IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-0945

STATE OF IOWA,
Plaintiff-Appellee,

vs.

STANLEY LIGGINS,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
THE HONORABLE MARLITA A. GREVE, JUDGE

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR

I. The Defendant has Waived his Claim that His State and Federal Constitutional Rights to a Fair Trial were Violated because Information Indicating Juror Misconduct was not Further Investigated; Even if Not Waived, a Remand for Further Consideration of this Matter is Unwarranted.

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II. The District Court did not Commit Error when it Admitted the Former Testimony of Donna Atkins.

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IV. The District Court Acted within its Discretion When it Found the Testimony of Frank Reising was Admissible under Iowa Rule of Evidence 5.403.

Authorities

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V. The District Court Acted within its Discretion When it Found the Testimony of Antonio Holmes was Admissible under Iowa Rule of Evidence 5.403.

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Iowa Rule of Evid. 5.804 (b)(1)(B)
Iowa Rule of Evid. 5.807

VI. The District Court appropriately Excluded Evidence of a Hearsay Statement the Victim made to Another Little Girl before her Death.

Authorities

Jones v. State, No. 02-0854, 2003 WL 22438596 (Iowa Ct. App. Oct. 29, 2003)
State v. Mitchell, 757 N.W. 2d 431 (Iowa 2008)
State v. Veverka, 938 N.W. 2d 197 (Iowa 2020)
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VII. The District Court Acted within its Discretion When it Denied the Defendant's Motion for a New Trial, and a Remand for Further Consideration of the Motion is Unneeded.

Authorities

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VIII. The District Court did not Err when it Refused to Dismiss this Case.

Authorities

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State v. Mitchell, 757 N.W. 2d 431 (Iowa 2008)
State v. Neiderbach, 837 N.W. 2d 180 (Iowa 2013)
State v. Trompeter, 555 N.W. 2d 468 (Iowa 1996)

ROUTING STATEMENT

The State disagrees that this case should be retained by the Iowa Supreme Court. While defendant argues in Division I that the court had a sua sponte duty to inquire into possible juror misconduct, the State disagrees this raises a substantial issue of first impression, as the analogous analysis he borrows from other areas of criminal law are particularly in apposite. As for his claim in Division VIII that this case should be dismissed because the State suppressed exculpatory evidence, this Court has previously rejected dismissal in such cases. *State v. Hillsman*, 281 N.W. 2d 114, 117 (Iowa 1989).

This case can be decided based on existing legal principles. Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

Defendant-appellant Stanley Liggins (hereafter defendant) appeals following his conviction in 2019 for first-degree murder. The Honorable Marlita A. Greve presided at the jury trial and subsequent sentencing.

This appeal is from defendant's fourth trial, following trials in 1993 and 1995, as well as a mistrial in 2018, after the Iowa Court of

Appeals ordered a new trial in 2013. *Liggins v. State*, No. 12-0399, 2013 WL 5963013, at * 4-8 (Iowa Ct. App. Nov. 6, 2013). Many witnesses testified in person at the 2019 trial. However, given the passage of time and the death of many other witnesses, testimony of those witnesses was presented by reading to the jury transcripts of their former testimony at prior proceedings. This brief refers to those former testimonies by the respective exhibit numbers assigned to the different transcripts.

Course of Proceedings

The State accepts defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

The burned body of nine-year-old Jennifer Lewis was found near Jefferson Elementary School in Davenport, Iowa, on the evening of September 17, 1990. Ex. 522 p.25, line 15 – p.29, line 5;Conf.App. 482-86. She had been sexually abused and then manually strangled to death. Her body was set on fire. Ex. 510A p.362, lines 1 – 21; p. 366, line 4 – p.367, line 5; p. 375, line 12 – p.377, lines 9 – 10; p.386, line 14 – p.387, line 12;Conf.App.197,201-202,210-12,221-22. Gasoline was used to burn the body, and it was particularly poured

into the crotch area of the little girl, leaving significant charring. Such burning could have destroyed evidence of any biological fluids present in the vagina or rectum of the victim. 2019 Tr. p.587, lines 7 – 17; p.595, line 6 – p.597, line 13. Ex. 502 p.472, line 2 – p.473, line 14; p.490, line 10 - p.495, line 2; Conf.App.133-34,151-56. The fire was first seen at 8:16 p.m. near the school and the fire department responded by 9:07 p.m. 2019 Tr. p.27, line 15 – p.30, line 1; p.89, line 25 – p.90, line 7. Ex. 514, p 686, line 10 – p.687, line 20;Ex. App.41-42.

Earlier that same day, Jennifer had been shopping with her mother Sherri Glenn and step-father Joe Glenn. They arrived at their Rock Island home sometime after 5:10 p.m. Ex. 517 p.261, line 5 – p. 263, line 8; p.293, line 5 – p.294, line 10;Conf.App.347-49,379-80. They arrived to find several acquaintances or friends already there. Soon, the defendant also arrived – he was another acquaintance of the Glenns. Ex. 517 p.297, line 11 – p.300, line 6;Conf.App.383-86.

Defendant jointly owned a vehicle with his girlfriend Brenda Adams. It was a medium-red or maroon colored four – door Peugeot. Defendant was the primary driver of the Peugeot. 2019 Tr. p. 748, lines 14 – 17. Ex. 513 p.541, line 20 – p.542, line 9;Conf.App.248-50.

Ex. 86A (photo of defendant's car). This was the car defendant was driving when he arrived at the Glenn residence that day. 2019 Tr. p.269, line 18 – p.271, line 9. Ex. 516 p.504, line 1 – p.505, line 1;Conf.App.283-84.

Shortly after defendant arrived at the Glenn residence, Jennifer took her bike to ride over to a friend's house. About three minutes after she left, defendant also left in his car. Before doing so he told Joe Glenn he "had places to go and business to take care of." Ex. 517 p.302, line 5 – p.305, line 5;Conf.App.388-91.

Diane Pemberton knew Jennifer, as she sometimes went to Pemberton's house to play with her children. On the day she was killed, Jennifer went to her house in the late afternoon, with the witness testifying it was sometime after 5:30 p.m. As Jennifer rode her bike, a man drove up and stopped in front of Pemberton's house. He signaled Jennifer to come to his car, which she did. After speaking with the man, Jennifer rode away on her bike. Ex. 516 p.499, line 14 – p.503, line 25; p.520, line 21 – p.521, line 14;Conf.App.278-82,297-98.

Pemberton identified defendant and his Peugeot as the man and car she had seen that day. She had no doubt it was him. Ex. 516

p.504, line 1 – p. 505, line 14;Conf.App.283-84. Another woman in the neighborhood, Mary Watson, also saw the victim go up to a burgundy colored car that day and speak to the man inside, whom the witness did not know. In an earlier trial she had identified the vehicle displayed in the courtroom as the car she saw that day. 2019 Tr. p. 162, lines 14 – 21; p.165, line 9 – p. 171, 11.

Jennifer rode her bike back home, and defendant also returned there. Ex. 517 p.306, line 8 – p.307, line 8;Conf.App.392-93. When Joe Glenn asked him what he was doing, defendant said, "I ain't got nowhere to go. I'm bored." Ex. 517 p.307, lines 16 – 18;Conf.App.393. Defendant then asked if anyone had any gum, but no one did. The defendant then gave Jennifer $1.00 to go buy him some gum, and she headed towards the nearby Mac's Liquor Store to buy it. Mac's sold other items besides liquor, and minors could shop there. 2019 Tr. p.104, lines 1 – 5; p.115, lines 1 – 22. Ex. 507 p.175, line 21 – p.176, line 2; Ex. 517, p.307, line 21 – p.310, line 7;Conf.App.181-82,393-96. Joe Glenn soon noticed that both Jennifer and defendant were gone – defendant had said nothing before leaving. Ex. 517 p. 308, line 16 – p. 09, line 7;Conf.App.394-95.

Charlotte McCray, the owner of Mac's Liquor, testified Jennifer entered the store sometime between 6:15 and 6:45 p.m. The little girl bought a pack of gum and said she was buying it "for a friend." Ex. 507 p.176, line 8 – p.177, line 14;Conf.App.182-83.

Antonio Holmes went to Mac's Liquor on September 17, to purchase beer. He was unsure of the exact time of his arrival, believing it was from 5:30 p.m. up to as late as 5:50 p.m. 2019 Tr. p. 450, line 7 – 21. Before he entered the store, he saw a black male standing outside. Holmes asked, "How's it going?" Holmes recalled the man responded, "Okay." 2019 Tr. p.450, line 13 – p.451, line 23. At the trial in 2019, Holmes identified defendant as that man. 2019 Tr. p.451, line 24 – p.452, line 9. While inside the store, Mr. Holmes saw Jennifer obtaining change after buying the gun. She left the store and he then bought his beer. Upon leaving the store, he saw no one outside. 2019 Tr. p. 452, line 10 – p. 453, line 2.

Lloyd Eston testified that between 8:15 and 8:30 on September 17, 1990, he saw a medium-reddish car parked on the side of a road which runs near Jefferson School in Davenport. He saw a man standing by the car, with the trunk and a door open. Eston could not discern the man's race. Ex. 513 p.533, line 20 – p.536, line 9; p 541,

line 20 – p.542, line 9;Conf.App.241-44,249-50.[1] Several days later he described the car to police as a red, four-door foreign car. Eston testified that when police spoke with him they showed him a vehicle, as well as a photograph of a vehicle. Ex. 513 p.533, line 20 - p.538, line 14;Conf.App.241-46. When asked if he had previously seen the vehicle police showed him, Eston replied, "Yes." Ex. 513 p.541, line 20 – p.542, line 12;Conf.App.249-50. Eston was showed a photograph of a car at trial which he stated looked like a Peugeot, and that it appeared to be the same as the car depicted in the photograph police had shown him, but he could not be positive. Ex. 513 p.542, line 19 – p. 544, line 13;Conf.App.250-52.

Mr. Eston also testified in his deposition that police had shown him an actual car, apparently parked in a police garage. He stated he was "pretty sure" it was the car he had seen that night. Ex. 513 (deposition portion) p. 29, line 16 – p. 30, line 9; Conf.App.269.

[1] This witness provided some testimony at the first jury trial until he was declared unavailable by reason of mental infirmity, so his pretrial deposition was allowed to be read into evidence. Exhibit 513, which was read to the jury in this case, consists of Eston's earlier trial testimony, as well as his testimony at the deposition. The deposition portion of the exhibit does not have visible page numbers, so citations are made to the pages of the PDF file.

Another witness provided testimony that defendant's vehicle was in the area where the victim's body was burned during the evening of September 17.

W.H.[2] testified at defendant's trial in 2019 that in 1990 the witness lived in Davenport near Jefferson School. On September 17, 1990, W.H. was at a friend's house in the neighborhood. Sometime after 9 p.m. W.H. saw a fire near Jefferson School, and also observed a car parked at an intersection near the school; one taillight was brighter than the other. 2019 Tr. p. 332, line 6 – p. 345, line 2. The evidence reflects that the car W.H. saw that night was defendant's Peugeot, as one of its taillights was brighter than the other. 2019 Trial Tr. p. 586, lines 7 – 15. State's Ex. 86B (video of defendant's car).W.H. had on an earlier occasion in court identified the defendant's car, brought into the courtroom, as the one the witness saw that night because of the lights. 2019 Tr. p. 342, line 6 – p.344, line 2.

