NO. 21-1676

IN THE SUPREME COURT FOR THE STATE OF IOWA

STATE OF IOWA,
Appellee,

vs.

NELSON FLORES,
Appellant.

AN APPEAL FROM THE IOWA DISTRICT COURT
FOR CRAWFORD COUNTY

HONORABLE ZACHARY HINDMAN, JUDGE

FINAL BRIEF OF APPELLANT

NELSON FLORES
Appellant,

CHRISTOPHER J. ROTH, #AT0010491
ROTH WEINSTEIN, LLC
1213 Jones St.
Omaha, NE 68102
P: (712) 310-7859
F: (402) 615-6223
Roth@RothWeinstein.com

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

IOWA CASELAW

FEDERAL CASELAW

OTHER STATE CASELAW

CONSTITUTIONAL PROVISIONS

STATUTES

IOWA COURT RULES

STATEMENT OF THE ISSUES

I. Did the District Court err when it found good cause for the State's motion to continue trial beyond Mr. Flores' speedy trial deadline?

Barker v. Wingo, 407 U.S. 514 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)

Ennenga v. State, 812 N.W.2d 696 (Iowa 2012)

Fong Yue Ting, 149 U.S. 698 (1893)

People v. Betka, 992 N.Y.S.2d 634 (N.Y. Crim. Ct. 2014)

State v. Bond, 340 N.W.2d 276 (Iowa 1983)

State v. Campbell, 714 N.W.2d 622 (Iowa 2006)

State v. Chavez–Romero, 285 P.3d 195 (Wash. App. 2012)

State v. Jentz, 853 N.W.2d 257 (Iowa App. 2013)

State v. McNeal, 897 N.W.2d 697 (Iowa 2017)

State v. Miller, 637 N.W.2d 201 (Iowa 2001)

State v. Montes-Mata, 292 Kan. 367, 253 P.3d 354 (Kan. 2011)

State v. Taylor, 881 N.W.2d 72 (Iowa 2016)

II. Did the District Court err when it admitted the 2016 Project Harmony video under Iowa Rule of Evidence 5.106?

State v. Austin, 585 N.W.2d 241 (Iowa 1998)

State v. Davis, 858 N.W.2d 36 (Iowa App. 2014)

State v. Huser, 894 N.W.2d 472 (Iowa 2017)

State v. Veverka, 938 N.W.2d 197 (Iowa 2020)

State v. Zieman, 829 N.W.2d 589 (Iowa App. 2013)

United States v. Baron, 602 F.2d 1248 (7th Cir. 1979)

United States v. Castro-Cabrera, 534 F.Supp.2d 1156 (C.D. Cal. 2008)

IA R. Ev. 5.106

III. Did the District Court err when it admitted statements as co-conspirator admissions when it had previously ruled the same statements inadmissible?

State v. Dullard, 668 N.W.2d 585 (Iowa 2003)

State v. Elliott, 806 N.W.2d 660 (Iowa 2011)

State v. Gilmore, 132 N.W. 53 (Iowa 1911)

State v. Huser, 894 N.W.2d 472 (Iowa 2017)

State v. Kidd, 239 N.W.2d 860 (Iowa 1976)

State v. Puffinbarger, 540 N.W.2d 452 (Iowa App. 1995)

IA. R. Ev. 5.801(d)(2)(E)

IV. Was there sufficient evidence to convict Mr. Flores when the State's entire case rested on the credibility of one witness?

State v. Brubaker, 805 N.W.2d 164 (Iowa 2011)

State v. Ramirez, 895 N.W.2d 884 (Iowa 2017)

State v. Robinson, 288 N.W.2d 337 (Iowa 1980)

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

State v. Wickes, 910 N.W.2d 554 (Iowa 2018)

IA R. Cr. P. 2.19(8)(a)

V. Did the District Court err when it overruled Mr. Flores' motion for new trial based upon the evidence not supporting the jury's verdict?

State v. Adney, 639 N.W.2d 246 (Iowa App. 2001)

State v. Ellis, 578 N.W.2d 655 (Iowa 1998)

State v. Heard, 934 N.W.2d 433 (Iowa 2019)

State v. Reeves, 670 N.W.2d 199 (Iowa 2003)

VI. Was Mr. Flores' Trial Counsel ineffective when he failed to object to witness vouching by the State's expert forensic interviewer?

State v. Barnhardt, 919 N.W.2d 637 (Iowa App. 2018)

State v. Canal, 773 N.W.2d 528 (Iowa 2009)

State v. Clark, 814 N.W.2d 551 (Iowa 2012)

State v. Greene, 595 N.W.2d 24 (Iowa 1999)

State v. Hopkins, 576 N.W.2d 374 (Iowa 1998)

State v. Hrbek, 336 N.W.2d 431 (Iowa 1983)

State v. Jaquez, 856 N.W.2d 663 (Iowa 2014)

State v. Maxwell, 743 N.W.2d 185 (Iowa 2008)

State v. Myers, 382 N.W.2d 91 (Iowa 1986)

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

State v. Westeen, 591 N.W.2d 203 (Iowa 1999)

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)

Washington v. Scurr, 304 N.W.2d 231 (Iowa 1981)

U.S. Const. Am. 6

Iowa Const. Art. 1 §10

IA. R. Ev. 5.702

ROUTING STATEMENT

The Appellant, Mr. Flores believes that this case should be retained by the Supreme Court because it involves substantial issues of first impression, namely the speedy trial rights of the accused when he is being held in the custody of another entity. Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

Nelson Flores was first charged in Crawford County case FECR067438 in a three count trial information alleging: Count I, sexual abuse in the second degree, in violation of Iowa Code §§709.1, 709.3(1)(b), 903B.1, Count II, lascivious acts with child, in violation of Iowa Code §§709.1, 709.8(1)(a), 709.8(2)(a), 903B.1, and Count III, assault with intent to commit sexual abuse, in violation of Iowa Code §§709.11, 903B.2. Trial Information, Appx. P. 4. The Trial Information was filed on July 14, 2016. Trial Information, Appx. P. 4. Mr. Flores waived his right to a speedy trial within 90 days pursuant to Iowa Rule of Criminal Procedure 2.33(2)(b), and the document indicated an interpreter was used. Written Arraignment and Plea of Not Guilty, FECR067438. Appx. P. 7. On August 1, 2017, Mr. Flores filed a waiver of his right to a speedy trial within one year pursuant to IA R. Cr. P. 2.33(2)(c), however on this document there was no indication an interpreter in Spanish was utilized. Waiver of Right to Speedy Trial, FECR067438. Appx. P. 9. Trial was continued several times over the course of 2018 and 2019. It was eventually set for a bench trial on January 28, 2020, but that trial was continued on the State's motion and was reset to September 9, 2020. 1/15/2020 Motion for Continuance, 3/10/2020 Order Setting Hearing. Appx. P. 11-12. On September 4, 2020, the State moved to continue the trial without objection due to Mr. Flores' need for an interpreter. 9/4/2020 Motion for Continuance, Appx.

