015). In Oregon, a defendant need only prove "that counsel's failure had a tendency to affect the result of his trial." *Lichau v. Baldwin*, 39 P.3d 851, 857 (Or. 2002).

Like the dissenting states, Zacarias proposes the Court adopt a harmless error standard when examining prejudice resulting from ineffective assistance of counsel. A harmless error approach is familiar to claims involving deprivation of the Sixth Amendment right to counsel, *see, e.g. Hensley*, 534 N.W.2d at 382 (harmless error analysis applied to admission of statements obtained in violation of Sixth Amendment). But, most importantly, a harmless error analysis protects the Constitutional right to effective assistance of counsel

regardless of guilt, by ensuring that a defendant's right to a fundamentally fair trial with effective assistance of counsel is not undermined simply because the record is impenetrable or the State's evidence is strong.

3. Under the proposed Iowa Constitutional standard, trial counsel provided ineffective assistance.

The record is sufficient on both prongs to consider the ineffective assistance of counsel claim on direct appeal. Regarding the first prong, whether trial counsel performed as a reasonably competent attorney, it is evident from Issue II that serious errors occurred at trial regarding impeaching C.G. The Iowa Supreme Court has recognized that impeaching the complaining witness is critical in cases of alleged sexual assault. *See, e.g. Millam v. State*, 745 N.W.2d 719, 723 (Iowa 2008) (In a case with no physical evidence of the sexual abuse and no witnesses, the complaining witness' "credibility was pivotal to the State's case. Any evidence undermining that credibility could only work in [defendant's] favor.").

Defense counsel *recognized* that the impeachment evidence was critically important: eliciting it through the law enforcement officers'

testimony was clearly a part of his trial strategy. But, counsel missed his opportunity to comply with Rule 5.613(b) by failing to impeach C.G. about her statements to law enforcement during her cross examination, and failing to respond properly to the state's argument regarding *Turecek*. Counsel made a second error by failing to recall C.G., which would have been permitted had he properly researched the *Turecek* case. He made a third error when, after completing his offer of proof and demonstrating why the missing impeachment testimony was so essential, he failed to ask that that evidence be presented to the jury or renew his attempts to get the evidence before the jury. (TT IV 74:23-75:19, 90:17-91:14).

This was not an issue of trial strategy, or of trial counsel merely making a bad guess in an area where the law is not particularly clear. *Millam*, 745 N.W.2d at 722 ("[I]n situations where the merit of a particular issue is not clear from Iowa law, the test is whether a normally competent attorney would have concluded that the question . . . was not worth raising." (citation omitted)). Rule 5.613(b) is clear. It is not new, it has been the rule in Iowa since 1852 that when impeaching a witness, the witness should be given the opportunity

to explain or deny their prior inconsistent statement. *See Glenn v. Carson*, 3 Greene 529, 531 (Iowa 1852) ("It is always proper to call the attention of the witness to any statement made by him, material to the issue, and if he testifies that he did not make it, or if he has made statements out of court different from those under oath, the facts may be shown to impair his credibility."). For no conceivable reason, trial counsel simply skipped over that step and attempted to impeach C.G. without laying the proper foundation under Rule 5.613(b), and without arguing that justice required the impeachment proceed without that foundation.

Trial counsel also failed to adequately respond to the state's misleading argument about *Turecek* (TT IV 66:19-23), as described above – *Turecek* states that a party cannot call a witness to impeach them as a method for putting on otherwise inadmissible evidence, not that a party cannot call a witness for the sole purpose of impeachment. Properly researching these basic impeachment issues in advance of trial would have saved a great deal of trouble.

This error contributed to Zacarias' conviction. There was no physical evidence of the assault, and law enforcement conducted no

investigation to determine whether any part of C.G.'s story could be verified. The jury had to determine whether C.G. was intoxicated to the point where she was incapable of consent. Her inconsistent statements as to whether or not she had taken the Trazadone, or had done hits of marijuana wax, combined with the one vodka orange juice drink, would have assisted the jury in determining if her story about being blacked out after one drink was credible. The jury did not get to hear these inconsistencies and was deprived of valuable information as a result. The state cannot prove beyond a reasonable doubt that this error did not contribute to Zacarias' conviction. The judgment must be reversed.