In September 1990, Brenda Adams, defendant's girlfriend, lived in an apartment in Milan, Illinois, whereas defendant lived at the

[2] As this witness was questioned during the 2019 trial regarding the witness' past status as a police confidential informant, consistent with defendant-appellant' brief the State's brief also uses the initials W.H.

Hillside Inn in Rock Island. Because guests were disallowed at her apartment, whenever defendant spent the night with her, she would take him home early in the morning before her apartment manager arrived. Defendant used their jointly owned Peugeot on September 17. During that day she talked with him on the telephone a couple times, the last conversation occurring at 10 p.m. 2019 Tr. 742, line 13 – p.745, line 6; p.749, line 3 – p.750, line 14. He told her he would come to her apartment “shortly" and asked if she needed anything. She requested he buy her a pack of cigarettes. However, he did not arrive until sometime between 12 a.m. and 12:30 a.m. the next day. 2019 Tr. p. 750, line 24 – p. 751, line 21; p. 768, lines 24 – 25.

Ms. Adams testified that defendant became quiet sometime after he arrived. At one point he put his head on her lap and asked her if she would “love him no matter." She found the question odd, since they “weren’t in that kind of relationship at that time.” 2019 Tr. p. 751, line 16 – p. 752, line 6. She did not detect the smell of gasoline on the defendant. When she later went out to the car to retrieve a cigarette, she did not notice any gasoline smell – but she was just there for a minute. 2019 Tr. p. 769, lines 9 – 14; p. 771, lines 20 – 22; p. 773, lines 14 – 21. However, when she drove defendant back to his

residence the next morning, she did smell gas. 2019 Tr. 752, line 22 – p. 753, line 21.

Adams went to bed in her bedroom, but defendant did not sleep with her; she assumed he slept on the couch in the living room. Because she had no personal knowledge whether he did sleep there after she went to bed, she had no knowledge of his whereabouts. Indeed, she agreed defendant would have been able to leave while she slept and then return early without her awareness. 2019 Tr. p. 774, lines 3 – 6. The State presented evidence that defendant returned to his room at the Hillside Inn during the early morning hours of September 18 and took a lengthy shower, lasting 45 minutes. 2019 Tr. p.734, line 22 – p.738, line 24; p.904, line 8 – p.909, line 2; p.913, lines 17 – 24. Ex. 521, p.1190, line 11 – p.1192, lin2 2;Conf.App. App.472-74.

Donna Atkins (sometimes spelled Adkins in the record) testified that on the day after the murder she was helping a male friend move out of the Hillside Apartments, which was adjacent to the Hillside Inn where defendant lived. A red car was parked in the parking space assigned to her friend's apartment. The evidence shows that the car she saw was defendant's Peugeot. At about 11 a.m. that morning she

walked past the Peugeot – it reeked of gasoline and she saw a gas can in the backseat. She was familiar with defendant's car because it was routinely parked in front of her friend's apartment. Ex. 501A p.1136, line 19 – p.1143, line 12;Ex.App.32-39. The gasoline smell was so strong that Atkins cautioned a female companion to not smoke. Ex. 501A p. 1141, lines 11 – 15;Ex.App.37.

Law enforcement officers spoke with defendant on September 19, 1990. He admitted he had been at the Glenn residence and had given Jennifer a dollar to buy some gum for him on September 17. When asked if he had seen the victim at any time other than at the Glenn residence, he denied it. However, after being confronted with contrary information, he admitted having done so. 2019 Tr. p.892, line 24 – p.898, line 22. Ex. 505 p. 1159, lines 6 – 19; p.1161, line 2 – p.1166, line 21; p.1169, lines 2 – 24;Conf.App.161-68,171.

When later asked about the gas can police found in the Peugeot's trunk, defendant admitted he kept a gas can in the trunk, but claimed he had not used it in months. He denied ever leaving it inside the passenger portion of his car. Ex. 505 p.1168, lines 19 – 24; p.1169, line 25 – p.1170, line 13;Conf.App.170-72.

Frank Reising testified that he had shared a jail cell with defendant in Scott County for several weeks in 1992. Once the two of them were watching a television newscast about the murder in this case. Although Reising could not recall the exact words, during the newscast defendant said something like the following: “I may have done it, but I’m not going to get caught for it." 2019 Tr. 430, lines 1 – 21.

Despite analysis of hair, fingerprints, DNA, bodily fluids and fibers found in defendant’s car and in his room at the Hillside Inn, no evidence was found linking him to the victim. 2019 Tr. p. 546, line 7 – p. 553, line 1; p. 610, line 17 – p. 619, line 18. However, it is possible to clean a surface so as to remove DNA and trace evidence such as fibers and hairs, by use of vacuuming or washing the surface. 2019 Tr. p. 554, lines 9 – 23. A search of defendant’s car found evidence of washing, as the carpet under the back seat was wet when searched. 2019 Tr. p. 563, lines 9 – 25. Moreover, remnants of a plastic garbage bag were found under the victim’s body. Police found a plastic garbage bag in a storage area at the Hillside Inn, where the defendant lived. Analysis of this garbage bag and the remnant revealed both were consistent with being a Hefty Steel Sak garbage bag. 2019 Tr. p.

713, line 5 – p. 720, line 14; p. 984, line 13 – p. 986, line 16; p. 987, line 13 – p. 993, line 23 . In September 1990, the Hefty Steel Sak was only sold to commercial customers buying in bulk. 2019 Tr. p. 720, line 15 – p. 721, line 1.

ARGUMENT

I. The Defendant has Waived his Claim that His State and Federal Constitutional Rights to a Fair Trial were Violated because Information Indicating Juror Misconduct was not Further Investigated; Even if Not Waived, a Remand for Further Consideration of this Matter is Unwarranted.

Preservation of Error

At the end of the first day of jury deliberations, the court attendant received information that a juror had heard from a third-party that an earlier trial of defendant had ended in a hung jury. The attendant promptly reported to the trial judge, who in turn advised defense and prosecution counsel of it and that the matter would be further considered the next day of trial. The question was considered the next day at a hearing outside the jury's presence, at which time both defense counsel and defendant Liggins were present. None of the parties believed that a mistrial was warranted, and the defense did not request any further inquiry be made, such as questioning of the jurors. 2019 Tr. 1280, line 5 – p. 1285, line 17.

Defendant asserts that his state and federal constitutional rights to a fair trial were violated due to juror misconduct because the district court failed to further investigate this matter. In contending the district court erred, defendant invokes the decision in *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 2d 654 (1954), which remanded for further proceedings regarding a third-party communication with a juror. *Id.* at 229 – 30, 74 S.Ct. at 451 - 52. Defendant asks this Court to adopt a procedure similar to the one announced in *Remmer*. Defendant's Brief at 38, 42 – 45, 55.

However, this claim has been waived. The defense was very explicit in the district court that it did not want a mistrial; nor did it indicate any desire for further investigation of the matter. 2019 Tr. p.1282, line 19 – p. 1284, line 3. Consequently, this Court may affirm without reaching the merits of the defendant's argument. *Jasper v. State*, 477 N.W. 2d 852, 856 (Iowa 1991) (a party "cannot deliberately act so as to invite error and then object because the court has accepted the invitation").

Nevertheless, on appeal defendant asserts the court had a sua sponte duty to pursue a further investigation to elicit more specific information about the matter. He urges this duty arose once the court

attendant advised the trial judge of the communication. Defendant's Brief at 38, 45 – 47. However, his reliance on the decisions in *State v. Tejeda*, 677 N.W. 2d 744 (Iowa 2004), and *State v. Watson*, 620 N.W. 2d 233 (Iowa 2000), to escape the waiver rule is unavailing.

It is true that in *State v. Tejeda*, the Court held that a trial court has a sua sponte duty of inquiry *when* a defendant alleges a breakdown in communication with counsel. 677 N.W. 2d at 749, 750. The State fails to understand how that decision excuses this defendant's failure to preserve error, as the defendant in *Tejeda* had sent two letters to a district court judge alleging a breakdown in communication and requesting new counsel – but no hearing was conducted. By writing those letters, the defendant had preserved error because the letters alerted the district court to the problem. 677 N.W. 2d at 747 – 49. *See State v. McDonald*, No. 15 – 1690, 2016 WL 6902329, at * 2 (Iowa Ct. App. Nov. 23, 2016) (*Tejeda* inapplicable because defendant never requested new counsel). Thus, while *Tejeda* speaks of a sua sponte duty once alerted to a possible problem, it is not the case where the defense believed no problem existed – such as is true of this case.

Nor does the decision in *State v. Watson*, assist defendant. A court's sua sponte duty of inquiry when the issue concerns counsel's possible conflict of interest is sui generis, inapplicable to matters not involving the right to counsel in criminal cases. *Harrington v. Iowa Valley Mut. Ins. Ass'n,* No. 00-2001, 2002 WL 1331846, at * 2 (Iowa Ct. App. June 19, 2002). A conflict of interest question is unique because of counsel's possible divided loyalties, which perforce may adversely affect his or her judgment and advocacy on behalf of the defendant. *See State v. Smitherman*, 733 N.W. 2d 741, 748 (Iowa 2007) (noting a conflict based on joint representation can "effectively seal the lips of the attorney on critical matters").

Finally, in footnote five in Division I of his brief, defendant appears to assert error because defendant Liggins was not present when the court initially advised defense counsel and the prosecutor of the juror communication, with the proviso the matter would be considered the next day of trial. Defendant was personally present at the hearing the next day. Defendant's Brief at 49. Claims premised on defendant's absence that first day have been waived. *State v. Schweitzer*, 646 N.W. 2d 117, 121 (Iowa Ct. App. 2002) (claim raised in a footnote in party's brief is waived). Moreover, defendant's

reliance on *State v. Shorter*, 893 N.W. 2d 65 (Iowa 2017), and *State v. Blackwell*, 238 N.W. 2d 131 (Iowa 1976) is misplaced. In those cases, the defendant was not present when the court and counsel conferred and agreed on a response to a jury question during deliberations, or when the court questioned jurors during a recess about a disruption in the proceedings. *Shorter*, 893 N.W. 2d at 83-84; *State v. Blackwell*, 238 N.W. 2d at 132-36. Since nothing here occurred the first day, other than advising counsel and setting the matter for a hearing the next day, it did not constitute a critical stage of trial. Even if defendant should have been present, error is harmless. *State v. Shorter*, 893 N.W. 2d at 84 (no prejudice where defense counsel *was* present and the defendant failed to show how his participation would have changed matters).

Defendant's challenges on appeal have been waived.

Standard of Review

Defendant asserts the applicable standard of review is de novo, again relying on the unique decision in *State v. Watson*, which involved a constitutional question regarding conflicted counsel. Defendant's Brief at 39. The State disagrees and submits that abuse of discretion is the applicable standard for reviewing questions

regarding juror misconduct. *See State v. Webster*, 865 N.W. 2d 223, 231 (Iowa 2015). While the Court in *State v. Christianson,* 929 N.W. 2d 646, 677 (Iowa 2019), later declined to decide whether abuse of discretion or de novo review applies in such cases, the concurring opinion of three justices emphasized that the opinion does *not* overrule precedent that abuse of discretion is the correct standard. *Id.* at 681 – 82 (Waterman, J., concurring). But even under de novo review, there would be no basis for relief.