P. 14. On January 29, 2021 the State moved to reset the trial due to Mr. Flores having obtained new counsel. 1/29/2021 Motion to Re-Set Trial & Pre-Trial Conference, Appx. P. 15. On May 4, 2021, the District Court continued trial to July 13, 2021 on the motion of Defense counsel, presumably for the case to be tried at the same time as the companion case FECR069029. 5/4/21 Order Continuing Trial and Pretrial Conference, Appx. P. 16.

Mr. Flores was also charged in a ten count trial information in a separate case, Crawford County Case FECR069029: Counts I-III, sexual abuse in the third degree in violation of Iowa Code §§709.1, 709.4(1)(b)(3)(d), 903B.1, Count IV-V, extortion in violation of Iowa Code §§711.4(1)(a), 711.4(2), Count VI, conspiracy to commit a felony (suborn perjury), in violation of Iowa Code §§706.1, 720.3, Count VII, conspiracy to commit an aggravated misdemeanor (prevent apprehension or obstruct the prosecution of the defendant), in violation of Iowa Code §§706.1, 719.3, Count VIII, lascivious conduct with minor, in violation of Iowa Code §§709.14, 903B.2, Count IX, tampering with a witness or juror, in violation of Iowa Code §720.4, and Count X, dissemination and exhibition of obscene materials to minor, in violation of Iowa Code §728.2. Trial Information, FECR069029, Appx. P. 40. The Trial Information in FECR069029 was filed on April 12, 2021. Mr. Flores submitted a written arraignment and plea of not guilty on May 6, 2021. Written Arraignment, FECR069029, Appx. P. 45. In this written

arraignment, Mr. Flores demanded his right to a speedy trial pursuant to Iowa Rule of Criminal Procedure 2.33(2)(b). Written Arraignment, FECR069029 p. 3, Appx. P. 47. In an arraignment order, the District Court set the case for jury trial on July 13, 2021. Order of Arraignment, FECR069029, Appx. P. 48.

Several motions and orders related to a continuance of trial were filed in both cases. On July 2, 2021, the State filed a motion for good cause finding for continuance, alleging that because Mr. Flores was in the custody of Immigration and Customs Enforcement (hereinafter "ICE"), he could not be brought to trial on July 13, 2021. Motion for Good Cause Finding For Continuance, Appx. P. 50. On July 6, 2021, the State filed a petition for writ of habeas corpus ad prosequendum, requesting the District Court issue and order commanding ICE to release Mr. Flores to the custody of the Crawford County Sheriff. Petition for Writ of Habeas Corpus Ad Prosequendum, Appx. P. 52. On July 7, 2021, Mr. Flores filed a resistance to the State's continuance. Resistance to State's Motion to Continue Trial, Appx. P. 54. The District Court set a hearing on the State's motion to continue trial for July 8, 2021.

At the July 8, 2021 hearing, the State argued for the continuance of trial, and in addition to restating the reason that Mr. Flores was in ICE custody, also stated that the parties were in the midst of conducting depositions of potential trial witnesses. 7/8/21 PTC 5:3-25, 6:9-22. Mr. Flores' counsel asserted to the Court

that he had diligently attempted to schedule the depositions for a period of three months. 7/8/21 PTC 7:14-22.

On July 9, 2021, the District Court issued a writ of habeas corpus for Mr. Flores with the wrong name, and corrected the writ in a nunc pro tunc order on the same date. 7/9/21 Writ, 7/9/21 Order Nunc Pro Tunc, Appx. P.59-61. On August 12, 2021 the District Court issued an order nunc pro tunc with corrections to the original writ. Nunc Pro Tunc Order on State's Petition for Writ of Habeas Corpus Ad Prosequendum, 8/12/2021 Corrected-Writ of Habeas Corpus, Appx. P. 63-66. Mr. Flores was transported on the same date from the Pottawattamie County Jail to the Crawford County Jail. 8/12/21 Return of Service, Appx. P. 68.

The admissibility of the Project Harmony Videos was heavily litigated throughout the case. At the final pretrial conference prior to the beginning of the jury trial, the State reiterated its intention to offer the videos. 8/12/21 PTC TR 14:19-22. Mr. Flores once again objected to their admissibility at the pretrial conference and by way of a limine motion. 8/12/21 PTC TR 15:22. The State further argued that the testimony of Wendy Hernandez should be compelled by the Court, or if she is excluded or claims privilege, then she should be declared unavailable and her deposition should be entered into evidence. 8/12/21 PTC TR 37:16-25, 38:1-4. Mr. Flores filed a motion in limine requesting first that certain false ID cards be excluded from evidence due to their prejudicial effect

outweighing their probative value. 8/12/21 PTC TR 59:4-6. He further requested that testimony regarding a rumor that he hired someone to kill another person be disallowed. 8/12/21 PTC TR 61:20-25, 62:1-13. Mr. Flores also requested once again that the District Court not allow the State to play the Project Harmony videos. 8/12/21 PTC TR 64:5-9, 65:2-23.

The District Court overruled Mr. Flores' motion in limine in regards to the ID cards and contract killer rumor, but directed the State to present that evidence first outside the presence of the jury. 8/14/21 PTC Order, p. 18-19, Appx. P. 86-87. The District Court did sustain Mr. Flores' limine as to the Project Harmony videos, overruling the prior order that allowed the videos to be entered into evidence. 8/14/21 PTC Order p. 31, Appx. P. 99. The District Court did find that the videos could potentially come in pursuant to Rule 5.801(d)(1)(B), but reserved such ruling until the evidence was presented at trial. 8/14/21 PTC Order p. 31, Appx. P. 99.

On the morning of trial, Mr. Flores' Trial Counsel brought the issue back up before the District Court, arguing that his impeachment with prior statements from one of the videos would not essentially open the door to the State being able to admit the videos. Trial Vol. 1 TR 8:5-25, 9:1-23. The District Court once again declined to rule on the issue until after Mr. Flores' cross examination of W.R. Trial Vol. 1 TR 14:1-6. The Court somewhat ruled on the issue the following day,

but still did reserve final ruling until after Mr. Flores' cross examination of W.R. Trial Vol. 2 TR 9:23-25, 10:1-7. The District Court at that time did believe that admission of prior statements from one recorded interview would not open the door for the admission of other recorded interviews. Trial Vol. 2 TR 12:23-25, 13:1-2, 21:11-14.

Day one of the trial was jury selection. During trial, the District Court found that the 2016 Project Harmony interview was admissible under Rule 5.106, but not the 2020 Project Harmony interview. Trial Vol. 3 TR 123:11-25, 124:1-2, 126:1-2.

