IN THE SUPREME COURT OF IOWA
Supreme Court No. 21-1676

STATE OF IOWA,
Plaintiff-Appellee,

vs.

NELSON FLORES,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR CRAWFORD COUNTY
THE HONORABLE ZACHARY HINDMAN, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

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

STATEMENT OF THE CASE

Nature of the Case

Nelson Flores appeals from eleven convictions, including sexual abuse in the second degree, for sex crimes against his girlfriend's daughter. Flores claims six instances of reversible error occurred.

First, Flores argues no good cause existed to continue his trial date. The district court moved the trial date for good cause because the parties had not completed necessary pretrial tasks and because Flores was in the custody of federal immigration authorities.

Second, Flores argues the court erred by admitting a video interview of the victim. The district court correctly allowed the video under the rule of completeness, not as substantive evidence, for the limited purpose of allowing the jury to fairly evaluate the victim's credibility.

Third, Flores argues the court incorrectly allowed a hearsay statement by the victim's mother—that she wanted to flee the state with the victim and the defendant—as a co-conspirator statement.

The district court correctly found that the statement was made in furtherance of the conspiracy—namely, to test the waters to see whether the victim's foster mother would go along with the scheme.

Fourth, Flores challenges the sufficiency of the evidence by arguing the convictions are supported only by the victim's testimony. This framing of the issue highlights its fatal flaw: the jury can absolutely convict based only the testimony of a victim.

Fifth, Flores challenges the weight of the evidence supporting the jury's verdicts, again assailing the credibility of the child victim. As an expert witness explained, the reporting of sexual abuse by a child victim is a process. Flores's criticisms of the child victim's testimony mirror what research has revealed about that process; they do not undermine it.

Last, Flores argues trial counsel failed to object to witness vouching. This claim must be resolved in postconviction relief proceedings.

Course of Proceedings

FECR067438 begins in 2016

In 2016, Nelson Flores vaginally and anally raped his girlfriend's nine-year-old daughter. Tr. Vol 2 p. 187, line 1 – p. 192,

line 21. After the victim, W.R., disclosed the sexual abuse to a health care worker, the State charged Flores with three crimes: Count I, sexual abuse in the second degree, in violation of Iowa Code section 709.3(1)(b), 903B.1; Count II, lascivious acts with a child, in violation of Iowa Code section 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 section 709.11, 903B.2. Trial Information; App. 4.

Law enforcement arrested Flores on June 24, 2016. Flores posted bond and, with the help of an interpreter, waived his right to a speedy trial within ninety days. Written Arraignment and Plea of Not Guilty; App. 7. Noting Flores had waived his right to speedy trial, the court set trial for November 8, 2016. Order of Arraignment (8-2-2016).

Over the course of the next two years, Flores requested multiple continuances; the court granted each one noting Flores had waived his right to a speedy trial. Order Continuing Trial and Pretrial Conference (10-17-2016); Order Continuing Trial and Pretrial Conference (12-30-2016); Order Continuing Trial and Pretrial Conference (3-7-2017); Order Continuing Trial and Pretrial Conference (8-21-2017); Order Continuing Trial and Pretrial

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During this time, W.R.'s family mounted an intense campaign to pressure her into recanting her report of the abuse. The campaign prevailed, and W.R. recanted—for a time. Tr. Vol. 2 p. 241, line 25 – p. 242, line 10.

On April 9, 2019, the parties reached a tentative plea agreement and the court set a hearing for a plea taking and sentencing for May 6, 2019. Order Setting Plea (4-9-2019).

"Per the agreement of the parties," trial was continued again on July 9, 2019. Order Re-Setting Trial and Pretrial Conference (7-9-2019). Flores requested another extension in 2019, which the court granted. Order Continuing Trial and Pretrial Conference (8-8-2019). On October 23, 2019, the court noted Flores had rejected the State's

plea offer and the court again reset the trial date. Order Continuing Trial and Pretrial Conference (10-23-2019). Flores requested another continuance in December, which the court granted. Order Continuing Pretrial Conference (12-9-2019). In December 2019, Flores waived his right to a jury trial.