The district court is presumed to have appropriately exercised its discretion. The reviewing court will only reverse when the district court abused its discretion when considering a matter committed to its discretion. *State v. Holland*, 485 N.W. 2d 652, 655 (Iowa 1992). An abuse of discretion only exists when the court "exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable." *State v. Wickes*, 910 N.W. 2d 554, 564 (Iowa 2018) (internal quotation marks and citation omitted).

Merits

Before the jurors were released from service the first day of deliberations, one of them approached the court attendant and privately spoke with her. This juror reported that "her son's friend

was on the last jury and that he told her that the jury was hung." 2019 Tr. p. 1280, lines 19 – 24. The trial in 2018 had resulted in a hung jury. Upon inquiry from the attendant, this juror indicated that she had advised three other jurors of what she had heard. One of those other jurors also spoke with the attendant that day. This juror believed that all of the jurors were aware of the matter, as the first juror had loudly announced it. 2019 Tr. p. 1280, lines 19 – p. 1281, line 20.

Defendant complains this information is vague. He asserts it is unclear whether the first juror had learned of the information by speaking with her son, or whether she also spoke with the juror in the earlier trial. He also suggests the identity of this former juror is in doubt. Finally, defendant asserts inquiry of the remaining jurors was needed to ascertain exactly what they had heard about the former trial. Defendant's Brief at 51-52, 54-55.

Defendant asserts the court should have conducted a hearing similar to that ordered in *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 2d 654 (1954). Defendant's Brief at 42-45, 54- 55. In *Remmer*, the defendant was tried for tax evasion. Unknown to the defense until after the verdict, during the trial an unnamed person

had contacted one of the jurors and told him he could profit by bringing in a verdict favorable to the defendant. The juror reported the incident to the judge, who advised the prosecution – but not the defense – of the matter. The FBI then conducted an investigation during the trial, issuing a report which was considered by the court and the prosecutor, without notice to the defense. Deciding that the statement at issue had been made in jest, nothing further was done. *Id.* at 227 – 28, 74 S. Ct. at 450 – 51. After verdict, the defense learned of the incident and filed a motion for new trial. The defense requested a hearing on the matter, but the court denied the motion without holding the requested hearing. *Id.* at 227 – 28, 74 S.Ct. at 450 – 51

The United States Supreme Court reversed and remanded for a hearing on the matter. In doing so, the Court stated that unauthorized, private third-party communications "with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." This presumption "is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." Because the

district court had acted in a summary and ex parte fashion, the record failed to explicate what had actually transpired or whether the defense was harmed. Consequently, the Court remanded for a hearing. *Id.* at 229 – 30, 74 S.Ct. at 451 – 52.[3]

Defendant asks this Court to determine "when a district court must, in the absence of a request from one of the parties, conduct a *Remmer* – type hearing when allegations of juror misconduct are brought to the court's attention." Defendant's Brief at 45. This request should be rejected.

In urging a sua sponte duty to investigate possible juror misconduct, defendant correctly notes the importance of the right to a trial by an impartial jury. Defendant's Brief at 42. However, there is another critical constitutional right involved in criminal trials – the

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[3] This Court recently discussed the *Remmer* decision in *State v. Christiansen*, but primarily regarding *Remmer's* provision of a rebuttable presumption of prejudice to be applied when there is an improper communication with a juror. There was no claim in *Christiansen* that the district court's hearing on juror misconduct was inadequate. The conviction in *Christiansen* was affirmed without further proceedings. 929 N.W. 2d at 662, 667 – 80. *Remmer's* provision of a presumption of prejudice which must be rebutted by the prosecution either no longer applies or has been significantly restricted. Instead, the *defendant* generally has the burden of establishing actual bias. *See Smith v. Phillips*, 455 U.S. 209, 215, 102 S.Ct. 940, 945, 71 L.Ed.2d 78 (1982); *State v. Christiansen*, 662 N.W. 2d at 668 – 71.

right of the defendant, with or without the assistance of counsel, to decide and pursue a chosen theory of how to defend against criminal charges. When recognizing a constitutional right of self-representation in *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975), the Court stated: "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make [a] defense." *Id.* at 818, 95 S.Ct. at 2533. While certain decisions are left to counsel when a defendant is represented, others are for the defendant alone; but, as a general matter all are committed to the defense and not the trial court for decision. *See Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed. 2d 987 (1983) (while the defendant has the "ultimate authority to make certain fundamental decisions regarding the case," such as whether to waive a jury or to testify, other matters are left to counsel's professional judgment); *Faretta*, 422 U.S. at 820 – 21, 95 S.Ct. at 2534 (recognizing the power of trial counsel "to make binding decisions of trial strategy in many areas" as agent of the defendant).

Furthermore, a criminal defendant has a right to be tried by the jury at hand, in the absence of manifest necessity for a mistrial over

defense objection because of the interests of public justice. *Illinois v. Somerville*, 410 U.S. 458, 459, 93 S.Ct. 1066, 1068, 35 L.Ed. 2d 425 (1970). If manifest necessity is not present, the trial should proceed. As the Court observed in *Somerville*: "The determination by the trial court to abort a criminal proceeding where jeopardy has attached is not one to be lightly undertaken, since the interests of the defendant in having his fate determined by the jury first impaneled is itself a weighty one." *Id.* at 471, 93 S.Ct. at 1073.

The defense did not want a mistrial. As counsel stated at the hearing: "In talking it over with Mr. Liggins, we are – we're not going to move for a mistrial." 2019 Tr. p. 1283, lines 10 – 18. Nor did the defense see a need for further investigation. Counsel's remarks indicated that the fact of prior trials could not have been unknown to the jurors, given the use at this trial of prior testimony from the earlier trials for numerous witnesses. While the results of any of the prior trials had not been expressly presented to the jury, counsel noted that "speculation would have been out there anyway, given the odd procedural history of this case." 2019 Tr. p. 1282, line 19 – p. 1283, line 18. The district court and the prosecutor also agreed that a

mistrial was unwarranted, and saw no need for further investigation. 2019 Tr. p. 1284, lines 1 – 15.

The parties then collaborated on an additional instruction for the jury. In doing so, defense counsel urged that a relatively short and simple instruction should be issued; he believed that the report of the communication was “kind of a nonissue” and he did not want a detailed or elaborate instruction that would" exaggerate the importance" of the matter. 2019 Tr. p. 1283, line 19 – p.1284, line 3. The following instruction was issued to the jury:

> This case shall be tried on the evidence presented in the courtroom during the trial only. Final Instruction No. 6 defines what evidence is and is not. Each juror shall abide by the admonition that prohibits a juror from communicating about this case with anyone. Please continue with your deliberations.

Jury Instr.47;App.123.

The State recognizes that the communication at issue raises a question of juror misconduct. However, given the fact the jury was aware of prior trials, with possible speculation about their outcomes, the defense reasonably decided to avoid complicating the matter with a further investigation, and instead chose to pursue a decision by the jury the defense helped to select. *See Escobedo v. State,* No.03-1913,

2004 WL 2804848, at * 1-2 (Iowa Ct. App. Dec. 8, 2004) (no ineffectiveness for not seeking mistrial when juror dismissed during trial, as the defense wished to keep the jury it had); *Allen v. State*, 298 Ga. App. 807, 681 S.E. 2d 243, 243 – 44 (2009) (no ineffectiveness for failing to seek further investigation or a mistrial after jurors possibly saw defendant in handcuffs, as counsel did not wish to call attention to the matter and he believed a mistrial was not in the defendant's best interest); *State v. Swenson*, No. A-12-277, 2013 WL 2106773, at * 10 (Neb. App. May 7,2013) (although ineffectiveness claim not reached because of inadequate record, Court notes counsel's failure to seek a mistrial following prosecutor's remarks may have been a strategic decision to take a chance on a favorable verdict); *Green v. State*, 351 S.C. 184, 192 – 73, 569 S.E. 2d 318 (2002) (no ineffectiveness for not seeking a mistrial after jury apparently considered defendant's failure to testify during deliberations, where counsel believed defendant had a " 'good' jury more likely to acquit").

The decisions of defense counsel and defendant were appropriate and solely committed to their decision-making. The district court was not remiss in agreeing with that judgment.

But, defendant likens this situation here to others where a sua sponte duty has been recognized. Relying on *State the Watson*, he points to the sua sponte duty applicable when the district court has reason to believe defense counsel has a conflict of interest. Defendant's Brief at 47. However, the State believes the rule applicable in conflict of interest cases is unneeded here. A sua sponte duty appears needed in counsel conflict cases because the problem of divided loyalties may present impediments to ferreting out a need for a remedy. *See State v. Smitherman*, 733 N.W. 2d at 348 (noting that a conflict due to joint representation can "effectively seal the lips of the attorney on critical matters and tend to prevent the attorney, often in very subtle ways, from providing effective representation").

Nor does this case present concerns similar to those necessitating a sua sponte duty when mental competence of the defendant is at issue. Like the right to zealous and fully loyal counsel, the right to be tried only when mentally competent concerns *the very ability* to effectively present a defense, as opposed to making various decisions when competent to do so. *Drope v. Missouri*, 420 U.S. 162, 171 – 72, 96 S. Ct. 896, 903 – 04, 43 L.Ed. 2d 103 (1975) (indicating that a mentally incompetent defendant is deprived of any real

opportunity to defend himself and that prohibition of a trial in such a situation “is fundamental to an adversary system of justice.").

The defendant in this case was not hindered by conflicted counsel or any mental incompetency, when deciding what was best for his defense. It would have been inappropriate for the court to have chosen differently in this case. *See In re S.P.,* 719 N.W. 2d 535, 540 (Iowa 2006) (noting that a district court “is prohibited from assuming the role of an advocate”).

Finally, defendant’s reliance on *State v. Bigley*, 202 N.W. 2d 56 (Iowa 1972), is also unavailing. Although error was preserved in *Bigley*, the Court adopted ABA Standard 3.5(f) regarding possible juror exposure to media accounts, providing that a trial court “*may on its own motion* or shall on motion of either party” question the jurors about any exposure to the media. (emphasis supplied). *Id.* at 58 (quoting ABA standard). As noted, the district court’s sua sponte authority is not mandatory and failure to inquire is reversible only for an abuse of discretion. *See State v. Frank*, 298 N.W. 2d 324, 327 – 28 (Iowa 1980). Given what has already been stated regarding the defense position on the matter, without any belief further inquiry was

warranted, the State submits no abuse of discretion would occur under *Frank*, even if the *Bigley* rule applied.

Deny the request for a remand for further inquiry.

II. The District Court did not Commit Error when it Admitted the Former Testimony of Donna Atkins.

Preservation of Error

The district court admitted at trial former testimony given at an earlier trial of the defendant by Donna Atkins, who was deceased. 2019 Tr. p.887, line 17 – p.888, line 7. Ex. 501A p.1135, lines 6 – 9;Ex. App. 31. Defendant argues this evidence violated both the hearsay rule and his state and federal constitutional rights of confrontation. Defendant's Brief at 59, 61-62. He believes he was denied a full and fair opportunity to cross-examine Atkins at the earlier proceeding. He bases this assertion on the State's failure to timely disclose police reports discussing persons who could, he believes, have contradicted her testimony she smelled gasoline and saw a gas can when she approached defendant's car the morning after the murder. Defendant's Brief at 59, 61-63.