During the trial, the District Court ruled that evidence of the fake ID and the fight between Wendy Hernandez and Mr. Flores was inadmissible as not relevant and under Rule 5.403. Trial Vol. 3 TR 214:23-25, 215:1. The District Court further ruled that statements made by Wendy Hernandez were not admissible as co-conspirator statements admissible under Rule 5.801(d)(2)(e). Trial Vol. 3 TR 216:17-24. The State requested similar statements be admitted during a different witness Jennifer Bullock's testimony. Trial Vol. 4 3:4-16. After hearing the witness testify outside the presence of the jury, the District Court allowed these statements to be presented to the jury. Trial Vol. 4 16:5-13.

The State rested after Ms. Bullock's testimony. Trial Vol. 4 74:8. The Defense made a motion for judgment of acquittal as to all the counts in both cases.

Trial Vol. 4 63-70. The Defense presented one witness, Dr. Ross Valone. Trial Vol. 4 74:14.

A verdict was returned in FECR067438 which found Mr. Flores guilty of all counts in the Trial Information. Criminal Verdict, FECR067438. Mr. Flores was also found guilty in FECR069029 of Counts 1-3, 6-10, and not guilty on Counts 4-5. Criminal Verdict FECR069029.

Mr. Flores filed a Motion for New Trial wherein he alleged five different issues: 1) the District Court improperly admitted the Project Harmony video, 2) the District Court improperly admitted evidence regarding Mr. Flores' immigration status in the United States, 3) the District Court failed to rule on Mr. Flores' motion for mistrial following the elevator incident, 4) the District Court failed to rule on Mr. Flores' Motions for Judgment of Acquittal, and 5) the jury's verdict was contrary to the evidence. Motion for New Trial, Appx. P. 18.

The District Court denied Mr. Flores' post-trial motions for the reasons stated during the sentencing/motion hearing on October 29, 2021. 10/29/21 Order. The District Court upheld the charges in the felony case, but dismissed the charges in the simple misdemeanor case under Ia. R. Cr. P. 2.54. Sentencing TR 9:18-25, 10:1-13.

On October 29, 2021, The District Court sentenced Mr. Flores in FECR067438 to an indeterminate term of incarceration of 25 years, after ordering

the three counts to be ran concurrent. Order of Disposition, p. 2-4, Appx. P. 27-28. In FECR069029 the District Court ran all counts concurrent for an indeterminate term of ten years. Order of Disposition, p. 2-4, Appx. P. 27-28. The District Court ordered that the sentences in FECR067438 and FECR069029 be ran consecutive for a total indeterminate term of 35 years. Mr. Flores timely filed a notice of appeal on November 2, 2021.

STATEMENT OF THE FACTS

Jury trial in all cases commenced on August 17, 2021. Jury selection took up the entirety of the first day.

The State first called Amy Cirian as a witness. Trial Vol. 2 TR 61:22-24. She is the forensic interview program manager at Project Harmony in Omaha, NE, which is a child advocacy center. Trial Vol. 2 TR 63:12-13, 19-21. She testified that three different interviewers, April Anderson, Jessica Martinez, and Janessa Michaelis, met with W.R. at various times. Trial Vol. 2 TR 73:11-14. The first interview took place June 22, 2016, the second on October 8, 2019, and the third on January 11, 2020. Trial Vol. 2 TR 75:8-11. She believed after reviewing the videos that the interviewers followed proper procedure, did not make any mistakes, and that she did not have any concerns about them. Trial Vol. 2 TR 76:19-25, 77:1-4. The State further asked Ms. Cirian if there were red flags she looked for to identify coaching by an adult. Trial Vol. 2 TR 95:22-25, 96:1-9. She said that if

there are concerns and red flags for coaching, then there is a procedure to address it. Trial Vol. 2 TR 96:10-20. She then stated that none of the procedures to address red flags were instituted during W.R.'s interview. Trial Vol. 2 TR 96:21-23. The State reaffirmed the testimony with Ms. Cirian during her redirect examination, with her stating there were no red flags during W.R.'s interviews. Trial Vol. 2 TR 120:6-20.

Crawford County Sheriff's Deputy Michael Bremser testified next on behalf of the State. Trial Vol. 2 TR 122:18. He testified that he responded to a call on June 3, 2016 in regards to Nelson Flores. Trial Vol. 2 TR 123:18-23. He spoke with W.R. at a clinic, who he determined to be a potential victim of sexual abuse. Trial Vol. 2 TR 124:1-4, 125:9-10. He arranged for W.R. to go to Project Harmony. Trial Vol. 2 TR 128:7-11. Deputy Bremser later learned that W.R. did not go to Project Harmony but instead went to St. Anthony's. Trial Vol. 2 TR 129:11-17. Deputy Bremser later arrested Mr. Flores at his residence in Deloit, and described his demeanor at the time of the arrest as emotional, crying, and visibly upset. Trial Vol. 2 TR 132:6-17. He testified that a no contact order was put into place on June 24, 2016 between Mr. Flores and W.R. Trial Vol. 2 TR 134:6-13.

The State also called Crawford County Sheriff's Deputy Roger Rasmussen. Trial Vol. 2 TR 154:1. Deputy Rasmussen testified that he assisted with Mr.

Flores' arrest. Trial Vol. 2 TR 155:9-12. Deputy Rasmussen interviewed W.R. regarding potential no contact order violations. Trial Vol. 2 TR 156:20-25. Deputy Rasmussen witnessed a fake ID and fake social security card with the picture of Wendy Hernandez, who is W.R.'s mother. Trial Vol. 2 TR 165:12-25.

W.R. testified at trial for the State. Trial Vol. 2 TR 178:9. She testified that her birthday is July 29, 2005. Trial Vol. 2 TR 179:24-25. She lives with Jennifer Bullock, but used to live with her grandma, and before that lived with her mother, Wendy Hernandez. Trial Vol. 2 TR 180:16-18, 181:2-4, 182:2-12. She testified that she was at court "[b]ecause Nelson raped me." Trial Vol. 2 TR 185:17-20. She testified that it happened "[v]arious times." Trial Vol. 2 TR 187:23-25. W.R. testified that she was between nine and 15 years old when it happened. Trial Vol. 2 TR 188:1-4. She stated that it happened in her mom's bedroom, where she, Nelson, her mother, and her little brother slept. Trial Vol. 2 TR 189:9-17. When it happened her mother was not home, just Nelson and her little brother. Trial Vol. 2 TR 190:1-6. She testified that Nelson would touch her around her body, on her private area, including her vagina, and chest. Trial Vol. 2 TR 190:24-25, 191:1-5. She further testified that Nelson penetrated her vagina with his penis. Trial Vol. 2 TR 192:13-21. She would scream while he did this to her. Trial Vol. 2 TR 193:22-24.

