IN THE SUPREME COURT OF IOWA
Supreme Court No. 20—0156

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SHANE MICHAEL DAVIS,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR FLOYD COUNTY
THE HONORABLE CHRISTOPHER FOY (PLEA) AND HON.
DEDRA SCHROEDER (SENTENCING), JUDGES

APPELLEE'S AMENDED BRIEF

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ROUTING STATEMENT

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

This is a direct appeal following an *Alford* plea[1] to one count of lascivious acts with a child, a class D felony, in violation of Iowa Code section 709.8(1)(e), and one count of indecent contact with a child, an aggravated misdemeanor, in violation of Iowa Code sections 709.12(1)(a) and 903B.2 (2019).

Course of Proceedings

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

Facts & Course of Proceedings

In November 2019, in Floyd County case number FECR027926, the State filed a trial information in which it charged defendant Shane Michael Davis with one count of lascivious acts with a child, a class C

[1] *See North Carolina v. Alford*, 400 U.S. 25 (1970) (holding a defendant may enter a voluntary guilty plea notwithstanding an inability or unwillingness to admit guilt).

felony, in violation of Iowa Code sections 709.1, 709.8(1)(a), 709.8(2)(a) and 903B.1; and one count of indecent contact with a child, an aggravated misdemeanor, in violation of Iowa Code sections 709.12(1)(a) and 903B.2. *See* 11/04/2019 Trial Info; Conf. App.7–9. In count one of the charges, the State alleged that in the summer of 2019, Davis fondled or touched the pubes or genitals of a ten-year-old child "for the purpose of arousing or satisfying the sexual desires of either of them." *Id.* While count two charged that, in the same summer of 2019, Davis touched the "clothing covering the immediate area of the inner thigh, groin, buttock, anus, or breast" of an eleven-year-old child, "for the purpose of arousing or satisfying the sexual desires of either of them." *Id.*

The minutes of testimony, that were filed with the trial information, provided a more detailed account of Davis's crime. *See* 11/04/2019 Minutes; Conf. App.10–17. According to the minutes, the first victim, K.T, an eleven-year-old girl, reported that she was in the living room of Davis's house, when Davis "cupped and squeezed" her breasts. *See* Minutes at p.4; Conf. App.10–17. The second victim, B.T, stated that she was ten years old and that she was sitting on a couch at Davis's house, when Davis "rubbed her privates with his

hand." She added that Davis told her not to tell anyone "or he would beat and spank her." *Id.*

On November 25, 2019, following plea negotiations, Davis withdrew his not guilty plea to the charged offense in count I, and instead entered an *Alford* plea to the lesser included charge of lascivious acts with a child, a class D felony, in violation of Iowa Code section 709.8(1)(e). He also entered an *Alford* plea to the charged offense of indecent contact with a child, in count II. *See* Plea Tr. p. 2, lines 13–p. 3, lines 21; p. 16, lines 7–p. 22, lines 13; *see also* 11/29/2019 Alford Guilty Plea; Conf. App.49–52. In exchange for his pleas, the State agreed to follow the sentencing recommendations of the presentence investigation report (PSI) on both counts. Plea Tr. p. 3, lines 3–9. Following his guilty plea, Davis was advised that the only way to challenge his plea was by filing a written motion in arrest of judgment. Plea Tr. p. 21, lines 16–p.22, lines 12. Sentencing was set for January 21, 2020, *see* Plea Tr. p. 25, lines 3–5; and a PSI was ordered. *See* Order PSI; Conf. App.53–55.

On January 21, 2020, Davis appeared for sentencing. Before imposing the sentence, the district court asked Davis's counsel whether he had reviewed the PSI report with Davis; Davis's counsel

replied in the affirmative. Sent Tr. p. 2, lines 12–15. The district court then asked Davis's counsel if there were "any changes, objections, or corrections" to be made in the PSI report; and whether the court could rely on the PSI for sentencing. *Id.* at lines 17–20. Davis denied having any omissions or corrections and stated that the court could rely on the PSI for the purposes of sentencing. *Id.* at lines 20–22.