Defendant has preserved his claim of error based on the applicable hearsay rule, but not as to the right of confrontation. Before trial, the State filed a motion to present the former testimony

of a number of deceased witnesses, including Donna Atkins. Motion to Allow Former Testimony filed 4/1/15;App.53-54. Defendant filed a resistance contending this hearsay exception was inapplicable to Atkins, as failure to timely disclose the police reports deprived the defense of "an opportunity and similar motive" to develop her testimony. Resistance to State's Motion to Allow Former Testimony filed 4/22/16;App.69-75. At the later hearing on the matter, the defense asserted a confrontation objection under both state and federal constitutions. Tr. of Mot. 2/20-22/17 p. 64, line 20 – p. 65, line 4.

The district court filed a written ruling allowing presentation of Atkins' former testimony. The ruling expressly referred to the hearsay matter but said nothing regarding a confrontation claim. Ruling on State's Motion to Allow Former Testimony Pursuant to Iowa R. Evid.5.804;App.80-86. Thus, while the hearsay claim has been preserved, the constitutional claim has been waived for lack of a ruling. *Meier v. Senecaut*, 641 N.W. 2d 532, 537 (Iowa 2002).

Finally, defendant asserts that if any claim of error was not preserved, then his trial counsel was ineffective. Defendant's Brief at 57. Notice of appeal was filed in this case before July 1, 2019, so

defendant may now raise the claim on this direct appeal. *State v. Macke*, 933 N.W. 2d 226, 228 (Iowa 2019). However, because the direct appeal record is often inadequate to resolve ineffective assistance claims, due to counsel's inability to respond, this claim should be left for postconviction. *See State v. Straw*, 709 N.W. 2d 128, 133 (Iowa 2006).

Standard of Review

Hearsay claims are reviewed for correction of errors at law. *State v. Paredes*, 775 N.W. 2d 554, 560 (Iowa 2009). "Inadmissible hearsay is considered to be prejudicial to the nonoffering party unless otherwise established." *State v. Newell*, 710 N.W. 2d 6, 18 (Iowa 2006). Constitutional claims regarding ineffective assistance of counsel and confrontation are reviewed de novo. *State v. Schaer*, 757 N.W. 2d 630, 633 (Iowa 2008); *State v. Straw*, 709 N.W. 2d at 133.

If the merits of the state and federal confrontation claims are reached, the same standards should be applied because defendant fails to urge a different standard under the Iowa Constitution. *See State v. Lowe*, 812 N.W. 2d 554, 566 (Iowa 2012).

Merits

Donna Atkins testified that on the day after the murder she was helping a male friend move out of the Hillside Apartments, which was adjacent to the Hillside Inn where defendant lived. A red car was parked in the parking space assigned to her friend's apartment. The evidence reflects that the car she saw was the defendant's Peugeot. At about 11 a.m. that morning she walked past the Peugeot – it reeked of gasoline and she saw a gas can in the backseat. She was familiar with defendant's car because it was routinely parked in front of her friend's apartment. The gasoline smell was so strong that Atkins cautioned a female companion to not smoke. Ex. 501A p.1136, line 1 – p.1143, line 12;Ex. App.32-39.

In defendant's first action for postconviction relief in 1999, the district court determined that the State had failed to previously disclose to the defense 77 police reports. Many of those reports, however, had been generated after defendant's two trials in 1993 and 1995. The postconviction court did not find any bad faith on the part of the prosecution in failing to disclose reports, and only a handful were deemed to have any exculpatory value. The court found that three of the reports had limited relevance to Donna Atkins' testimony

– police interviews with Shawn Saunders, Daryl Sheese and Michael Armstrong. While the lack of timely disclosure of these reports nevertheless constituted suppression of favorable evidence, the postconviction court also found they failed to meet the test of materiality under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). Ruling on PCR LACE 91830, pp. 8-13;App.12-17. That conclusion was affirmed on appeal when the Iowa Court of Appeals denied relief in the first postconviction case. *Liggins v. State*, No. 99 – 1188, 2000 WL 1827164, at * 1, 4 – 5 (Iowa Ct. App. Dec. 13, 2000).

Defendant argues the prior testimony of Donna Atkins was inadmissible, either under the hearsay exception for former testimony or under the confrontation clause, as the three reports were unavailable for use when Atkins testified in person.

1. Hearsay

Hearsay is generally inadmissible subject to certain exceptions. Iowa R. Evid. 5.802. One of those exceptions allows presentation of former testimony when a witness is unavailable due to death. Iowa R. Evid. 5.804 (a)(4) and (b)(1). To be admissible, the former testimony must be "now offered against a party who had … an opportunity and

similar motive to develop it by direct, cross-, or redirect examination." Iowa Rule of Evid. 5.804 (b)(1)(B). Thus, the Rule requires a showing of two matters: "unavailability and similar motive and opportunity to develop the challenged testimony." *See United States v. Bartelo*, 129 F. 3d 663, 670 (1st Cir. 1997), *cert. denied*, 525 U.S. 905, 119 S.Ct. 241, 142 L.Ed. 2d 198 (1998) (applying identical Federal Rule of Evid. 804 (b)(1)). A similar motive, but not necessarily an identical one, to develop the testimony is required for the hearsay exception. *Id.* Where the defense seeks through cross-examination to discredit a prosecution witness at the first proceeding, a similar motive typically would apply when use of former testimony is later sought because the witness is unavailable. *See United States v. Tannehill*, 49 F.3d 1049, 1057 (5th Cir.), *cert. denied*, 516 U.S. 859, 116 S.Ct. 859, 133 L.Ed. 2d 109 (1995).

Defendant urges the Atkins testimony is inadmissible because he was unaware of earlier police reports which, he believes, could have been used to cast doubt on her testimony. Defendant's Brief at 60 – 61. However, merely because new information later comes to light which might have proved helpful does not change the similarity of motive or undermine admission of prior testimony. *See United*

States v. Koon, 34 F. 3d 1416, 1426 – 27 (9th Cir. 1994), *aff'd in part, rev'd in part, on other grounds,* 518 U.S. 81, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996) (applying Federal R. of Evid. 804(b)(1)); *People v. Wilson*, 36 Cal. 4th 309, 343, 347, 114 P. 3d 758 (Cal. 2005), *cert. denied*, 547 U.S. 1042, 126 S. Ct. 1617, 164 L.Ed. 2d 336 (2006) (applying state evidence provision similar to Iowa's Rule 5.804 (b)(1)); *State v. Jones*, 791 So. 2d 622, 625 – 28 (La. 2001) (same). *But see Williams v. State*, 416 Md. 670, 7 A. 3d 670, 697 – 98 (2010).

Defense counsel did not cross-examine Atkins at the 1995 trial, which was the former testimony presented in this case. Ex. 501A p. 1144, lines 3 – 25;Ex.App.40. However, the defense did cross-examine Atkins at the 1993 trial. Ex. M0018;Ex.App.23-26. While defense counsel obviously never cross-examined her at either trial about these police reports, that is of no moment. *See United States v. McClellan*, 868 F. 2d 210, 215 (7th Cir. 1989) (in determining application of Rule 804 (b) (1) "the emphasis in this inquiry is upon the motive underlying the cross-examination rather than the actual exchange that took place").

If error occurred, it was harmless. First, defendant's girlfriend, Brenda Adams, testified that she smelled gasoline in the Peugeot the

morning after the murder. 2019 Trial Tr. p.752, line 22 – p. 753, line 21. Because the Atkins testimony was cumulative on that point, prejudice is absent. *State v. Newell*, 710 N.W. 2d at 19.

Further, the information in the police reports would have provided little, if any, assistance to the defense. Thus, any error would be harmless. *See People v. Wilson*, 36 Cal 4th at 542 – 43 (even if undisclosed information had been available at the first trial, it "would not have significantly altered the jury's view of [a witness'] credibility"). Donna Atkins' testimony that she smelled gasoline in defendant's car and saw a gas can on the vehicle's backseat is not credibly challenged by the undisclosed information in the reports regarding police interviews of Daryl Sheese, Shawn Saunders and Michael Armstrong. On September 18, 1990 Atkins testified she was at the Hillside Apartments helping Mr. Sheese move from his apartment because he had committed himself to a treatment facility for alcoholism. Ex. 501A p. 1137, line 5 - p. 1139, line 16; Ex.App.3-35. When a police officer interviewed Sheese, the officer showed him a photograph of the red Peugeot. Sheese advised the officer that he "did not recall" seeing such a car that day, but that he did see a brown Mustang parked outside the apartments. Ex. MG (Sheese police

report);Ex.App.4. Shawn Sanders told police that on that date her brown Mustang was parked in the lot. She stated that she did not own a gas can and never had one inside her vehicle. However, when shown photographs of defendant and his car, she indicated she had observed the car and defendant in the parking lot on earlier occasions. Ex. MI (Saunders police report);Ex.App.6. Michael Armstrong was unsure when he spoke to police if he had ever previously seen defendant's vehicle but thought he had seen the defendant walking through the Hillside parking lot. Armstrong had used the brown Mustang, but had never had a gas can in it. Ex. MH; Ex.App.5.

None of this information contradicts Atkins' testimony. All that Sheese said was that he "did not recall" seeing the Peugeot that day. Given his apparent problem with alcohol and imminent entry into a treatment program, his powers of observation and memory were likely compromised. The fact that the other two evidently did not see a Peugeot does not really contradict Atkins.

While defendant appears to suggest Atkins might have misidentified his car, actually seeing the Mustang, such is not plausible. Defendant's Brief at 60-61. Atkins was very clear in her testimony that there was a round gas can in the car she saw,

defendant did have a round gas can, and Saunders and Armstrong indicated there was no gas can in the Mustang. Ex. 501A p.1143, lines 4 – 18; Ex. 505 p.1168, lines 19 – 24; p.1169, line 25 – p.1170, line 13; Exs. MI and MH; Ex.App.5-6; Conf.App.170-71 Moreover, Atkins was very insistent during her trial testimony about the smell of gasoline – it being so strong she cautioned her female companion to not smoke. Ex. 501A p.1141, lines 11 - 19;Ex. App.37.

Both the district court and the Iowa Court of Appeals in the first postconviction action concluded the police reports failed to constitute material evidence under *Brady v. Maryland*, such as would reasonably affect the outcome of trial. Ruling in PCR CASE LACE91830 pp. 11-13; App.5-37. *Liggins v. State*, 2000 WL 1827164, at * 4 – 5.

While it is true the case against defendant is essentially circumstantial, that evidence is substantial. Defendant knew the victim and her family. Ex. 517, p. 297, line 11 – p. 300, line 6; Conf.App.383-86. He was seen privately talking with her on the street before returning to her home and requesting she go buy him a pack of gum at a nearby store. Right after the victim left, the defendant also left, without telling anyone at the Glenn home. Ex. 516, p. 499, line 14

– p. 505, line 14; Ex. 517, p.308, line 16 – p. 309, line 7; Conf.App.278-84,394-95. He was then seen lurking outside Mac's Liquor Store, where the victim had gone to purchase the gum. Later that evening his car was identified as being near the scene of the fire where the victim's body was burned. 2019 Tr. p.342, line 6 – p.344, line 2; p.451, line 24 – p.452, line 9; p.751, line 16 – p.752, line 6. He subsequently arrived late at his girlfriend's apartment, and she indicated he was acting strangely.2019 Tr. 751, line 16 – p.752, line 6. Evidence supported the conclusion that he returned to his own residence during the early morning hours and took a lengthy shower, lasting 45 minutes. The next morning his girlfriend smelled gasoline in the Peugeot. 2019 Tr. p.734, line 22 – p.738, line 24; p.752, line 22 – p.753, line 21; p. 904, line 8 – p. 913, lines 17-24.When questioned by police, defendant initially lied about having spoken with the victim before sending her for gum. Evidence was also introduced defendant admitted his guilt to a jail cellmate. Finally, remnants of a black garbage bag found attached to the victim's body had a composition consistent with commercial garbage bags available at the motel where defendant lived.2019 Tr. p.713, line 5 – p.721, line 1; p.892, line 24 – p.898, line 22; p. 984, line 13 – p. 993, line 23. This was substantial

evidence of guilt, and provides an additional reason to find any error to be harmless.