W.R. testified that she told her mother and grandmother about the assaults. Trial Vol. 2 TR 202:12-21. She also told a nurse at a Denison hospital about what happened. Trial Vol. 2 TR 205:18-25, 206:1-10. The nurse called the police. Trial Vol. 2 TR 206:11-15. W.R. went to Project Harmony and told a lady at Project Harmony essentially the same story to which she testified. Trial Vol. 2 TR 210:7-10.

W.R. testified that she went with her mom to purchase a fake ID when W.R. was fifteen years old. Trial Vol. 2 TR 238:3-9. She stated that her mom needed to get papers to be able to work. Trial Vol. 2 TR 238:17-20.

W.R. stated that she went back to Project Harmony a second time, and "took it all back." Trial Vol. 2 TR 242:1-3. W.R. also testified regarding a fight that took place between Nelson and Wendy Hernandez, W.R.'s mother. Trial Vol. 3 TR 10:12-23. The fight was regarding Wendy having a boyfriend and Nelson finding out. Trial Vol. 3 TR 13:19-25. W.R. also testified that Nelson had a girlfriend. Trial Vol. 3 TR 13:24-25, 14:1. She stated after she took back the allegations against Mr. Flores that he would continue to sexually abuse her. Trial Vol. 3 TR 16:6-19. W.R. testified that after the last time she was sexually abused she went to live with her great aunt. Trial Vol. 3 TR 47:9-12.

During cross-examination Mr. Flores' Trial Counsel asked W.R. if she did not state during her 2016 Project Harmony interview that Nelson rubbed his body

against hers. Trial Vol. 3 TR 68:18-25, 69:1-12 She testified that she meant that but reworded that statement. Trial Vol. 3 TR 69:13-17.

Dr. Suzanne Haney, a child abuse pediatrician at Children's Hospital and Medical Center in Omaha, and a subcontracter for Project Harmony, next testified for the State. Trial Vol. 3 TR 146:5-21. She reviewed a medical exam that was performed on W.R. at Project Harmony. Trial Vol. 3 TR 155:6-9. She testified that a nurse practitioner at Project Harmony, Jessica Tippery, performed the exam. Trial Vol. 3 TR 156:11-16. Dr. Haney testified that W.R.'s medical exam showed a normal genitourinary examination with no indication of prior trauma, and such a finding is not uncommon in girls and women that have had sexual intercourse. Trial Vol. 3 TR 160:4-25, 161:1-19. Dr. Haney testified, however, that there are injuries that could occur due to sexual abuse, such as bruising, petechiae, abrasions, lacerations and a complete hymenal cleft. Trial Vol. 3 TR 170:12-25, 171:1-8. There are also possible signs of long term damage that can be seen during a medical examination. Trial Vol. 3 TR 172:6-21. Further, the observations made by Ms. Tippery of W.R. were consistent with someone who never had intercourse. Trial Vol. 3 TR 175:11-17.

Exhibit 201, the video of the 2016 Project Harmony interview, was played for the jury, except for from timestamp 11:05 to 11:09:02. Trial Vol. 3 TR 185:13-25.

Gabriela Bermudez, W.R.'s aunt, also testified for the State. Trial Vol. 3 TR 186:20-25, 189:2-5. She calls W.R. by the name of "Judy." Trial Vol. 3 TR 189:6-12. She testified that she saw W.R. and Mr. Flores together in a car with W.R.'s mother and little brother during a time when there was a restraining order in place. Trial Vol. 3 TR 192:10-25, 193:1-11. She also saw W.R. and Mr. Flores together at a birthday party. Trial Vol. 3 TR 196:1-23.

Jennifer Bullock was the next witness that testified for the State. Trial Vol. 4 20:15-17. She is employed with the Center Against Abuse and Sexual Assault, CAASA. Trial Vol. 4 21:5-7. She is also W.R.'s great-aunt. Trial Vol. 4 23:10-13. DHS placed W.R. to live with Ms. Bullock September 24, 2020. Trial Vol. 4 27:10-17. Ms. Bullock testified that she had a conversation with Wendy Hernandez whereby Wendy had made arrangements to leave the State with Mr. Flores and live in Tennessee under a different name with W.R. so Mr. Flores would not get in trouble. Trial Vol. 4 37:12-22. She further stated that an attorney named Martha told Wendy Hernandez that the only way to be together with Nelson was to get married or leave the State. Trial Vol. 4 38:8-14. When asked by the State if there was a conflict between Ms. Bullock and her husband because of her taking in W.R. she replied there was not a conflict because her husband "believes Judy with all his heart." Trial Vol. 4 40:23-25.

Dr. Ross Valone, an obstetrician and gynecologist, testified on behalf of the Defense. Trial Vol. 4 74:12-4, 75:1. He testified that he has cared for children who suffered trauma to their genitalia. Trial Vol. 4 78:10-12. He has also conducted forensic examinations for alleged sexual abuse. Trial Vol. 4 78:21-23. He testified that the examination of W.R. was a delayed exam. Trial Vol. 4 80:22-25. His opinion was that there were no physical indicators or conditions that would indicate W.R. was sexually abused. Trial Vol. 4 83:8-14.

ARGUMENT

A. The District Court erred when it found good cause for the State's motion to continue trial beyond the speedy trial deadline.

a. Standard of Review

A district court's application of the procedural rules governing speedy trial is reviewed for correction of errors at law. *State v. Miller*, 637 N.W.2d 201, 204 (Iowa 2001). Findings of fact are binding if supported by substantial evidence. *State v. Bond*, 340 N.W.2d 276, 279 (Iowa 1983). Statutes which implement the right to a speedy trial should receive a liberal construction for the purpose of protecting citizens' liberty. *State v. Taylor*, 881 N.W.2d 72, 76 (Iowa 2016). A district court's determination of whether the State showed good cause for the delay is reviewed for abuse of discretion. *State v. McNeal*, 897 N.W.2d 697 (Iowa 2017). The discretion, however, is narrow when considering good cause for delay of the trial. *State v. Campbell*, 714 N.W.2d 622, 627 (Iowa 2006).

b. Preservation of Error

Mr. Flores objected to the continuance of trial beyond the one year speedy trial deadline.

c. Speedy Trial Violation

It should first be noted that Mr. Flores only made a direct demand for speedy trial in the FECR069029 case, and in case FECR067438 had filed a waiver of the

one year demand for speedy trial. However, Mr. Flores asserts that his speedy trial arguments should apply to both cases, given all the circumstances. These include that the cases were consolidated for trial, that the waiver was filed four years prior to the demand in FECR069029, and that the original waiver contained no evidence the document was explained to Mr. Flores in his native language. It is clear under all the circumstances that Mr. Flores' intention was to have trial on both cases within 90 days of the filing of the Trial Information in FECR069029.