4. Even under *Strickland*, Zacarias' conviction should be reversed.

If Zacarias' case is evaluated under the "reasonable probability that but for counsel's errors, the outcome would have been different" standard of *Strickland*, reversal is necessary. The Iowa Supreme Court reached a similar conclusion in *Millam*:

> "When the performance of counsel relates to the failure to present evidence, we must consider what bearing the evidence may have had on the outcome of the case." *Ledezma*, 626 N.W.2d at 148. Evidence of J.S.'s prior false

> claims of sexual abuse could have greatly impugned her credibility, thus lending credence to Millam's contention that he did not sexually abuse her. . . . Because of the State's reliance on J.S.'s claims and the lack of supporting physical evidence, this evidence would have "challenged the very core of the State's case." *Id.* at 149. In a case in which the evidence against the defendant is not overwhelming, such evidence is imperative to an effective defense. *Id.* at 148; *see also State v. Carey*, 709 N.W.2d 547, 559 (Iowa 2006) (the strength of the State's case is important when determining prejudice).

745 N.W.2d at 724.

The same conclusion applies here. Evidence of C.G.'s level of intoxication was imperative to the state's case, and evidence demonstrating that she may not have been intoxicated as she claimed would have greatly undermined that case – particularly since the state relied on her testimony to establish her intoxication, and not any toxicology screens or independently verifiable tests. The missing impeachment evidence went to "the very core" of the state's case and was imperative to Zacarias' defense. As in *Millam*, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 724. Zacarias' conviction must be reversed.

V. Zacarias received ineffective assistance of trial counsel when trial counsel failed to object to instances of prosecutorial misconduct, including commenting on Zacarias' right to remain silent in violation of the Fifth Amendment and disparaging defense counsel.

A. Standard of Review and Error Preservation

Ineffective assistance of counsel claims are reviewed de novo. *Straw*, 709 N.W.2d at 133. Such claims are not subject to normal error preservation rules. *Ondayog*, 722 N.W.2d at 784. "The defendant may raise the ineffective assistance claim on direct appeal if he or she has reasonable grounds to believe the record is adequate to address the appeal." *Straw*, 709 N.W.2d at 133 (citing Iowa Code § 814.7(2) (2005)).[13]

B. Argument

The first instance of prosecutorial misconduct occurred during the direct examination of Detective Anderson, when the prosecutor

[13] Zacarias' conviction became final when the judgment and sentence were entered on May 19, 2019. As a result, the 2019 amendments to Iowa Code § 814.7, providing that a defendant may no longer bring an ineffective assistance of counsel claim on direct appeal, do not apply to his case. *Macke*, 933 N.W.2d at 235.

elicited testimony that Zacarias declined to cooperate with the police, exercising his right to remain silent. (TT V 58:21-60:17).

There were further instances of prosecutorial misconduct during rebuttal closing argument when the defense had no further opportunity to respond. The prosecutor:

- Disparaged defense counsel for "just yell[ing]" and "attack[ing] the police" investigation (TT V 35:10-13).
- Commented on Zacarias' exercising his right to remain silent during the course of the police investigation: "The defendant spoke with the detective twice, scheduling an appointment and never showing up." (TT V 36:8-9).
- Vouching again for the police officers: "This isn't the cop's fault. They did their job, period." (TT V 36:11-12).
- Disparaging defense counsel for impeaching C.G. or arguing that she was not credible: "For whatever reason, towards the end they decide they want to attack [C.G.] by saying she's making things up." (TT V 38:20-22).
- Arguing that a "tongue" could be an object when there was no evidence to suggest that a tongue was involved in this case,

and claiming that Zacarias stated he performed oral sex on C.G. (TT V 41:12-20; see also TT III 31-32).

- Vouching again for the police officers, "who did their job perfectly." (TT V 40:24-25).