2. Confrontation Clause

Nor is there any merit to defendant's confrontation claim – but even if error occurred, it was harmless beyond a reasonable doubt.

The constitutional right of confrontation is satisfied if the defendant had a prior *opportunity* to cross-examine the now unavailable witness. *Crawford v. Washington*, 541 U.S. 36, 53 – 54, 124 S.Ct. 1354, 1365, 158 L.Ed. 2d 177 (2004); *State v. Schaer*, 757 N.W. 2d 630, 635 (Iowa 2008). The defendant in this case in fact had prior opportunities to cross-examine Atkins – although not utilized at the 1995 trial, counsel did cross-examine her at the 1993 trial. Ex. 501A p. 1144, lines 3 – 25; Ex. M0018; Ex.App.23-26,40. So long as a defendant has an opportunity to cross-examine, it does not matter whether the cross-examination proceeded in a particular fashion, or even if the defendant dispensed with cross-examination. *See People v. Wilson*, 36 Cal. 4th at 343, 346; *State v. Jones*, 791 So.2d at 626 – 27; *State v. Nyhammer*, 197 N.J. 383, 413 – 14, 963 A. 2d 316, 334 (2009). Thus, there was no confrontation violation in this case.

Even if a violation occurred, for all the reasons previously cited in this Division, any error would be harmless beyond a reasonable doubt. Furthermore, if the confrontation claim is only reached under the rubric of ineffective assistance of counsel, neither a breach of duty nor prejudice may be found for the simple fact that there is no reasonable probability of a different outcome if the testimony had not been admitted. *See Gering v. State,* 382 N.W. 2d 151, 153 – 54 (Iowa 1986).

Defendant's conviction should be affirmed.

III. The District Court Acted within its Discretion When it Ruled the Testimony of W.H. was Admissible under Iowa Rule of Evidence 5.403.

Preservation of Error

W.H.'s testimony at the 2019 trial reflected the witness had seen defendant's car sometime after 9 p.m. the day of the murder, near Jefferson School while the fire burned. 2019 Tr. p. 338, line 11 – p. 345, line 2; p. 586, lines 7 – 15. Defendant filed a pretrial motion in limine seeking to exclude W.H.'s testimony under Iowa Rule of Evidence 5.403, asserting the testimony was so unreliable that any probative value would be outweighed by unfair prejudice. First Motion in Limine;Conf.App.6-14. At the later hearing on that motion,

the defense raised the matter of W.H.'s former status as a confidential informant as relevant to the defense argument. Tr. of Mot. 2/20/ - 22/17 p. 124, line 16 – p.125, line 14.

Following a hearing on defendant's motion, the court ruled W.H. could testify. Ruling on Defendant's First Motion in Limine; Conf.App.46-51. The court's ruling reasonably appears to be a final ruling, and so the State agrees he has preserved his claim. *State v. Schaer*, 757 N.W. 2d 630, 634 (Iowa 2008). While Rule 5.403 does not expressly provide for exclusion because evidence is "unreliable," such a claim apparently may be raised under the Rule. *State v. Doolin*, 942 N.W. 2d 500, 510 n.4 (Iowa 2020).

Standard of Review

The appellate court reviews an evidentiary ruling for an abuse of discretion. *State v. Huston*, 825 N.W. 2d 531, 536 (Iowa 2013). An abuse of discretion only exists when the court "exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable." *State v. Wickes*, 910 N.W. 2d 554, 564 (Iowa 2018) (internal quotation marks and citation omitted).

Merits

Although relevant, evidence may be ruled inadmissible under Iowa Rule of Evidence 5.403 when it is substantially outweighed by the danger of unfair prejudice. In determining whether to exclude evidence, the district court must balance its probative value against the danger of its admission. *Huston*, 825 N.W. at 537. Only when the trial court abuses its discretion when applying the balancing test will the reviewing court reverse. *Id.* at 537.

W.H. testified at the 2019 trial in that in 1990 the witness lived in Davenport near Jefferson School. On September 17, 1990, W.H. was at a friend's house in the neighborhood. Sometime after 9 p.m. W.H. saw a fire near Jefferson School. The witness also observed a car parked at an intersection near the school; one taillight was brighter than the other. The evidence reflects that the car W.H. saw that night was defendant's Peugeot, as one taillight was brighter than the other. 2019 Tr. p. 332, line 6 – p. 345, line 2; p. 352, lines 13-23; p. 586, lines 7 – 15. State's Ex. 86B (video of defendant's car). W.H. had on an earlier occasion identified defendant's car, then brought into the courtroom, as the one observed that night because of the lights. 2019 Tr. p. 342, line 6 – p.344, line 2.

Defendant argues W. H.'s testimony is unreliable because the accounts W.H. had given varied over time. Police reports and testimony in one of defendant's postconviction cases indicated that an anonymous tip had been called into police early in the investigation, and the tipster reported having seen defendant in the area in the past. Determining the tipster might be W. H., a police officer interviewed W.H. on October 2, 1990. W. H. failed at that time to report having seen a fire on the night of the murder, as well as failed to report having seen a car in the area similar to defendant's vehicle. Exs. MS; EEE; FFF; Conf.App.31-34,515-17. Defendant's Brief at 69.

Defendant next notes that apparently not until W.H. later gave a deposition, did the witness report having seen a fire that night, as well as a car having square taillights. Ex.MS;Conf.App.31-34. Defendant's Brief at 69. Then, at the 1993 trial W.H. provided additional information that the left taillight of the car was brighter than the right one, but that W. H. believed that the difference was due to some bushes obscuring the view. Ex.MT;Conf.App.35-37. Finally, W. H.'s testimony at the 1995 trial indicated the view had not been obscured and that the taillights did differ in brightness. Ex.MU; Conf. App. 40-43.

Defendant then discusses information that came to light after the 1995 trial which showed that in the past W.H. had been a paid confidential informant for local police. Ex. MY; Conf. App.44-46. Defendant's Brief at 70. He appears to suggest there was a causal connection between W. H. being a confidential informant and changes in W.H.'s account of events over time, which became more helpful to the State over time. Defendant's Brief at 70-71.

The district court's conclusion that the objections the defense raised to this testimony should be left to the jury to resolve was correct. See Ruling on Defendant's First Motion in Limine; Conf.App.46-51.

Testimony was elicited during direct and cross-examination of W. H. at the 2019 trial regarding various inconsistencies in the accounts W.H. had given. W. H. was also questioned about having been a confidential informant. W.H. testified there had been no connection between that status and information and testimony W. H. had given in defendant's case, and was never paid for information or testimony in the case. Further, the defense elicited during cross-examination of a police officer evidence supporting the fact that there have been changes over time in W. H.'s account. 2019 Tr. p. 345, line

3 – p. 387, line 9; p. 1046, line 14 – p. 1050, line 19. Finally, the defense challenged this witness' credibility both in opening statement and in closing argument. 2019 Tr. p. 21, line 22 – p. 22, line 21; p. 1240, line 3 – p. 1243, line 12.

As a result, no abuse of discretion occurred when the court allowed the jury to hear the testimony. It is the role of the jury to sort out the evidence and decide what to believe and what to reject. *State v. Blair*, 347 N.W. 2d 416, 420 (Iowa 1984). The jury is free to accept some, but not all, of a witness' testimony, and it has the duty to resolve inconsistencies in a witness' testimony. *State v. Shanahan,* 712 N.W. 2d 121, 135 (Iowa 2006); *State v. Boutcher*, No. 17 – 1217, 2018 WL 3302010, at * 3 (Iowa Ct. App. July 5, 2018). The weight to be given certain evidence also is committed to the jury. *State v. Payne,* No. 16-1672, 2018 WL 1182624, at * 8-9 (Iowa Ct. App. Mar. 7, 2018). Defendant suggests there is a connection between the witness' status as a confidential informant and testimony for the State, despite the lack of evidence to support such a claim. Further, he suggests the jury likely failed to appreciate any deficiencies in the testimony because the trial was long and tedious and some jurors, at times, had trouble staying awake. Defendant's Brief at 71-72. 2019 Tr. p. 667,

line 1 – p.669, line 4; p. 775, line 6 – p. 776, line 3. These objections are merely speculative and insufficient to reverse. *See State v. Ritchison*, 223 N.W. 2d 207, 212-13 (Iowa 1974) (Court notes "a reviewing court cannot predicate error upon speculation").

But even if the witness should have been excluded, the error is harmless. Another witness provided evidence that defendant's car was seen in the area of the fire the night of the murder. Because the challenged evidence is cumulative, reversal is unwarranted. *State v. Wilson*, 878 N.W. 2d 203, 219 (Iowa 2016). This case should be affirmed.

IV. The District Court Acted within its Discretion When it Found the Testimony of Frank Reising was Admissible under Iowa Rule of Evidence 5.403.

Preservation of Error

Frank Reising testified that he had shared a jail cell with defendant in Scott County for several weeks in 1992. On one occasion, the two of them were watching a television newscast on television concerning the murder in this case. Although Reising could not recall the exact words, during the report defendant said something like the following: "I may have done it, but I'm not going to get caught for it." 2019 Tr. 430, lines 1 – 21.

Defendant filed a pretrial motion in limine to exclude Reising's testimony under Iowa Rule of Evidence 5.403. The defense asserted his testimony was so unreliable that any probative value would be outweighed by the unfair prejudice. First Motion in Limine;Conf. App.6-14. Tr. of Mot. 2/20 -22/17 p.128, lines 6-11.

The district court ruled Reising could testify, concluding the objections raised by the defense were matters committed to the jury for resolution. Ruling on Defendant's First Motion in Limine; Conf.App.46-51. The court's ruling denying the motion reasonably appears to be a final ruling, and so the State agrees defendant has preserved the Rule 5.403 claim he asserted in the district court. *State v. Schaer*, 757 N.W. 2d 630, 634 (Iowa 2008). While it is true Rule 5.403 does not expressly provide for exclusion on the ground evidence is "unreliable," such a claim apparently may be raised under the Rule. *State v. Doolin*, 942 N.W. 2d 500, 510 n.4 (Iowa 2020).

Defendant's brief also includes a general challenge to testimony from jailhouse informants. Relying on secondary sources which discuss social science studies, he asserts such testimony is unreliable and juries are ill-equipped to evaluate it. Defendant's Brief at 78 – 82. However, defendant failed to raise in the district court any general or

per se claim such evidence is unreliable; nor did he present in the district court any supporting social science. Thus, to the extent the reliability challenge rests on social science data regarding jailhouse informants, that aspect of the claim has been waived. *State v. Taylor*, 310 N.W. 2d 174, 178 (Iowa 1981).

Standard of Review

The appellate court reviews an evidentiary ruling for an abuse of discretion. *State v. Huston*, 825 N.W. 2d 531, 536 (Iowa 2013). An abuse of discretion only exists when the court "exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable." *State v. Wickes*, 910 N.W. 2d 554, 564 (Iowa 2018) (internal quotation marks and citation omitted).