In January 2020, the State moved to continue the trial date; Flores did not resist; and the court set a bench trial date of September 9, 2020. Order Setting Hearing (3-10-2020); App. 12. In September 2020, the State moved for a continuance to allow Flores to secure an interpreter after the parties learned Flores, who had privately retained counsel, was not entitled to an interpreter at State expense. The Court granted the continuance for good cause shown. Order (9-8-2020).

In October 2020, Flores changed counsel. Appearance (10-20-2020). The court set a trial date of April 14, 2021. Order Re-Setting Trial and Pretrial Conference (2-4-2021).

FECR069029 begins in 2021

While Flores was free on bond, he continued to sexually abuse W.R., despite the no contact order. On March 1, 2021, Flores was arrested for new charges of sexual abuse against W.R. Warrant

Served FECR069029 (3-1-2021). The State formally charged Flores by trial information, and Flores demanded a speedy trial. Written Arraignment and Plea of Not Guilty (5-6-2021).

On May 4, 2021, Flores again requested a continuance in FECR067438. The district court granted the motion and set trial for July 13, 2021. Order Continuing Trial and Pretrial Conference (5-4-2021); App. 16.

On June 27, 2021, the State moved to consolidate the two cases against Flores together with cases against two other defendants (W.R.'s mother and grandmother). Motion to Consolidate Trials (6-27-2021). Flores resisted. The court ultimately jointed the two cases against Flores but did not join his case with the other defendants.

On July 2, 2021, the State moved for a short continuance—to July 27—in both cases against Flores. Motion for Good Cause Finding For Continuance (7-2-2021); App. 50. The State relied on the fact that Flores was in federal custody and "a number of unresolved pretrial motions on key evidentiary issues and joinder of multiple trials, and the State anticipates having to put on evidence in support of its motions." Four days later, the State also filed a petition for writ of habeas corpus ad prosequendum to secure custody of Flores from

the United States Immigration and Customs Enforcement (ICE). App. 52.

The court held a July 7, 2021, hearing on the motion to continue. The State was prepared to try the case on the court's next available date, July 27—or just fourteen days after the July 13 date Flores had originally requested. Transcript of Hearing on Motion for Good Cause (7-8-2021) p. 12, lines 4-14. Yet, defense counsel had a vacation planned for July 28 – August 4, and he asked to delay the case until August 24th. Tr. of 7-8-21 p. 13, line 22 – p. 14, line 7. The court settled on August 17 (which is when trial commenced).

The court granted the State's motion to continue based on Flores being in federal custody as well as the unresolved pretrial matters:

> The State of Iowa has requested a Writ of Habeas Corpus Ad Prosequendum, and ICE has not responded as to whether or not it will honor the writ.
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> For various reasons, a number of these depositions have not taken place, and the case will therefore not be ready for trial as necessary discovery was not completed. There are approximately 12 pending motions that have not been heard or ruled upon.

Order Re: Motion for Good Cause Finding For Continuance pp. 1-2; App. 56-57.

Final pre-trial conference occurred as scheduled on August 12, 2021, where the parties discussed the various pre-trial motions—including the motion in limine addressing the victim's videotaped statements. Tr. of 8-12-2021 p. 64, line 5 – p. 69, line 4.

A consolidated trial—FECR067438 and FECR069029

A five-day trial started August 17, 2021. The case was submitted on the fourth day, and the jury returned the verdicts on the morning of the fifth day. The jury convicted on the eleven counts described above while acquitting Flores of two counts of extortion. Verdicts.

Flores filed a motion for judgment of acquittal as well as a motion for new trial. On October 29, 2021, the district court denied those motions and sentenced Flores to concurrent sentences for the three crimes in FECR067438 and concurrent sentences for the eight crimes in FECR069029. The court ran those two sets of sentences consecutively. In sum, Flores received a thirty-five-year sentence (with a seventy-percent mandatory minimum on the second-degree sex abuse conviction from FECR069029), together with fines, surcharges, restitution, and lifetime parole. Judgment and Sentence pp. 1-6; App. 26-31.