The district court then asked whether the State would be providing victim impact statements. *Id.* at lines 23.

> **The State:** Yes, Your Honor. I do have a total of four statements that I will be reading, each of them. One is for each of the children and then for their parents."
>
> **The Court:** Any objection, [defense counsel]
>
> **Defense Counsel:** I have no objection. They are already attached to the presentence report, I believe.
>
> **The Court:** Go ahead.

Sent. Tr. p. 2, lines 24–p. 3, lines 6.

After listening to the victim impact statements, the court asked for the State's sentencing recommendation. The State stated:

> Your Honor, in this case the plea agreement was that the State would follow the recommendation made by the presentence investigation, so the State would join in those recommendations being made.

Sent. Tr. p. 14, lines 6–11. Of note, the PSI had recommended a suspended consecutive prison sentence, with probation and placement in a residential treatment facility for 180 days or until maximum benefits. *See* PSI p. 11; Conf. App.61–88.

Davis requested a suspended sentence on both counts to "run concurrent to each other" with supervised probation, and without placement in the residential treatment facility. Sent. Tr. p. 15, lines 1–p. 18, lines 5.

The district court rejected Davis's recommendation; instead, it imposed a term of incarceration not to exceed five years in count I, and a term of incarceration not to exceed two years in count II. *Id.* p. 18, lines 23–p. 19, lines 24. The sentences were ordered to be served consecutively. *Id.* p. 19, lines 21–22. In explaining its reasons for imposing a prison sentence, the district court mentioned Davis's age, his employment, family circumstances, his criminal history, nature of the offense, his attitude, as well as the PSI. Sent. Tr. p. 18, lines 15–22.

Davis now appeals. *See* Notice of Appeal; Conf. App.94. In this direct appeal, Davis claims: (1) the district court considered impermissible sentencing factors in imposing a prison sentence, (2)

the State breached the plea agreement at sentencing by reading the victim impact statement, (3) trial counsel was ineffective by pressuring him to accept a plea offer and by not asking the trial court to be bound by the plea agreement. For the reasons given below, all of Davis's claims should fail.

ARGUMENT

I. Davis did not preserve error on his argument that the district court considered the contents of the PSI. Nevertheless, there was no error at Davis's sentencing hearing.

Preservation of Error

Error was not preserved as to Davis's first argument alleging that the district court improperly considered some statements made in the victim impact statements that were attached to the PSI. *See* Appellant's Br. at 18–27.

Davis did not object to the district court's consideration of the contents of the PSI, including the attached victim impact statements, at the sentencing hearing, and therefore he failed to preserve error. *See State v. Headley*, 926 N.W.2d 545, 551–52 (Iowa 2019). In *Headley*, the Iowa Supreme Court stated that defendants who fail to object to information contained in the PSI at sentencing, waive their rights on appeal to challenge the district court's reliance on the PSI.

Id.; *State v. Gordon*, 921 N.W.2d 19, 23 (Iowa 2018). "A court has the right to rely on the information on the PSI if the defendant fails to object to the information contained in the PSI." *Gordon* N.W.2d at 24. Here, Davis did not offer any objection; when asked whether the court could rely on the PSI for sentencing purposes, Davis replied in the affirmative. Sent. Tr. p. 2, lines 12–22. Likewise, Davis did not object to the prosecution reading the victim impact statements even though he understood that the victim impact statements were attached to the PSI. *Id.* at p. 3, lines 2–6. Disclaiming an issue below precludes review of it on appeal. *State v. Washington*, 257 N.W.2d 890, 893 (Iowa 1977) (stating that a party to a criminal proceeding may not complain of error where he himself has acquiesced in, committed, or invited the error). Because error was not preserved, this Court should summarily dismiss this claim.