Merits

Although relevant, evidence may be ruled inadmissible under Iowa Rule of Evidence 5.403 when it is substantially outweighed by the danger of unfair prejudice. In determining whether to exclude evidence, the district court must balance its probative value against the danger of its admission. *Huston*, 825 N.W. at 537. Only when the trial court abuses its discretion when applying the balancing test will the reviewing court reverse. *Id.* at 537.

Defendant claims Reising's prior testimony had been contradictory as to whether he expected, or received, any favorable treatment from the State after reporting defendant's statement. Defendant also notes that in Reising's prior testimony, Reising admitted he had lied to police in the past on a matter unrelated to this case. Defendant's Brief at 76-77. Defendant also asserts there is evidence of the witness' animus against him. Reising testified at a hearing in defendant's first postconviction action. As Reising left the witness stand, he stated: "You lucky, boy." Ex. MV;Ex.App.13-15. The defendant asserts this was a racial epithet since the defendant is an adult African – American male. Defendant's Brief at 78. Although not entirely clear, the evidence at trial indicates Reising is not an African – American male. 2019 Tr. p. 435, lines 18-21.Defendant also asserts the witness had animus due to the nature of the crime; in past testimony he had referred to defendant as a "sick" person. Defendant's Brief at 77.

Relying on the decision in *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456, 126 S.Ct. 1195, 1197, 163 L.Ed.2d 1053 (2006), the defendant urges that Reising's use of the word "boy" constituted a racial epithet. Defendant's Brief at 78. However, that case rejects the

view that use of that word alone, without additional evidence, is sufficient to show racial animus. Instead, the circumstances surrounding utterance of the word must be considered when determining if it constitutes a racial epithet. *Id.* at 458. Consequently, the statement alone is insufficient to establish any animus against defendant based on race. Furthermore, given the nature of the crime in this case, the State also disagrees that Reising's strong condemnation of it reflects a disqualifying animus. *See State v. Borboa*, 157 Wash. 108, 135 P.3d 469, 476 (2006) (prosecutor's description of the charges as "horrible" in his closing argument was permissible because in fact "the crime was horrible").

Regardless, matters defendant points to were put before the jury at the 2019 trial. Direct and cross-examination of Frank Reising elicited testimony regarding his dislike of defendant because of the nature of the crime, that he had in fact called defendant a "boy," that Reising had lied to police in the past about a matter unrelated to this case, and he was questioned about his testimony at earlier trials regarding whether he expected favorable treatment for his report of defendant's statement. 2019 Tr. p. 429, lines 10– 16; p. 430, lines 20 – 23; p. 433, lines 7 – 24; p. 435, line 18 – p. 436, line 2; p. 438, line

11 – p. 439, line 17; p. 444, line 1 – p. 446, line 3. Reising confirmed in his 2019 testimony that he never received any benefit from the State for reporting the statement. 2019 Tr. p. 431, line 20 – p. 432, line 9.

Further, in closing argument the defense urged the jury to ignore the Reising testimony as being unbelievable. 2019 Tr. p. 1248, line 10 – p. 1229, line 4.

Thus, no abuse of discretion occurred when the court allowed the Reising testimony. It is the role of the jury to sort out the evidence and decide what to believe and what to reject. *State v. Blair*, 347 N.W. 2d 416, 420 (Iowa 1984). The jury is free to accept some, but not all, of a witness' testimony, and it has the duty to resolve inconsistencies in a witness' testimony. *State v. Shanahan,* 712 N.W. 2d 121, 135 (Iowa 2006); *State v. Boutcher*, No. 17 – 1217, 2018 WL 3302010, at * 3 (Iowa Ct. App. July 5, 2018). The weight to be given certain evidence also is committed to the jury. *State v. Payne,* No. 16-1672, 2018 WL 1182624, at * 8-9 (Iowa Ct. App. Mar. 7, 2018).

Finally, if the Court finds the defendant has not waived his apparent claim that jailhouse informants are generally, or per se, unreliable, it should be rejected. First, this Court recently rejected reliance on social science data when considering eyewitness

identification. *See State v. Doolin*, 942 N.W. 2d 500, 507-08, 515- 16 (Iowa 2020) (in refusing to find counsel ineffective for not seeking exclusion of identification evidence, Court declines to reconsider its precedents in view of social science data); *State v. Booth-Harris*, 942 N.W. 2d 562, 567, 571-72 (Iowa 2020) (declining to rely on social science data when upholding trial court's refusal to suppress pretrial identification, and declining to find counsel ineffective for not requesting eyewitness identification instruction incorporating current social science concepts). Second, several courts have rejected outright, or found irrelevant, claims of general unreliability. *See Kansas v. Ventris*, 556 U.S. 586, 589, 598 n.*, 129 S.Ct. 1841, 1844, 173 L.Ed. 2d 801 (2009); *Randolph v. People of the State of Calif.*, 380 F. 3d 1133, 1147 – 48 (9th Cir. 2004); *People v. Jenkins*, 22 Cal.4th 900, 1008, 997 P. 2d 1044 (2000).

While this Court in *State v. Marshall*, 882 N.W. 2d 68, 82 (Iowa 2016), discusses some of the social science data defendant cites, it does not appear to have necessarily relied on it when deciding the informant issue before it, and the Court did not rule on the general reliability of such evidence. It must be emphasized that there is no evidence here that Reising was acting as an agent for the State at

the time the defendant admitted his guilt. The State should not be "deprived of evidence because the defendant, acting on his own, has exercised poor judgment." *Id.* at 83.

Even if error occurred it is harmless, as there was sufficient evidence of guilt without Reising's testimony. Defendant knew the victim and her family. He was seen privately talking with her on the street before returning to her home and requesting she go buy him a pack of gum at a nearby store. Right after the victim left, the defendant also left, without telling anyone at the Glenn home. Ex.516, p.499, line 14 – p.505, line 14; Ex. 517, p.297, line 11 – p.300, line 6; Conf.App.278-84,383-86. He was then seen lurking outside Mac's Liquor Store, where the victim had gone to purchase the gum. Later that evening his car was identified as being near the scene of the fire where the victim's body was burned.2019 Trial Tr. p. 342, line 6 – p. 344, line 2; p. 451, line 24 – p. 452, line 9. He subsequently arrived late at his girlfriend's apartment, and she indicated he was acting strangely. 2019 Tr. p. 751, line 16 – p. 752, line 6. Evidence supported the conclusion that he returned to his own residence during the early morning hours and took a lengthy shower, lasting 45 minutes. The next morning his girlfriend smelled gasoline in the Peugeot. 2019 Tr.

p. 734, line 22 – p. 738, line 24; p. 752, line 22 – p. 753, line 21; p. 904, line 8 – p. 913, line 24. Another witness smelled gasoline from his car that morning and saw a gas can in the back seat. Ex. 501A p. 1136, line 19 – p. 1143, line 12; Ex.App.32-39. When questioned by police, defendant initially lied about having talked to the victim in private before sending her for the gum. 2019 Tr. p. 892, line 24 – p. 898, line 22. Finally, remnants of a black garbage bag found attached to the victim's body had a composition which was consistent with commercial garbage bags available at the motel where the defendant lived. 2019 Tr. p. 713, line 5 – p. 721, line 1; p. 984, line 13 – p. 993, line 23. This was substantial evidence of guilt.

The conviction should be affirmed.

V. The District Court Acted within its Discretion When it Found the Testimony of Antonio Holmes was Admissible under Iowa Rule of Evidence 5.403.

Preservation of Error

Antonio Holmes identified defendant at the 2019 trial as the man he saw outside the convenience store where the victim was purchasing gum. 2019 Tr. p. 450, line 7 – p. 452, line 9. Defendant filed a pretrial motion in limine seeking to exclude this testimony under Iowa Rule of Evidence 5.403. The motion asserted the

identification evidence was unreliable and had little, if any, probative value, and that any probative value would be outweighed by the unfair prejudice. First Motion in Limine; Conf.App.6-14.

The court ruled Holmes could testify, finding the objections raised by the defense concerned matters committed to the jury for resolution. Ruling on Defendant's First Motion in Limine; Conf.App.46-51. The court's ruling reasonably appears to be a final ruling, and so the State agrees defendant has preserved the Rule 5.403 claim asserted in the district court. *State v. Schaer*, 757 N.W. 2d 630, 634 (Iowa 2008). While it is true Rule 5.403 does not expressly provide for exclusion because evidence is "unreliable," such a claim apparently may be raised under the Rule. *State v. Doolin*, 942 N.W. 2d 500, 510 n.4 (Iowa 2020).

However, defendant's motion did not contend that his reliability objections were supported by any social science data or studies. Nor was any such claim, or evidence, later presented in this case regarding social science findings. Thus, to the extent defendant's reliability challenge rests on social science data regarding eyewitness identification, that aspect of his claim has been waived. *State v. Taylor*, 310 N.W. 2d 174, 178 (Iowa 1981).

Standard of Review

The appellate court reviews an evidentiary ruling for an abuse of discretion. *State v. Huston*, 825 N.W. 2d 531, 536 (Iowa 2013). An abuse of discretion only exists when the court "exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable." *State v. Wickes*, 910 N.W. 2d 554, 564 (Iowa 2018) (internal quotation marks and citation omitted).

Merits

Although relevant, evidence may be ruled inadmissible under Iowa Rule of Evidence 5.403 when it is substantially outweighed by the danger of unfair prejudice. In determining whether to exclude evidence, the district court must balance its probative value against the danger of admission. *Huston*, 825 N.W. at 537. Only when the trial court abuses its discretion when applying the balancing test will the reviewing court reverse. *Id.* at 537.

Antonio Holmes testified in this trial that defendant was the man he saw outside a convenience store, waiting for the victim. Defendant urges this testimony was unreliable for a number of reasons. First, he notes evidence indicating that Holmes was intoxicated when he selected defendant's photograph from a photo

array, conducted after the crime. The next day he contacted police and reported he was not sure about the identification he had made, due to his drinking. He returned to the police station and again selected defendant's photograph, but with the proviso that he was not sure. Furthermore, defendant points to evidence that by the time of the photo array his photograph already had been displayed in the media, and Holmes may have seen it. Defendant also points out the claimed encounter outside Mac's Liquor was brief. He urges these matters undermined the reliability of Holmes' in-court identification of defendant. Defendant's Brief at 86-87, 90.

While defendant recognizes this witness positively identified him at a deposition before the first trial, he discounts that identification as suggestive under *State v. Folkerts*, 703 N.W. 2d 761 (Iowa 2005). Defendant's Brief at 87, 90.

Defendant also challenges the identification evidence because Holmes had a pending charge at the time he stated he saw the defendant, and at the time of his testimony at the 1993 trial Holmes had a plea agreement providing that he would testify. Defendant appears to argue Holmes' identification of him was induced by his desire to gain a benefit from the State. Defendant's Brief at 87-88, 91.

The district court rejected defendant's challenge under Rule 5.403, concluding the questions the defense had raised regarding the validity of the identification should be resolved by the jury. Ruling on Defendant's First Motion in Limine;Conf.App.46-51. The court was correct.