The good-cause test for speedy trial relies only on one factor: the reason for the delay. *Taylor* at 77 (Iowa 2016). "[I]f the reason for the delay is insufficient, other factors will not avoid dismissal" *Id.*, quoting *Ennenga v. State*, 812 N.W.2d 696 (Iowa 2012). In *Miller*, the Iowa Supreme Court explained that surrounding circumstances for the delay can operate on a sliding scale:

> The shortness of the period, the failure of the defendant to demand a speedy trial, and the absence of prejudice are legitimate considerations only insofar as they affect the strength of the reason for delay. This means that, to whatever extent the delay has been a short one, or the defendant has not demanded a speedy trial, or is not prejudiced, a weaker reason will constitute good cause. On the other hand, if the delay has been a long one, or if the defendant has demanded a speedy

trial, or is prejudiced, a stronger reason is necessary to constitute good cause.

Miller at 205.

The District Court clearly abused its discretion in finding good cause for a continuance. The State itself seemed uncertain as to whether the reason for a continuance was good cause, and requested the continuance "as a matter of practicality more than anything else." 7/8/21 PTC 8:22-25. The State further asserted that "at a certain point, the defendant is forcing the State's hand on whether or not to file a petition for writ, and I don't know that defendant really can be in that position to force the State." 7/8/21 PTC 9:11-15. The State also asserted that "The State has experienced in other cases where there's a defendant in federal custody demanding speedy, defendant files a writ, it's been denied by the federal government. I will say that the State does not have any reason to think that the federal government will deny its writ in this case, but unless and until that – the feds release him to us, you know, we – we can't get him here." 7/8/21 PTC 9:25, 10:1-7.

First, the State's reasoning that the Defendant was somehow forcing its hand into petitioning for a writ defies all logic and is contrary to the law. "A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process." *Barker v. Wingo*, 407 U.S.

514, 527, 92 S.Ct. 2182, 2190, 33 L.Ed.2d 101, 115 (1972). Here, the duty was on the State to bring Mr. Flores to trial. Mr. Flores' Trial Counsel had at one point attempted to do so, but said effort was denied by the District Court. 4/12/21 Motion to Transport, 4/13/21 Order to Transport. As soon as Mr. Flores's Trial Counsel attempted to have Mr. Flores transported, the State was on notice that Mr. Flores' transport was going to be an issue, and that the State should make attempts as soon as possible to get Mr. Flores to Crawford County for trial.

The State only fulfilled its duty to bring Mr. Flores to trial at the last minute. The District Court noted the State's failure to do so, believing that the State could have requested the writ earlier. 7/8/19 PTC 16:24-25. The State further made the bare assertion that in other cases the federal government had denied the writ in other cases, without providing any cases or evidence support its argument. This argument was contradicted by the fact that the State was able to obtain Mr. Flores' custody the same day the District Court filed the corrected writ of habeas corpus.

The District Court noted that it was relying heavily on the *Jentz* case to find good cause to continue the trial date. *State v. Jentz,* 853 N.W.2d 257 (Iowa App. 2013). In *Jentz,* the district court denied a motion to dismiss on speedy trial grounds due to Jentz fleeing to Florida and incurring other criminal charges. The Court of Appeals found the delay was attributable to Jentz. *Jentz* at 272. Jentz failed to appear on two different cases in Iowa, then received new criminal charges

in Florida. *Id.* at 270. He was unable to be released to an Iowa warrant until he was finished with his Florida charges. *Id.* Jentz also admitted to leaving the State of Iowa with pending charges and not returning for his court dates. *Id.*

The factual scenario in *Jentz* is highly distinguishable from Mr. Flores' case. Mr. Flores was arrested by Immigration and Customs Enforcement due not to criminal charges, but rather immigration issues, which are civil in nature. *Fong Yue Ting,* 149 U.S. 698 (1893). Mr. Flores was being detained in Pottawattamie County, a mere hour down the road from Crawford. Mr. Flores made every effort to avail himself of the judicial process to have his day in court, including having his own attorney attempt his transport.

Few other states have examined this issue, but the ones that have support Mr. Flores' argument that his being held in ICE custody was not good cause for a continuance. In *State v. Montes-Mata,* the Kansas Supreme Court held that an ICE detainer does not vitiate a defendant's right to a speedy trial. 292 Kan. 367, 253 P.3d 354 (Kan. 2011). In another case, the State's failure to exercise due diligence to obtain a witness in ICE custody resulted in a dismissal on speedy trial grounds, finding that the court could not grant a good cause continuance when the government had not even tried to obtain the witness' presence from ICE custody. *People v. Betka,* 992 N.Y.S.2d 634 (N.Y. Crim. Ct. 2014). The Washington Court of Appeals also overturned a defendant's conviction when his trial date was

canceled due to him being in ICE custody. *State v. Chavez–Romero*, 285 P.3d 195 (Wash. App. 2012).

Mr. Flores used all diligence to bring his case to trial on the July 2021 date. The State could have started the process of a writ of habeas corpus months earlier, but chose not to until the same day it asked for a continuance. The District Court abused its discretion when it held the delay against Mr. Flores by finding good cause for the continuance. The delay should be held against the State and as such Mr. Flores' cases should be dismissed.

B. The District Court erred when it allowed the admission of the 2016 Project Harmony forensic interview under Iowa Rule of Evidence 5.106.

a. Standard of Review

The appellate courts review evidentiary decisions regarding admission of hearsay for correction of errors at law. *State v. Veverka,* 938 N.W.2d 197, 202 (Iowa 2020).

b. Preservation of Error

Mr. Flores objected to the admission of the Project Harmony videos by way of a motion in limine and objections at trial. Trial Vol. 2 121:2.

c. Admission of the Project Harmony Video

The District Court admitted the 2016 Project Harmony Video over the objection of Mr. Flores under Rule 5.106. Rule 5.106 reads:

> (a) When an act, declaration, conversation, writing, or recorded statement, or part thereof, is introduced by a party, any other part or any other act, declaration, conversation, writing, or recorded statement is admissible when necessary in the interest of fairness, a clear understanding, or an adequate explanation.
>
> (b) Upon request by an adverse party, the court may, in its discretion, require the offering party to introduce contemporaneously with the act, declaration, conversation, writing, or recorded statement, or part thereof, any other part or any other act, declaration, conversation, writing, or recorded statement which is admissible under subdivision "a" of this rule. This subdivision, however, does not limit the right of any party to develop further on cross-examination or in his case in chief matters admissible under subdivision "a" of this rule.

Iowa R. Ev. 5.106

The rule itself contains a requirement of necessity before admission of the entire recording or prior statement. See *State v. Huser*, 894 N.W.2d 472 (Iowa 2017). In the *Huser* case, the Iowa Supreme Court gave a discussion of the

potential "trumping" function of 5.106. It stated that "the rule of completeness may trump the ordinarily applicable rules of evidence. Yet, the rule cannot be simply used as an 'end run around the usual rules of admissibility.'" *Huser* at 509, citing *United States v. Castro-Cabrera*, 534 F.Supp.2d 1156, 1161 (C.D. Cal. 2008). A recorded statement cannot be admitted under the rule if the recorded statement does not actually provide context to the selected statement. See *State v. Davis*, 858 N.W.2d 36, (Iowa App. 2014). The whole statement can also be used when the selected statement creates a misleading impression for the jury. See *State v. Zieman*, 829 N.W.2d 589 (Iowa App. 2013).