Standard of Review

In the event this Court finds that Davis's sentencing challenge was preserved, review is for correction of legal error. *See* Iowa R. App. P. 6.907; *State v. Valin*, 724 N.W.2d 440, 444 (Iowa 2006). "[T]he decision of the district court to impose a particular sentence within the statutory limits is cloaked with a strong presumption in its

favor, and will only be overturned for an abuse of discretion or the consideration of inappropriate matters." *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). A reviewing court does not infer that the district court relied on improper sentencing considerations unless it is clear from the record. *Formaro*, 638 N.W.2d at 725–26.

Merits

When sentencing a defendant for a criminal offense, a district court is directed to receive and examine:

> All pertinent information, including the presentence investigation report and victim impact statements, if any, the court shall consider the following sentencing options. The court shall determine which of them is authorized by law for the offense, and of the authorized sentences, which of them or which combination of them, in the discretion of the court, will provide the maximum opportunity for the rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others.

Iowa Code § 901.5. While considering this information, a district court may not consider an unproven or unprosecuted offense when sentencing a defendant unless (1) the facts before the court show the defendant committed the offense, or (2) the defendant admits it. *State v. Jose*, 636 N.W.2d 38, 41 (Iowa 2001). A remand for resentencing is appropriate if the record contains "clear evidence"

that the sentencing court relied on unproven or unprosecuted offenses. *State v. Sailer*, 587 N.W.2d 756, 762–64 (Iowa 1998). Even if a victim impact statement discloses unproven offenses, "there must be an affirmative showing the court relied on . . . improper evidence." *Id.* at 762 (quoting *State v. Dake*, 545 N.W.2d 895, 897 (Iowa Ct. App. 1996)). Iowa appellate court's will look at the district court's reasons for imposing the sentence to determine whether any of the reasons given pertain to the impermissible statements. *See id.* at 763 (citing *State v. Phillips*, 561 N.W.2d 355, 359 (Iowa 1997). Here, the record does not establish that the court considered unproven and unprosecuted offenses when it sentenced Davis.

Davis contends the district court improperly considered unproven allegations disclosed in the victim impact statements that were attached to the PSI. *See* Appellant's Br. at 22. In particular, he claims that the court considered statements that he "made physical threats against alleged victim's parents as set forth in the victim impact statements the county attorney read to the Court during sentencing proceedings." *Id.*; *see* Sent. Tr. p. 5, lines 11–15; p. 10, lines 4–14. He argues that because the district court stated it considered the PSI in reaching its sentence, and because the victim

impact statements were attached to the PSI, the court must have relied on the uncharged allegations contained in the victim impact statements. *See* Appellant's Br. at 26. The State disagrees; contrary to Davis's assertions, the district court's statement of reasons for imposing the prison sentence does not establish that the court relied on such statements.

After listening to recommendations from both the State and the defense, the court chose a sentence of incarceration, and provided its reasons:

> **The Court:** The laws of Iowa require that a sentence be imposed that provides for rehabilitation, protects the community, and deters others from committing this type of offense, and deters your future actions, unlawful actions.
>
> The Court looks at several different factors in determining what an appropriate sentence is. I look at your age. I look at your employment circumstances, your family circumstances, your record, the nature of the offense, your attitude, which included some eye rolling, some huffing, and guess I wouldn't call it appropriate courtroom behavior, but—It also includes everything I've learned through the presentence investigation report.

Sent Tr. p. 18, lines 10–22. Here, the district court's comments indicate that the court took all the proper statutory factors into consideration. To the extent the victim impact statement alluded to

any uncharged criminal activity, this Court should find that the district court did not rely on any such statements because it did not mention that it considered any uncharged conduct. *State v. Sailer*, 587 N.W.2d 756, 762 (Iowa 1998) (to overcome the presumption the district court properly exercised its discretion, there must be an affirmative showing the court relied on . . . improper evidence). Moreover, this Court trusts that as part of the sentencing determination, district courts will "filter out improper or irrelevant evidence" that may be included in the victim impacts statements. *Id.* at 764; *see also LaPointe v. State,* 2017 WL 3067372, at *3 (Iowa Ct. App. July 19, 2017). A look at the district court's statements suggests that it performed that filtering process: there was no mention by the court of the victim impact statements or any uncharged conduct that was reflected in the victim impact statements. Because Davis has failed to make an affirmative showing that the sentencing court relied on any unproven allegations, his claim must fail on the merits and this Court should affirm.