Testimony was elicited during direct and cross-examination of Holmes at the 2019 trial regarding various matters defendant asserts undermined the reliability of his identification of defendant. 2019 Tr. p. 455, line 24 – p. 457, line 8; p. 459, line 17 – p. 462, line 2; p. 465, lines 7 – 15; p. 471, lines 5 – 25; p. 481, line 3 – p. 483, line 5. Furthermore, during opening statement and closing argument defense counsel challenged the Holmes evidence as unreliable. 2019 Tr. p. 22, line 22 – p. 23, line 7; p. 1239, line 5 – p. 1240, line 2. Moreover, the jury was instructed regarding eyewitness testimony and the various matters to consider when evaluating that evidence. Jury Inst. No. 23;App.121.

Consequently, no abuse of discretion occurred when the court allowed the jury to hear Holmes' testimony. It is the role of the jury to sort out the evidence and decide what to believe and what to reject. *State v. Blair*, 347 N.W. 2d 416, 420 (Iowa 1984). That is no less true

when the jury must evaluate the reliability of eyewitness testimony. *State v. Doolin*, 942 N.W. 2d at 511 ("Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.") (Internal quotation marks and citation omitted).

Defendant's challenges go to weight, and not admissibility, of the evidence. For example, his objection that Holmes was intoxicated when he first identified the defendant's photograph, as well as his criticism regarding the brevity of the encounter outside the store, raise concerns to be resolved by the jury. *See State v. Booth-Harris*, 942 N.W. 2d 562, 576 (Iowa 2020) (fact that eyewitness was under the influence of drugs when making pretrial identification was a matter for the jury, and insufficient to exclude the evidence); *State v. Mark*, 286 N.W. 2d 396, 405 (Iowa 1979) (pretrial identification procedure was reliable even though earlier face – to – face confrontation between witness and the defendant lasted only a few seconds). Additionally, concerns related to the witness' level of certainty also go to weight, and not admissibility, of the evidence. *Id.* at 407 (contradictory evidence regarding witness' level of certainty concerns weight and not admissibility of evidence). Finally, the plea

agreement in this case only required Holmes to testify truthfully when requested by the State, and there is no basis to conclude that false or misleading testimony was sought by the plea agreement or resulted from it. Ex. MO (plea agreement);Ex.App.12. The same response -- that it only goes to weight and not admissibility -- applies to the rest of defendant's objections.

Lastly, defendant cites several secondary sources regarding social science studies, as well as legal decisions discussing such studies, on the subject of eyewitness identification. Defendant's Brief at 88-91. While the State previously argued consideration of such matters has been waived, even if not waived it makes no difference. The Iowa Supreme Court recently issued decisions generally indicating the inapplicability of such information to questions regarding eyewitness identification. Although apparently such information is not per se irrelevant, the Court has not found it germane to resolving issues before it. *See State v. Doolin*, 942 N.W. 2d at 507-08, 515- 16 (in refusing to find counsel ineffective for failing to seek exclusion of identification evidence, Court declines to reconsider its precedents in view of social science data); *State v. Booth-Harris*, 942 N.W. 2d at 567, 571-72 (declining to rely on social

science data when upholding trial court's refusal to suppress pretrial identification, and declining to find counsel ineffective for not requesting a modified eyewitness identification instruction incorporating current social science concepts).

Regardless, his objections based on the social science data – that memory does not improve with time, that a witness' stated certainty regarding an identification does not necessarily correlate with accuracy, and exposure to media publication of a suspect's photo can have an effect – appear to be matters within the ken of the jurors' common experience and knowledge. *Cf. State v. Shorter*, 893 N.W. 2d 65, 86 (Iowa 2017) (in finding counsel not ineffective for failing to request uniform instruction on eyewitness identification, Court notes much of the instruction "embraces common sense notions that would not likely have escaped a conscientious jury unaided by the ISBA instruction").

Affirm defendant's conviction.

VI. The District Court appropriately Excluded Evidence of a Hearsay Statement the Victim made to Another Little Girl before her Death.

Preservation of Error

Relying on Iowa Rule of Evidence 5.807, the residual hearsay exception, defendant sought to present evidence that once in the late 1980's the victim made a statement to another schoolgirl that "bad things happen to her" when she was alone with Joe Glenn. Notice Re: Residual Hearsay;App.92-93. Defendant's Brief at 93, 95. Following an offer of proof, the district court disallowed the evidence. 2018 Tr. p. 1273, line 24 – p. 1276, line 19.

The State agrees defendant has preserved his claim on appeal for admission of this evidence. *See State v. Mitchell*, 757 N.W. 2d 431, 435 (Iowa 2008).

Standard of Review

District court rulings on the admission of hearsay are reviewed for correction of legal error. *State v. Veverka*, 938 N.W. 2d 197, 202 (Iowa 2020). The district court has no discretion to deny admission of relevant hearsay evidence when the criteria for admission have been met. However, "[t]he residual exception to the hearsay rule should be used sparingly." Whether evidence is admissible under the residual

“depends on the unique facts and circumstances of each case." *Id.* at 204.

Merits

For admission of hearsay under the residual exception, the proponent must establish the following: (1) trustworthiness of the evidence; (2) the evidence is material; (3) there is necessity for it; (4) its admission would serve the interests of justice; and (5) the proponent gave proper pretrial notice of the intent to seek admission of the evidence. All requirements must be met for admission of such evidence. *Id.* at 200; Rule 5.807.

During the offer of proof, Yuriria Gonzales, who goes by the name Judy, testified that in the late 1980s she knew the victim, who was a friend of her sister. At the time of the offer of proof, Gonzales was 36 years old. According to Gonzales, during the summer between second and third grade the victim told her on one occasion that “bad things happen to her" when she is alone with Joe Glenn, who was then her mom’s boyfriend Apparently, the victim was seven years old at the time, while the witness was one year younger. That was the only time they discussed this matter. The witness never told anyone about the conversation until 2013, when she told her mental health

therapist, because she had "pinky promised" the victim to keep it secret. 2018 Tr. p. 1257, line 15 – p. 1263, line 7; p. 1265, lines 6 – 7; p. 1267, lines 10 – 18. The witness had been diagnosed with posttraumatic stress disorder, unspecified anxiety disorder and unspecified depressive disorder. 2018 Tr. p. 1268, lines 12 – 15.

Gonzales did not contact police, however, until 2017. She testified in the offer of proof she finally reported to police after she prayed one night for a sign from God. She believes she received that sign the next day when she went shopping with her mother and her mother saw the witness' third-grade teacher in the store. 2018 Tr. p. 1262, line 9 – p. 1263, line 7.

In ruling the evidence was inadmissible, the district court found it was untrustworthy, questioned its materiality, and found justice would not be served by its admission. 2018 Trial Tr. p. 1274, line 9 – p. 1276, line 16. The court was correct. Not only does it strain credulity that the witness could so specifically recall a statement many years after it was made, but her failure to earlier come forward with the information renders it utterly suspect. Her claim that for 30 years she kept a promise made to another child when they were seven or six years old, until she received a sign from God, is bereft of

credibility. Finally, the information is too vague to be material because it does not explain what Joe Glenn allegedly had done to the victim, let alone assert sexual abuse had occurred. The evidence was not admissible. *See Jones v. State*, No. 02-0854, 2003 WL 22438596, at * 3 (Iowa Ct. App. Oct. 29, 2003) (upholding postconviction court's finding newly discovered evidence to be "incredible").

But even if there is error, it is harmless. Evidence at trial reflected Joe Glenn was either at home or looking for the victim after she went missing. 2019 Tr. p. 96, line 9 – p.120, line 13; p. 126, lines 4-12. Ex. 511, p. 197, line 1 – p. 201, line 2; Ex. 515, p. 493, line 7 – p. 497, line 12;Conf.App.229-33,272-76. Affirm the conviction.

VII. The District Court Acted within its Discretion When it Denied the Defendant's Motion for a New Trial, and a Remand for Further Consideration of the Motion is Unneeded.

Preservation of Error

Iowa Rule of Criminal Procedure 2.24 (2)(b)(6) allows a district court to grant a new trial "[w]hen the verdict is contrary to law or evidence." *Id.* Following the jury's verdict finding defendant guilty, he filed a motion for new trial. That motion asserted the jury's verdict was contrary to the weight of the evidence. Motion for New Trial filed 5/15/19; App.126. The district court denied the motion following a

hearing held before imposing sentence, concluding the greater weight of the evidence supported the verdict. Sent. Tr. p. 27, lines 11-14. On appeal the defendant seeks a remand because he believes the court misunderstood the record, incorrectly reciting some of the testimony and misinterpreting the import of other testimony. Defendant's Brief at 106 – 107, 109 -110.

The State submits that a general claim that the court erred in denying a new trial has been preserved. *See State v. Wickes,* 910 N.W. 2d 554, 570 (Iowa 2018). However, it does not believe defendant has preserved a claim that a remand is required based on his claim the trial court's decision is erroneous because the judge misunderstood the evidence. Defendant failed to assert such a claim either at the time the court orally ruled on the motion for new trial, or at any later point. As a result, the claim a remand is needed has been waived. *See Meier v. Senecaut*, 641 N.W. 2d 532, 537 (Iowa 2002)("When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal.").

Standard of Review

The appellate court will "review rulings on motions for new trial asserting a verdict is contrary to the weight of the evidence for an abuse of discretion." *State v. Ary*, 877 N.W. 2d 686, 706 (Iowa 2016). An abuse of discretion only exists when the court "exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable." *State v. Wickes*, 910 N.W. 2d at 564 (internal quotation marks and citation omitted). A new trial should be granted" only in exceptional circumstances." *Ary*, 877 N.W. 2d at 705.

Merits

A verdict is not contrary to the weight of the evidence unless "'a greater amount of credible evidence supports one side of an issue or cause than the other'." *State v. Shanahan*, 712 N.W. 2d 121, 135 (Iowa 2006) (quoting *Ellis*, 578 N.W. 2d at 658). A new trial may be granted only "in the extraordinary case in which the evidence preponderates heavily against the verdict rendered." *State v.Ary*, 877 N.W. 2d 686, 700 (Iowa 2016).

Application of the relevant rules of review to the evidence in this case leaves no doubt that the district court acted within its

discretion when denying the new trial motion. The State presented substantial evidence of the defendant's guilt.

While it is true that the case against defendant is essentially circumstantial, and no physical evidence linked him to the murder, that evidence nevertheless is substantial. Defendant knew the victim and her family. He was seen privately talking with her on the street before returning to her home and requesting she go buy him a pack of gum at a nearby store. Right after the victim left defendant also left, without telling anyone at the Glenn home. Ex. 516, p. 499, line 14 – p. 505, line 14; Ex. 517, p. 297, line 11 – p. 300, line 6;Conf.App.278-84,383-86. He was then seen lurking outside Mac's Liquor Store, where the victim had gone to purchase the gum. Later that evening his car was identified as being near the scene of the fire where the victim's body was burned. 2019 Tr. 342, line 6 – p. 344, line 2; p. 451, line 24 – p. 452, line 9. He subsequently arrived late at his girlfriend's apartment, and she indicated he was acting strangely.2019 Tr. p. 751, line 16 – p. 752, line 6. Evidence supported the conclusion that he returned to his own residence during the early morning hours and took a lengthy shower, lasting 45 minutes. The next morning his girlfriend smelled gasoline in the Peugeot. 2019 Tr. p. 734, line 22 –

p. 738, line 24; p. 752, line 22 – p. 753, line 21; p. 904, line 8 – p. 909, line 2; p. 913, lines 17-24.When questioned by police, defendant initially lied about having spoken with the victim before sending her for gum. Evidence was also introduced the defendant admitted his guilt to a jail cellmate. 2019 Tr. p. 430, lines 1-21; p. 892, line 24 – p. 898, line 22. Finally, remnants of a black garbage bag found attached to the victim's body had a composition which was consistent with commercial garbage bags available at the motel where the defendant lived. 2019 Tr. p. 713, line 5 – p. 721, line 1; p. 984, line 13 – p. 993, line 23.This was substantial evidence of guilt.