Flores appeals. Notices of Appeal; App. 38, 103.

Facts

One morning when W.R. was nine years old, after her mother left for work, she awoke to Nelson Flores touching her vagina over her clothes. Tr. Vol. 2 p. 190, line 1 – p. 192, line 25. He proceeded to touch her vagina under her clothes and then to rape her vaginally and anally, causing her to bleed. Tr. Vol. 2 p. 193, line 1 – p. 194, line 13.

At the time, W.R lived with her mother (W.H.), her half-brother (E.H.), and Nelson Flores. Tr. Vol. 2 p. 180, line 1 – p. 183, line 16; Tr. Vol. 2 p. 200, lines 7-16. Flores is not W.R.'s biological father. W.H. and Flores are the biological parents of younger brother E.H., who also lived in the home. Tr. Vol. 2 p. 189, lines 2-17.

W.R. told her mother and grandmother that Flores raped her, but they did not believe her after Flores denied the act. Tr. Vol. 2 p. 200, line 8 – p. 203, line 16. Eventually, W.R.'s mother took her to a medical clinic where W.R. told a nurse Flores raped her; the nurse called the police. Tr. Vol. 2 p. 203, line 24 – p. 206, line 15.

Soon after, W.R. gave an interview at Project Harmony—a sexual assault support and prevention organization. Tr. Vol. 2 p. 208, lines 7-12. W.R. told the professional at Project Harmony that Flores raped her. Tr. Vol. 2 p. 209, line 1 – p. 211, line 11.

W.R. was sent to live with her grandmother but would often stay in the home with her mother and Flores. Tr. Vol. 2 p. 207, lines 7-18. And immediately after reporting the rape, Flores, W.H., and W.R.'s grandmother began pressuring her not to tell the truth about the rape. Tr. Vol. 2 p. 211, line 14 – p. 213, line 20. They would tell her to say she made it all up. Tr. Vol. 2 p. 213, lines 21-23. They would threaten her. Tr. Vol. 2 p. 231, line 14 – p. 232, line 22. They told her she would have to go to foster are, she would never see her family again, that someone would hurt her, and that Flores would hurt her. Tr. Vol. 2 p. 232, line 23 – p. 234, line 18. Flores and W.H. would say they wanted to go to Canada or out of state with W.R., to get away from the court. Tr. Vol. 2 p. 235, line 15 – p. 237, line 2. W.R. believed they would take her away because they had cash saved up. Tr. Vol. 2 p. 237, lines 3-13. Flores also told W.R. that he was friends with a cop and "if I say something he doesn't want me to say, someone else is going to back him up." Tr. Vol. 2 p. 238, line 21 – p. 239, line 25. She also worried she would hurt her mother and that her little brother would no grow up without a father. Tr. Vol. 2 p. 240, line 13 – p. 241, line 15.

Eventually all of this pressure worked, and W.R. recanted. Tr. Vol. 2 p. 241, line 25 – p. 242, line 10. At a deposition, she said she was jealous of her little brother and did not like Flores. Tr. Vol. 2 p. 247, line 9 – p. 248, line 7. Yet, the recantation was not true, and W.R. only recanted because her mother and Flores pressured her. Tr. Vol. 2 p. 248, lines 2-11.

After the recantation, W.R. was supposed to be living with her grandmother and a no-contact order with Flores remained in effect. Tr. Vol. 2 p. 248, lines 12-21. Yet, she lived at her mother's and would often see Flores. Tr. Vol. 2 p. 248, line 17 – p. 249, line 3. W.R.'s aunt witnessed W.H. and Flores picking W.R. up from her grandmother's house. Tr. Vol. 3 p. 199, line 24 – p. 200, line 17.