II. Error was not preserved as to Davis's claim that the prosecutor breached the plea agreement; moreover, Davis does not raise this claim as an ineffective assistance of counsel claim. Had Davis properly raised this claim as an ineffective assistance of counsel claim, it still would have failed for lack of subject matter jurisdiction.

Preservation of Error, Waiver, and Motion to Dismiss for lack of jurisdiction.

Error was also not preserved as to Davis's second claim alleging a breach of the plea agreement. He says the State breached the plea agreement by reading the victim impact statements to the sentencing court. *See* Appellant's Brief at 27–32. But Davis did not object at the sentencing hearing to the State's reading of the victim impact statements; to the contrary, Davis invited the error to which he now complains—he consented to the State reading the four victim impact statements. *See* Sent Tr. p. 2, lines 24–p. 3, lines 6. He cannot now complain of the error which he invited or assented to. *See State v. Washington*, 257 N.W.2d 890, 893 (Iowa 1977) (stating party to a criminal proceeding may not complain of error where he himself has acquiesced in, committed, or invited the error). Error was not preserved, and this Court should decline the invitation to address this unpreserved claim. "Issues not raised before the district court, including constitutional issues, cannot be raised for the first time on

appeal." *State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008); *accord Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002) (ruling on merits required to preserve error).

Understandably, Davis does not raise this claim under the rubric of ineffective assistance of counsel—this Court could not resolve such a claim. *See generally* Iowa Code § 814.7 (2020). Thus, lacking preserved error or an alternative means to reach the issue, there is nothing for this Court to review and the State will not address this claim any further. This Court should summarily affirm.

III. Davis's ineffective assistance of counsel claims cannot be decided on direct appeal; Statutory amendments to Iowa Code section 814.7 deprives this Court of subject matter jurisdiction.

Motion to Dismiss for lack of subject matter jurisdiction.

Davis's last contention in sections II and III of his proof brief is that his trial counsel was ineffective for (1) inducing him to plead guilty, thus his plea was made involuntarily; (2) failing to bind the district court to the plea agreement under Iowa Rule of Criminal Procedure 2.10. *See* Appellant's Br. at 33–50. This Court cannot reach the merits of these claims that Davis raises under the rubric of ineffective assistance of counsel because it lacks jurisdiction.

Before July 1, 2019, criminal defendants could raise ineffective assistance of counsel claims on direct appeal if they had "reasonable grounds to believe the record is adequate to address the claim on direct appeal." Iowa Code § 814.7(2) (2018); *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). But after July 1, 2019, the Iowa legislature prohibited an appellate court from deciding claims of ineffective assistance of counsel on direct appeal. Iowa Code § 814.7 (effective July 1, 2019). Judgment against Davis was entered in January 2020, after the effective date of the amendment to section 814.7—meaning the new version of the statute applies. *See State v. Ross*, 941 N.W.2d 341, 345 (Iowa 2020) (holding we have jurisdiction to hear ineffective-assistance-of-counsel claims on direct appeal only "if the appeal was already pending on July 1, 2019"). Davis is therefore barred by section 814.7 from bringing a claim alleging ineffective assistance on direct appeal because his judgment was entered after July 1, 2019. He remains able to pursue his application for ineffective assistance of counsel in an application for postconviction relief under chapter 822, but this appeal must be dismissed.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed. In the alternative, Davis's conviction and sentence should be affirmed.

REQUEST FOR NONORAL SUBMISSION

Nonoral submission is appropriate for this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **2,944** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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