In denying a new trial, the district court comprehensively reviewed the evidence at trial, touching on the evidence just discussed in this brief. Sent. Tr. p. 19, line 3 – p. 27, line 24. Based on its comprehensive consideration of the evidence at trial, the district court correctly concluded that "based on the greater weight of the credible evidence, the Court does find that the motion for new trial on that basis is denied." Sent. Tr. p. 27, lines 11 – 15.

However, defendant urges a remand is necessary out of a belief that the court misapprehended some of the evidence. In doing so, he asserts the judge found prosecution witness W.H. was not a credible

witness. Defendant's Brief at 104-110. These claims do not withstand analysis.

First, the claim the court found W.H. to lack credibility is based on the following observation the court made when discussing the evidence: "Now, [W.H.] was *a little bit* all over the map. I'm not sure how important [W.H.s] testimony was or was not because there was, clearly, other people who saw this car in the area at the time that [the victim's] body was burning." (Emphasis supplied). Sent. Tr. p. 26, lines 15 – 18. The State believes these comments fall short of a finding that this witness was not credible, as a general matter. Direct and cross-examination of W.H. at the 2019 trial do reflect inconsistencies regarding W.H.'s testimony, such as where W.H. was when first seeing the fire, whether or not W.H. had called police and given an anonymous tip, as well as several protestations of memory lapse. 2019 Tr. p. 345, line 3 – p. 346, line 20; p. 349, lines 8 – 24; p. 255, line 7 – p. 361, line 24. Such matters do not support a general finding of a lack of credibility, or a reason to grant a new trial. Instead, they were matters to be left to the jury. *See State v. Shanahan*, 712 N.W. 2d 121, 135 (Iowa 2006) (jury is free to accept some, but not all, of a witness' testimony); *State v. Payne*, No. 16-1672, 2018 WL 1182624,

at * 8-9 (Iowa Ct. App. Mar. 7, 2018) (weight to be given certain evidence was for the jury to decide); *State v. Boutcher*, No. 17 – 1217, 2018 WL 3302010, at * 3 (Iowa Ct. App. July 5, 2018) (inconsistencies of witness testimony are to be resolved by the jury). While the court incorrectly stated "other people" had seen the defendant's car in the area besides W.H., where only one witness did so, such has no singular significance.

Nor does the State agree that the district court misapprehended any of the evidence. Defendant cites a passage in the court's oral ruling, asserting it reflects an erroneous attribution of certain testimony to Lloyd Eston, when in fact it was given by W.H. These matters concerned testimony that defendant was familiar with the area around the Davenport school and that his car had distinctive taillights, testimony which was actually given by W.H. Defendant's Brief at 106-107. After mentioning these facts, *without attributing the evidence to W.H.,* the court then immediately goes on to discuss Lloyd Eston's testimony about what he saw that night. Sent. Tr. p. 22, line 17 – p. 23, line 7. This juxtaposition alone is insufficient to conclude the court misunderstood. Again, sorting out the evidence at

trial and determining what credibility to give it was for the jury. *See State v. Shanahan*, 712 N.W. 2d at 135.

Defendant also asserts the court erred when it found Antonio Holmes to be credible and truthful when he testified he saw the defendant outside the store where the victim had gone to purchase gum. See Sent. Tr. p. 21, lines 21 – 25. Defendant urges the court's conclusion that Holmes was truthful misses the salient point, as the proper inquiry is whether the identification was accurate, and not the witness' belief in it, as identification witnesses usually believe they are truthful. Defendant's brief at 109-10. This argument borders on being a mere question of semantics. Besides, evaluation of the Holmes identification testimony, and whether there was anything "off" about it, was for the jury to assess. *See State v. Shorter*, 893 N.W. 2d 65, 74 (Iowa 2017) (despite introduction of impeaching evidence, "the strength of the identity evidence of these witnesses is a question for the jury").

A remand is unneeded.

VIII. The District Court did not Err when it Refused to Dismiss this Case.

Preservation of Error

Defendant urges this prosecution should have been dismissed by the district court. Although the Iowa Court of Appeals in 2013 granted defendant's request and ordered a new trial for violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963), he now asserts the case should be dismissed. Because of the passage of time, he argues, he lost the ability to obtain a fair trial -- critical witnesses have died or, in the case of one, are no longer in a physical and mental state for effective cross-examination. He has preserved his claim under the due process clauses of the federal and state constitutions, including his request for a different state constitutional rule if need be. Motion to Dismiss for Violation of Due Process; Defendant's Second Renewed Motion to Dismiss; Ruling on Defendant's Motion to Dismiss; Ruling on Defendant's Renewed Motion to Dismiss; App.57-68,76-78,88-90;Conf.App.61-62. Tr. of Mot. 2/20 – 22/17 p. 285, line 3 – p. 286, line 17. *See State v. Mitchell*, 757 N.W. 2d 431, 435 (Iowa 2008).

Standard of Review

Denial of a motion to dismiss is generally reviewed for correction of errors at law. *State v. Neiderbach*, 837 N.W. 2d 180, 190 (Iowa 2013). However, de novo review applies to constitutional claims. *State v. Gallup* 500 N.W. 2d 437, 441 (Iowa 1993).

Merits

Granting a new trial for a *Brady* violation is the standard remedy because the suppressed evidence may be presented to a new jury. *See California v. Trombetta*, 467 U.S. 479, 486 – 87, 104 S.Ct. 2528, 2533, 81 L.Ed. 2d 413 (1984) ("In nondisclosure cases, a Court can grant the defendant a new trial at which the previously suppressed evidence may be introduced."). Consistent with this principle, Iowa case law rejects dismissal as a remedy for suppression of exculpatory evidence. *State v. Hillsman*, 281 N.W. 2d 114, 117 (Iowa 1989). Given this, defendant asks this Court to apply the test used in due process claims based on pre-accusatorial delay. Defendant's Brief at 114. The State believes this analysis is in apposite and this Court should reject it out of hand. Alternatively, that test does not help defendant for he fails to meet it.

To prevail on a due process claim of pre-accusatorial delay, the defendant must prove: (1) the delay was unreasonable; and (2) the defendant suffered actual prejudice. *State v. Brown*, 656 N.W. 2d 355, 363 (Iowa 2003). As noted, the first prong refers to delay being "unreasonable". However, the case law indicates that unreasonableness is present when the State *intentionally* delays a case in order to obtain a tactical advantage over the defendant. *Id.; State v. Edwards*, 571 N.W. 2d 497, 501 (Iowa Ct. App. 1997). As stated in *State v. Isaac*, 537 N.W. 2d 786, 788 (Iowa 1995): "The due process protection in prosecutorial delay cases is available to defendants to make sure the State will not employ tricks to gain an advantage over a defendant." As for the second prong, defendant must prove *actual* prejudice. General assertions of loss of witness memory, or unavailability of evidence due to death, are insufficient for prejudice. "To establish actual prejudice, the defendant must show loss of evidence or testimony has *meaningfully impaired* [the defendant's] ability to present a defense."(Emphasis supplied). *State v. Edwards*, 517 N.W. 2d at 501.

Regarding the unreasonableness of the delay, defendant asserts it has been met because the State violated *Brady*. Defendant's Brief

at 114. But, a *Brady* violation may exist when evidence is not disclosed, despite the lack of any bad faith to withhold evidence. *Brady*, 373 U.S. at 87, 83 S.Ct. at 1197. No court in the history of this case has ever concluded that the prosecution was guilty of bad faith in that regard. Further, when assessing a claim of pre-accusatorial delay, the reviewing court will not presume impropriety or bad faith. *State v. Isaac*, 573 N.W. 2d at 788. Thus, the first part of the test is unmet.

Nor has defendant established actual prejudice. His ability to confront the deceased Donna Atkins with information that three others did not see, or recall seeing, defendant's car when she saw it and smelled gasoline does not establish prejudice. This information had very little value, if any, as evidence contradicting her. See Division II at 48 - 50.

Nor was the defense meaningfully impaired because it could not present evidence from the deceased Teresa Held. He urges she could have testified she heard the victim's stepfather, Joe Glenn, state he wished to videotape himself performing sex acts on the victim. And, because Glenn also was unavailable for the 2019 trial, the defense could not ask him about this information. Defendant's Brief at 115. However, the State filed a resistance to the motion to dismiss which

asserted Held was not a credible witness. She was a cocaine user. Further, when she was questioned by police she first denied having heard Glenn make a sexual reference to the victim, but later changed that position during the police interview. However, another person who was present when she claims Glenn made the statement told police he never heard such a statement. State's Resistance to Defendant's Renewed Motion to Dismiss, with attachments A and B; Conf.App.74-84..

Apparently, defendant sees this information as providing Joe Glenn a motive for murder. However, given the credibility issues regarding Held's statement, as well as evidence Glenn was either at home or searching for the victim during the night she was taken, actual prejudice is not present. 2019 Tr. p.96, line 9 – p.120, line 13; p. 126, lines 4 - 12. Ex. 511, p. 197, line 1 – p. 201, line 2; Ex. 515, p. 493, line 7 – p. 497, line 12; Conf.App.229-32,272-76. *See State v. Hall*, 395 N.W. 2d 640, 643 (Iowa 1986) (no relief unless the missing witness "would have provided material evidence for the defense").

Defendant complains he lost the ability to effectively cross-examine W.H. due to the passage of time. He points to W.H.'s testimony at the 2019 trial, noting a number of instances when the

witness denied certain matters, and failed to recall other ones. Further, because of vision problems, at one point the defense was unable to refresh W.H.'s recollection because the witness was unable to read the prior testimony. Defendant's Brief at 116-17.

However, review of the cross-examination of this witness, as a whole, fails to reflect a level of memory or vision problems sufficient to materially impair the defense. 2019 Tr. p. 349, line 8 – p. 387, line 9. Ironically, it could be argued W.H.'s lapses in memory and denials of certain matters, which were then impeached, tended to undermine the strength of the witness' evidence against the defendant. Finally, because the witness was not the only person to place the defendant's car near the fire, the defense was not materially impaired.

Defendant also complains he was prejudiced because the prior testimony of many deceased witnesses was read into the record, thus eliminating the ability of the jurors to assess their demeanor and credibility, and instead they likely considered "the demeanor and attitude of the person reading the transcript for the record" when assessing the evidence. Defendant's Brief at 117 – 18. Speculation about prejudice is insufficient for relief. *See State v. Edwards*, 571

N.W. 2d at 507 (general assertions of loss of evidence are insufficient to show actual prejudice).

Finally, the defendant requests a favorable ruling under the Iowa Constitution if the Court should find the federal due process clause does not support his claim. Defendant's Brief at 119 – 21. However, the view taken by Iowa courts of due process claims involving pre-accusatorial delay parallels the federal case law. *State v. Trompeter*, 555 N.W. 2d 468, 470 (Iowa 1996). In view of what has already been argued, there is no persuasive basis for finding relief under the Iowa Constitution.

This case should be affirmed.

CONCLUSION

Defendant's murder conviction should be affirmed

REQUEST FOR ORAL SUBMISSION

The State requests to be heard in oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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