Flores continued to sexually abuse W.R. Tr. Vol. 3 p. 16, line 6 – p. 17, line 21. For instance, in May of 2020, Flores vaginally raped W.R. in her room at W.H.'s house. Tr. Vol. 3 p. 17, line 22 – p. 20, line 14. He also put his mouth on her breast. Tr. Vol. 3 p. 22, lines 13-21.

Flores vaginally raped her again in August of 2020. Tr. Vol. 3 p. 31, line 17 – p. 32, line 5. He attempted anal penetration as well but failed. Tr. Vol. 3 p. 32, lines 19-23. Like the other times, the sexual

abuse caused pain but this time was distinct in that it caused a burning sensation. Tr. Vol. 3 p. 33, line 8 – p. 34, line 8. This time Flores also made W.R. place his penis in her mouth. Tr. Vol. 3 p. 35, lines 16-23.

In September of 2020, W.R. reported the abuse at school. Tr. Vol. 4 p. 28, line 2 – p. 31, line 18. Within a week, W.R went to live with her great aunt Jennifer Bullock. Tr. Vol. 4 p. 28, line 2 – p. 31, line 18. Jennifer Bullock is a counselor at the Center Against Abuse and Sexual Assault, where she counsels child victims of abuse. Tr. Vol. 4 p. 20, line 25 – p. 22, line 7.

W.H. told Jennifer Bullock that she wanted to leave the state with W.R.:

> She had said that they wanted to be a family together again and that the only way that they would be able to do that so that Nelson wouldn't get in trouble was to leave the state and that they were planning on going to Tennessee with his family. He had a construction job lined up. And she had other documents under another name in order to be able to work down there. And that they were going to take [W.R.] and [E.H.] with them so that -- so Nelson wouldn't get in trouble and they could be a family together pretty much.

Tr. Vol. 4 p. 37, lines 12-22.

Living with Jennifer Bullock and her great uncle, W.R. feels "warm" and "happy"—like a "family." Tr. Vol. 3 p. 49, line 1 – p. 50, line 7.

ARGUMENT

I. Good cause existed to delay the trial.

Preservation of Error

The State does not contest error preservation.

Standard of Review

Review of a motion to dismiss for speedy trial violation is for abuse of discretion. *See State v. Winters*, 690 N.W.2d 903, 907 (Iowa 2005).

Merits

Flores argues the State violated his right to a speedy trial in both cases against him. He acknowledges he waived his right to speedy trial in FECR067438, yet he attempts to bootstrap that earlier case to the later case. The two cases must be analyzed independently.

In case FECR067438, Flores waived his right to speedy trial. Written Arraignment and Plea of Not Guilty; App. 7. He also requested at least a dozen continuances before reaching, and then rejecting, a tentative plea agreement. Order Continuing Trial and Pretrial Conference (10-23-2019). Even after the State filed the

second case, FECR069029, Flores did not reassert his right to speedy trial in the first case, FECR067438. *See State v. Finn*, 469 N.W.2d 692, 694 (Iowa 1991) (holding defendant must clearly and unequivocally reassert speedy-trial rights).

Flores offers threes reasons to tie the cases together for speedy-trial purposes. Each is meritless. First, he argues the cases were consolidated for trial. Yet, the cases were not consolidated at the time Flores demanded speedy trial in the second case (5-6-2021), and Flores resisted the consolidation (7-1-2021). Second, he notes the waiver in the first case was four years prior to the demand for speedy trial in the second case. He fails to note the dozen continuances he requested in the interim. Finally, he suggests the waiver document does not state that it was explained to him in Spanish. Yet, defense counsel can waive the right to speedy trial on behalf of the client, *see State v. LeFlore*, 308 N.W.2d 39, 41 (Iowa 1981); and, based on the many motions for continuance, intended to do so here. In sum, nothing in the record suggests Flores desired a trial on both cases within ninety days of the filing of the trial information in FECR069029. To the contrary, Flores waived speedy trial in FECR067438 and never reasserted the right.

Even if we consider the two cases together, the court did not violate Flores's right to a speedy trial. The district court delayed the consolidated trial date for good cause because Flores had not completed depositions and because he was in the custody of federal immigration authorities.