> The District Court believed the 2016 video should be played, stating:
>
> "It seems to me like the video – I think we can play it. I don't think it – it just seems like there's – I don't know if I would say an inconsistency, but it seems like if the – in light of the nature of the rule of completeness, I think what the jury will have to be instructed is that the witness's prior statements not under oath can be used only for purposes of assessing the witness's credibility and not as substantive evidence."
>
> Trial Vol. 3 127:3-12.

The District Court further cited to two cases to support its decision to admit the Project Harmony videos. First, it cited the Iowa Supreme Court's decision in

State v. Austin, 585 N.W.2d 241 (Iowa 1998) for the proposition that the entire statement from the same statement is admissible under the rule of completeness found in Rule 5.106. Second, the District Court cited to *U.S. v. Baron*, which the District Court found to be analogous to Mr. Flores' case. 602 F.2d 1248 (7th Cir. 1979). The District Court also referenced an unpublished Michigan case for the premise that impeachment showing a statement was not in a prior statement does not open any 5.106 doors. Trial Vol. 3 134:1-5.

In the *Austin* case, a prior recording was introduced after defense counsel used a summary of the recording to cross-examine a witness on specific instances. *Austin* at 244. The Iowa Supreme Court found that the entire recording's admission was not erroneous because the specific points, when taken out of context, could have led the jury to believe that the interview statements were inconsistent with the witness' trial testimony. *Id.*

Baron involved a federal bribery case where the main complaining witness was extensively cross-examined by the defense with memoranda the witness had prepared. *Baron* at 1250. The trial court in *Baron* allowed in all the memoranda because as the appellate court stated "Although on cross-examination certain discrepancies were emphasized, it was debatable whether these were real inconsistencies, depending on how one interpreted ambiguities in both the memoranda and the testimony. Moreover, the asserted inconsistencies went to

details and the major portions of the memoranda were consistent with Bryant's testimony." *Baron* at 1252. The Seventh Circuit found that under those circumstances "it would have been unfair and extremely confusing to the jury not to admit the memoranda." *Id.*

There were several instances throughout W.R.'s cross-examination where Mr. Flores' Trial Counsel referenced her 2016 forensic interview. These include statements regarding how many times Mr. Flores touched W.R.'s vagina (Trial Vol. 3 70:15-20, 75:17-21), what position W.R. told the interviewer that W.R. was in when Mr. Flores tried to touch her (Trial Vol. 3 74:25, 75:1-16, 80:13-25, 81:1-7), what Mr. Flores touched W.R.'s vagina with (Trial Vol. 3 77:20-25, 78:1-5), if anything came out of Mr. Flores' penis (Trial Vol. 3 80:7-12), what days of the week Mr. Flores would assault W.R. (Trial Vol. 3 81:16-25, 82:1-2), and if W.R. had left anything out of the 2016 interview (Trial Vol. 3 89:15-20).

Mr. Flores' case is distinguishable from the cases cited by the District Court. Mr. Flores' Trial Counsel did not pick and choose minute details from the video, which, if taken out of context, would mislead the jury as to the original statement. Many of the cross-examination points from the 2016 video were on statements W.R. did not say in her 2016 video, further undermining the District Court's decision, given it was the District Court that reasoned if the impeachment has to do

with a lack of statement, that does not trigger 5.106 admissibility. Trial Vol. 3 125:15-21.

Another reason the admission of the 2016 Project Harmony tape was error is because the State essentially goaded the Defense into cross-examining W.R. regarding the tape. The State made reference to the 2016 interview as well, starting with whether W.R. remembered talking to the lady at Project Harmony. Trial Vol. 2 209:14-19. Then the State engaged with W.R. in the following exchange:

[State]: And do you remember what you told her?

[W.R.]: What I said about Nelson.

[State]: You remember telling her –

[W.R.]: What happened.

[State]: – the same things you have been testifying to here today?

[W.R.]: Yes.

[State]: Did you tell that person the truth?

[W.R.]: Yes.

…

[State]: Wendy, do you remember we just had a brief conversation, you and I, about what you told this lady the first time you went to Project Harmony. Do you remember specifically what you told her?

[W.R.]: No.

[State]: Do you remember generally what you told her? What did – Who did it have to do with? Who did you talk about?

[W.R.]: Nelson.

[State]: What did you talk about Nelson about?

[W.R.]: About what he did.

[State]: And by what he did, what are you talking about?

[W.R.]: Rape.

[State]: Were you truthful with this lady?

[W.R.]: Yes

Trial Vol. 2 210:7-15, 22-25, 211:1-13.

The Defense was required at this point to cross-examine W.R. regarding the inconsistencies in the tape, given that she essentially admitted during cross-examination to not being truthful in the 2016 interview. It was error for the District Court to then place the burden on Mr. Flores for the "opening of the door" to the 2016 tape. As the admission of the 2016 tape was error, this Court should reverse Mr. Flores' convictions and remand for new trial on this issue.

C. The District Court erred when it allowed the admission of the same alleged co-conspirator statements it had previously ruled inadmissible.

a. Standard of Review

The standard of review with respect to the admission of hearsay evidence is for correction of errors at law. *Huser* at 495. The district court's preliminary findings are reviewed for substantial evidence. *Huser* at 504. When hearsay is improperly admitted the error is presumed to be prejudicial unless the State shows the contrary. *State v. Elliott*, 806 N.W.2d 660, 669 (Iowa 2011).

b. Preservation of Error

Mr. Flores preserved error by objecting to the admission of the co-conspirator statements. Trial Vol. 4 12:21-22.

c. Admission of Co-conspirator statements

Iowa Rule of Evidence 5.801(d)(2)(E) provides that "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" is not hearsay. "Proof of a conspiracy must include evidence independent of the co-conspirator's statement." *State v. Dullard*, 668 N.W.2d 585 (Iowa 2003). To be in furtherance of the conspiracy a statement "in some measure or to some extent, it must aid or assist toward the consummation of the object of the conspiracy." *State v. Gilmore*, 132 N.W. 53, 55 (Iowa 1911). A statement cannot be considered to be

in furtherance of a conspiracy after the last objectives of the conspiracy have been achieved. *State v. Puffinbarger*, 540 N.W.2d 452 (Iowa App. 1995). To