Vouching for the credibility of law enforcement by arguing that they did their job perfectly is prosecutorial misconduct. *State v. Graves*, 668 N.W.2d 860, 874 (Iowa 2003) (prosecutors may not express personal beliefs or personally vouch for the credibility of a State's witness, including law enforcement officers). Disparaging defense counsel, beyond merely attacking the defendant's theory of the case, is prosecutorial misconduct. *State v. Coleman*, 907 N.W.2d 124, 140 (Iowa 2018). Misstating or inventing evidence is prosecutorial misconduct. *State v. Leedom*, 938 N.W.2d 177, 194 (Iowa 2020) ("Counsel can draw inferences from the evidence in closing arguments, but they cannot misstate or create the record." (citation omitted)).

Commenting on a defendant's exercise of the right to remain silent and not talk to law enforcement is prosecutorial misconduct impacting a defendant's fundamental rights that should have drawn

an objection – both when it occurred during the state's case in chief and when it was brought up for a second time during rebuttal closing argument – and a motion for mistrial. *State v. Porter*, 283 N.W.2d 351, 353 (Iowa 1979) ("The right of an accused to remain silent without fear of being chided at trial for doing so is clearly a fundamental right.").

These unobjected-to comments prejudiced and inflamed the jury at a time when the defense had no further opportunity to respond. Defense counsel failed to preserve error by objecting to these comments, and therefore failed to obtain a jury instruction telling the jury to disregard these statements. One of these statements compromised Zacarias' fundamental right to remain silent. There was no strategic benefit to letting these statements lie. Whether under a harmless error analysis (Zacarias' proposed Iowa Constitutional standard) or under a "reasonable probability that the outcome would have been different but for counsel's errors" analysis (the *Strickland* test), Zacarias was prejudiced by trial counsel's failure to object to prosecutorial misconduct.

VI. In light of the cumulative effect of the above errors, Zacarias was denied his right to a fair trial.

A. Standard of Review and Error Preservation

A claim of cumulative error is not subject to typical error preservation rules, because it is a rule of analysis applied to claims of ineffective assistance of counsel. *See, e.g. Clay*, 824 N.W.2d at 500 ("Under Iowa law, we should look to the cumulative effect of counsel's errors to determine whether the defendant satisfied the prejudice prong of the *Strickland* test."). Like all claims for ineffective assistance of counsel, a claim for cumulative error is reviewed de novo, with an eye towards all of the claimed errors, to determine whether counsel's errors affected the fundamental fairness of the proceedings. *Id.* at 501-02. In reviewing the cumulative effect of counsel's errors, the court should also consider the prejudicial effect of the other issues preserved for review, including the improper jury instructions, the sufficiency of the evidence against Zacarias, and the wrongful denial of the opportunity to impeach C.G.

B. Argument

The cumulative effect of counsel's errors prejudiced Zacarias' right to a fair trial. Defendants have a due process right to put on a

case. *Washington*, 388 U.S. at 19; *Simpson*, 587 N.W.2d at 771. In different ways, each of counsel's errors prejudiced Zacarias' defense. First, Zacarias was unable to effectively impeach the witness on whose credibility the state's case depended. Second, Zacarias was left defenseless against the insinuation that defense counsel was baselessly attacking the police and the complaining witness. Third, Zacarias was not able to respond to the arguments that the police officers did their jobs perfectly. Together, these errors created the impression that Zacarias *had no defense* to the allegations against him, and that the trial was a formality. Finally, after the meaningless trial, Zacarias was convicted of a crime under a statute which did not apply to his conduct. Competent counsel would have protected the record and zealously put on a defense. Without competent counsel, Zacarias was denied a fair trial. His conviction must be reversed.

CONCLUSION

Zacarias was convicted of a crime which did not apply to his conduct in this case, because the district court improperly defined "object" under Iowa Code 708.2(5) to mean a part of the body. This error alone requires reversal. However, the district court also erred

in impermissibly restricting impeachment of the complaining witness, and Zacarias' right to a fair trial was prejudiced by numerous instances of ineffective assistance of counsel. As a result of all of these cumulative errors, Zacarias was denied a fundamentally fair proceeding. The judgment against him must be reversed.

ORAL ARGUMENT NOTICE

Counsel requests oral argument.

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This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) (no more than 14,000 words); excluding the

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Dated: October 7, 2020
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