Importantly, Flores relies on Iowa Rule of Criminal Procedure 2.33(2)(b), not the right to speedy trial provided for by the Sixth Amendment of the Federal Constitution or Article I, Section 10 of the Iowa Constitution. *See State v. Bond*, 340 N.W.2d 276, 278 (Iowa 1983) (distinguishing rule-based and constitutional rights to speedy trial). Under the rule, a defendant who has not waived his right to a speedy trial "must be brought to trial within 90 days after indictment is found or the court must order the indictment to be dismissed unless good cause to the contrary be shown." Iowa R. Crim. P. 2.33(2)(b).

There are three exceptions to the ninety-day rule: (1) the defendant waived speedy trial, (2) the delay is chargeable to the defendant, and (3) where "good cause" exists for the delay. *See State v. Nelson*, 600 N.W.2d 598, 600 (Iowa 1999). When the State

satisfies its burden to show one of these exceptions applies, trial may be delayed. *State v. Miller*, 311 N.W.2d 81, 83 (Iowa 1981).

The primary exception at issue in this case is the "good cause" exception, though Flores did waive the right to speedy trial in the first case and some of the delay in the second case is chargeable to him too. On May 10, 2021, Flores agreed to waive speedy trial until July 13, 2021. Order for Arraignment; App. 48. On July 2, 2021, the State moved for a short continuance in both cases against Flores. Motion for Good Cause Finding For Continuance (7-2-2021); App. 50. The State relied on the fact that Flores was in federal custody and "a number of unresolved pretrial motions on key evidentiary issues and joinder of multiple trials, and the State anticipates having to put on evidence in support of its motions." *Id.*

The court held a July 7, 2021, hearing on the motion to continue. The State was prepared to try the case on July 20 but the court's next available date was July 27—or just fourteen days after the July 13 date Flores had originally requested. Transcript of Hearing on Motion for Good Cause (7-8-2021) p. 12, lines 4-14. Yet, defense counsel had a vacation planned for July 28 through August 4, and he asked to delay the case until August 24th. Tr. of 7-8-21 p. 13, line 22

– p. 14, line 7. The court settled on August 17 (which is when trial commenced). Thus, most of the delay beyond July 27 is attributable to Flores, through his counsel who had a vacation planned. This should frame the importance of speedy trial right to Flores and inform whether he is using the right as a shield or a sword in this case.

The speedy trial rules were meant to be a shield for the defendant, not a sword. *State v. Zaehringer*, 306 N.W.2d 792, 796 (Iowa 1981). "The rule was not intended to provide a defendant with a weapon to trap state officials and terminate prosecutions. Nor was it intended to be a device to give a defendant absolute immunity from prosecution." *State v. Hamilton*, 309 N.W.2d 471, 475 (Iowa 1981). Thus, a defendant "may not actively, or passively, participate in the events which delay his trial and then later take advantage of that delay to terminate the prosecution." *Finn*, 469 N.W.2d at 694.

"It is the public policy of the state of Iowa that criminal prosecutions be concluded at the earliest possible time consistent with a fair trial to *both* parties." Iowa R. Crim. P. 2.33(2) (emphasis added). Dismissing criminal charges because of a delay occasioned by the defendant would be brazenly contrary to the public interests

underlying the speedy trial rule. *Miller*, 311 N.W.2d at 83–84. "The time proscription of [the rule] is principally for the benefit of the defendant. A defendant who elects to forego this speedy trial right by causing or acquiescing in delay should not profit from the State's failure to obtain an extension of the time period for trial." *Id.* at 84.

Again, the speedy trial right may be waived. *See Winters*, 690 N.W.2d at 908; Iowa R. Crim. P. 2.33(2)(b). In fact, the Iowa Supreme Court has previously held that the right to speedy trial is not personal to the defendant. *See LeFlore*, 308 N.W.2d at 41. Appointed counsel may waive the right without the defendant's consent:

> the statutory right to a speedy trial under rule 27(2)(b) is not a personal right that can be waived only by the defendant. Defense counsel acting within the scope of his or her authority may waive this right on the defendant's behalf without the defendant's express consent. In the present case defense counsel expressly waived defendant's right to a speedy trial; counsel also waived this right by the succession of continuance motions. Defense counsel's action was within the scope of his authority, and the delay caused thereby was in no way attributable to the State.