During Gabriela Bermudez's testimony, the State attempted to elicit testimony regarding statements from Wendy Hernandez and her plans to leave the state with Mr. Flores and W.R. The District Court ruled these statements as inadmissible because the State did not meet its burden to show the statements were made in furtherance of a conspiracy, reasoning that "the statement can't just be by a conspirator about the conspiracy, it has to be in furtherance of the conspiracy." Trial Vol. 3 216:21-23. During Jennifer Bullock's testimony, the State elicited similar statements regarding Wendy Hernandez and her plans to leave the state with Mr. Flores and W.R. Trial Vol. 4 7:16-23. During this testimony, however, the District Court found that the State had met its burden to show the statements were made in furtherance of the conspiracy. The District Court stated:

> "[W]e've got circumstances where this is after this witness, Jennifer Bullock, has become involved with this family, and so essentially any move by Wendy Hernandez and by the defendant involving [W.R.] is going to have to involve Jennifer Bullock in some way because essentially they're going to have to get the kid away from her or take her with – either without this witness's knowledge or with this witness's knowledge, so with that it seems to me like why would

Wendy be telling this witness that other than essentially to butter her up and get – get her to a point where this conspiracy can happen."

Trial Vol. 4 15:16-25, 16:1-4.

The District Court relied on the Iowa Supreme Court case of *State v. Kidd* to support its reasoning. 239 N.W.2d 860 (Iowa 1976). In *Kidd*, the Iowa Supreme Court held that statements made an hour after a robbery that were essentially a report of the robbery to a co-conspirator were held to be in furtherance of the conspiracy. *Kidd* at 865. The *Kidd* case, however, is distinguishable from Mr. Flores's case.

The District Court erred when it determined that the co-conspirator statements were made in furtherance of the conspiracy. At first the District Court held the statements regarding Wendy Hernandez's future plans were inadmissible because they were not in furtherance of the conspiracy. The District Court reversed its reasoning without any different testimony other than the witness who was testifying. The District Court then made the leap in logic to the inference that Wendy was trying to "butter up" the witness, without any facts or evidence to support the conclusion. The District Court believed the timing of the statement was insignificant. However, the timing was highly significant, as under the District Court's reasoning W.R. would have had to have been in Jennifer Bullock's

custody in order for the "butter up" statements to make sense. The District Court committed legal error by admitting the statements.

D. There was insufficient evidence to find Mr. Flores guilty when the State's entire case was based upon the credibility of one witness.

a. Standard of Review

Claims of insufficient evidence are reviewed for correction of errors at law, and a verdict will be upheld if substantial evidence supports it. *State v. Ramirez*, 895 N.W.2d 884, 890 (Iowa 2017). Substantial evidence supports a verdict if, "when viewed in the light most favorable to the State, it can convince a rational jury that the defendant is guilty beyond a reasonable doubt." *State v. Wickes*, 910 N.W.2d 554, 563 (Iowa 2018). A reviewing court considers all the evidence at trial, not just the evidence that supports the verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980). It is the State's "burden to prove every fact necessary to constitute the crime with which the defendant is charged, and the evidence presented must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." *State v. Brubaker*, 805 N.W.2d 164 (Iowa 2011)

b. Preservation of Error

To preserve error on a claim of insufficient evidence, the defendant must make a motion for judgment of acquittal after the close of evidence by either side. *State v. Truesdell*, 679 N.W.2d 611 (Iowa 2004); Iowa R. Crim. P. 2.19(8)(a). This

requirement was met in Mr. Flores' case when his Trial Counsel made such a motion.

c. Insufficient Evidence

In this case, there was insufficient evidence to convict Mr. Flores of any of the charges. Mr. Flores was charged in multiple count informations in two different cases. However, all the charges and really the State's entire case rested upon the credibility of one witness, W.R. The State presented other witnesses and evidence in an attempt to supplement her testimony, but it was mostly window dressing. W.R. was inconsistent throughout her testimony and inconsistent with multiple prior statements, including forensic interviews, police interviews, statements to a juvenile court, and under oath in prior depositions. In addition to the inconsistencies, W.R. had recanted on multiple occasions, and then taken back the recantation. Even when all the evidence presented at trial is viewed in a light most favorable to the State, no rational jury could have found Mr. Flores guilty of any of the charges.

E. The District Court erred when it overruled Mr. Flores' motion for a new trial because the jury's verdict was contrary to the evidence presented.

a. Standard of Review

A motion for new trial on the basis that the weight of the evidence does not support the verdict is reviewed for an abuse of discretion. *State v. Heard*, 934 N.W.2d 433, 439 (Iowa 2019). The trial court should exercise its discretion where the weight of the evidence is against the verdict by a preponderance and where the interests of justice so require. *State v. Reeves*, 670 N.W.2d 199, 203 (Iowa 2003). To establish an abuse of discretion, the defendant must show the district court exercised its discretion on grounds for reasons clearly untenable or to an extent clearly unreasonable. *Id.* at 202. A new trial should be granted when the "evidence preponderates heavily against the verdict" *State v. Ellis*, 578 N.W.2d 655 (Iowa 1998).

b. Preservation of Error

Mr. Flores preserved error through his motion for a new trial.

c. Denial of Motion

A trial court abuses its discretion in overruling a motion for new trial based upon weight of the evidence when "the testimony of a witness or witnesses which otherwise supports conviction is so lacking in credibility that the testimony cannot

support a guilty verdict" or "in which the evidence supporting a guilty verdict is so scanty, or the evidence opposed to a guilty verdict so compelling, that the verdict can be seen as contrary to the evidence." *State v. Adney*, 639 N.W.2d 246 (Iowa App. 2001).

As stated in the previous section of the brief, the State's entire case rested upon the credibility of W.R. There was no corroborating evidence to support W.R.'s story. This case was the quintessential example of a case where the testimony of a witness "is so lacking in credibility that the testimony cannot support a guilty verdict." *Id.* For that reason, this Court should remand Mr. Flores' case for a new trial.

F. Mr. Flores' Trial Counsel was ineffective when he failed to object to witness vouching by the State's expert forensic interviewer.

Mr. Flores' Trial Counsel was ineffective when he failed to object to testimony elicited by the State through witness Amy Cirian that consisted of impermissible vouching of the victim-witness' credibility. Criminal defendants are entitled to effective assistance of counsel under both the U.S. Constitution and the Iowa Constitution. U.S. Const. Am. 6; Iowa Const. Art. 1 §10. Effective assistance of counsel is essential for a fair trial, and a defendant's due process rights are violated when counsel is not effective. *State v. Simpson*, 587 N.W.2d 770, 771 (Iowa 1998).

a. Standard of Review

Claims that an appellant's trial attorney was ineffective are reviewed de novo. *State v. Clark*, 814 N.W.2d 551, 560 (Iowa 2012). To prevail on a claim of ineffective assistance, an appellant must show that their counsel was deficient, and prejudice resulted from such deficiency *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 2064, 80 L.Ed.2d 674 (1984); *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). To show a deficiency the appellant must show that trial counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *State v. Canal*, 773 N.W.2d 528, 532 (Iowa 2009). To show prejudice, an appellant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

b. Improper Vouching

"Competent representation requires counsel to be familiar with the current state of the law." *State v. Hopkins*, 576 N.W.2d 374, 379-80 (Iowa 1998). Trial counsel is not expected to predict changes in the law, but counsel must "exercise reasonable diligence in deciding whether an issue is 'worth raising.'" *State v. Westeen*, 591 N.W.2d 203, 210 (Iowa 1999). However, counsel need not raise an issue that is meritless. *State v. Greene*, 595 N.W.2d 24, 29 (Iowa 1999). The Iowa Supreme Court in *State v. Hrbek*, held that "failure to preserve error may be so

egregious that it denies a defendant the constitutional right to effective assistance of counsel." *State v. Hrbek*, 336 N.W.2d 431, 435-36 (Iowa 1983) (quoting *Washington v. Scurr*, 304 N.W.2d 231, 235 (Iowa 1981)).

The State improperly elicited testimony from witness Amy Cirian that constituted vouching for the credibility of W.R. It was a failure on Trial Counsel's part to not object to the vouching testimony. Expert opinion testimony is permitted if "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Iowa R. Evid. 5.702 (2015). The Iowa Supreme Court held that "experts will be allowed to express opinions on matters that explain relevant mental and psychological symptoms present in sexually abused children." *State v. Myers*, 382 N.W.2d 91, 97 (Iowa 1986). However, the expert may not comment directly or indirectly on the credibility or truthfulness of a witness. *Id.* Further, the Iowa Rules of Evidence state that expert opinions as to truthfulness of a witness are inadmissible because they "go a step beyond merely aiding the fact finder in understanding the evidence and actually invade the exclusive domain of the jury, that is, the determination of the guilt or innocence of the accused." *Myers*, 382 N.W.2d at 95. In addition, the Iowa Supreme Court has held that "when an expert witness testified a child's demeanor or symptoms are consistent with child abuse, the expert crosses that very thin line and indirectly vouches for the victim's

credibility, thereby commenting on the defendant's guilt or innocence." *State v. Jaquez,* 856 N.W.2d 663, 666 (Iowa 2014).

During the direct examination of Ms. Cirian, the State asked about red flags that Project Harmony interviewers will look for in regards to coaching. Trial Vol. 2 95:22-24. Then the following exchange took place:

> [State]: And if there are concerns and red flags during an interview, what is the protocol for that?
>
> [Cirian]: So if we have concerns that a child is very suggestible or has been coached, typically at that time we will break. We will go staff with the multi-disciplinary team next door, whether that be law enforcement, CPS, our advocacy team, medical team. We will talk about our concerns. Sometimes an interview may be ended. But otherwise we may continue gathering as much information as we can.
>
> [State]: And were any of those things done during [W.R.]'s interviews?
>
> [Cirian]: No.

Trial Vol. 2 96:10-23.

Cirian's testimony crossed the impermissible line of witness vouching when she testified that essentially there were no red flags with W.R.'s child advocacy interview. Although Cirian did not directly state that W.R. was credible or was to

be believed, she indirectly indicated such. This is not the case of an expert witness that testified regarding generalities of children in sex abuse cases. *State v. Barnhardt*, 919 N.W.2d 637(Table) (Iowa App. 2018). In this case, Cirian testified specifically about W.R.'s interview and the lack of credibility related "red flags." There was no other way the jury could have taken this testimony other than to believe that Cirian, an expert, believed that W.R. was telling the truth in her child advocacy interview.

The law on witness vouching is well settled, and thus Mr. Flores' Trial Counsel's performance was deficient due to his failure to object to the vouching testimony. The vouching testimony prejudiced Mr. Flores as well. W.R. had previously recanted, her testimony was inconsistent with her numerous out of court statements, and there was not a scintilla of physical or other evidence to corroborate W.R.'s claims. The factual scenario in Mr. Flores' case is similar to *Jaquez*. *Jaquez* at 666. In that case, the Iowa Supreme Court found a violation of the vouching rule and that *Jaquez* was prejudiced by the violation due to the inconsistent testimony of the victim-witness and the lack of physical corroborative evidence. The same facts are present in Mr. Flores' case, and as such should result in his case being remanded for a new trial.

CONCLUSION

For the reasons stated above, the Appellant requests the Court dismiss both cases due to the speedy trial violations. Alternatively, the Appellant requests that this Court vacate his convictions and enter a judgment of acquittal consistent with the insufficient evidence. Lastly and in the alternative, the Appellant requests this Court vacate his convictions and remand the case for a new trial.

NELSON FLORES,
Appellant.

/s/ Christopher J. Roth
CHRISTOPHER J. ROTH
#AT0010491
ROTH WEINSTEIN
1213 Jones St.
Omaha, NE 68102
P: (402) 800-6690
F: (402) 615-6223
Roth@RothWeinstein.com

REQUEST FOR ORAL SUBMISSION

The Appellant believes that the issues presented herein cannot be fully and completely submitted and decided on the briefs, and does believe oral argument is necessary. Should the court decide oral argument is necessary, the Appellant believes 15 minutes per side is sufficient.

No. 21-1676

IN THE SUPREME COURT FOR THE STATE OF IOWA

STATE OF IOWA,
Appellee,

Vs.

NELSON FLORES,
Appellant.

CERTIFICATE OF SERVICE

CHRISTOPHER J. ROTH, after being duly sworn states:

1. He is the attorney for the Appellant herein.

2. On the 14th Day of October 2022 he filed a copy of the Appellant's Final Brief with the Appellate EDMS system, which served an electronic copy on all parties of record.
3. Mr. Roth further served a copy via USPS mail to Nelson Flores, #6471829, Iowa Medical and Classification Center, 2700 Coral Ridge Ave., Coralville, IA 52241

NELSON FLORES
Appellant,

/s/ Christopher J. Roth
CHRISTOPHER J. ROTH,
#AT0010491
Roth Weinstein, LLC
1213 Jones St.
Omaha, NE 68102
P: (402) 800-6690
F: (402) 615-6223
Roth@RothWeinstein.com

No. 21-1676

IN THE SUPREME COURT FOR THE STATE OF IOWA

NELSON FLORES,
Appellant,

Vs.

STATE OF IOWA,
Appellee.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R.App. 6.903(1)(g)(1) or (2) because:
    a. This brief contains 9,032 words, excluding the parts of the brief exempted by Iowa R. App.P.6.903(1)(g)(1).
2. This brief complies with the typeface requirement of Iowa R.App.P. 6.903(1)(e) and the type style requirements of Iowa R. App. P. 6.903(1)(f) because:
    a. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14.

/s/ Christopher J. Roth 10/14/2022