Id. Similarly, the United States Supreme Court has acknowledged that "[a]lthough there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the

conduct of trial." *New York v. Hill*, 528 U.S. 110, 115 (2000). This is because "only counsel is in a position to assess the benefit or detriment of the delay to the defendant's case. Likewise, only counsel is in a position to assess whether the defense would even be prepared to proceed any earlier." *Id.* The Iowa Court of Appeals has since resolved cases in which a defendant attacked counsel's decisions to waive his or her speedy trial rights, noting that such matters are soundly within trial counsel's discretion. *See, e.g.*, *State v. Meyer*, No. 14-0661, 2015 WL 408112, at *1–2 (Iowa Ct. App. Jan. 28, 2015) (reversing district court's dismissal based on violation of speedy trial deadline, defense attorney's representation that a waiver of speedy trial rights would be filed operated as a waiver of defendant's speedy trial rights); *State v. Leyja*, No. 10-0040, 2010 WL 3503459, at *2 (Iowa Ct. App. Sept. 9, 2010) (defense counsel's request for continuance was an implicit waiver by counsel). Here, defense counsel's request to delay the trial further due to his vacation was an implicit waiver of that time on behalf of his client Flores.

And there was good cause for the shorter delay the State requested in July. The court granted the State's motion to continue

based on Flores being in federal custody as well as the unresolved pretrial matters:

> The State of Iowa has requested a Writ of Habeas Corpus Ad Prosequendum, and ICE has not responded as to whether or not it will honor the writ.
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Order Re: Motion for Good Cause Finding For Continuance pp. 1-2; App. 56-57.

According to the Iowa Supreme Court, "good cause focuses on only one factor: the reason for the delay." *Winters*, 690 N.W.2d at 908 (quotation omitted). Other circumstances of the delay "bear on the inquiry only to the extent they relate directly to the sufficiency of the reason itself." *Id.* (quotation omitted). Such circumstances include: "(1) the length of the delay, (2) whether the defendant asserted his or her right to a speedy trial, and (3) whether prejudice resulted from the delay." *Id.* But "if the reason for the delay is insufficient, the other factors will not avail to avoid dismissal." *Id.* (quotation and marks omitted).

Here, the surrounding circumstances bear on the reason for delay to show the reason was valid and sufficient. The delay was short. In fact, the State only needed seven days (from July 13 to July 20). Yet, due to congestion of the court docket from other cases with speedy trial deadlines, the next available court date was fourteen days away (July 27). Order Re: Motion for Good Cause Finding For Continuance p. 2; App. 57. Again, the delay beyond July 27 was at the request of defense counsel. And the case was set for this busy part of the (pandemic affected) calendar due to Flores's many motions to continue. This ties into Flores' assertion of the right to a speedy trial—it was inconsistent and contingent. Similarly, if the delay were truly prejudicial to Flores, defense counsel could not in good faith have delayed the trial for a vacation. There is zero indication of prejudice in the record.

Thus, the reason for delay here faces a relatively low hurdle. The first reason was that Flores was in the custody of the federal government for immigration reasons. This is a relatively rare occurrence and requires a petition for writ of habeas corpus ad prosequendum. In our federalist system, the State has no control over Flores's federal immigration status and the State has no power to

force the federal government to hand over custody of an immigrant. Although the State could have perhaps requested custody earlier, it is Flores's fault that the State had to find him and secure his custody for trial. The Iowa Supreme Court has noted a defendant "may not actively, or passively, participate in the events which delay his trial and then later take advantage of that delay to terminate the prosecution." *Finn*, 469 N.W.2d at 694. Although it is the State's job to bring Flores to trial, it is not the State's job to resolve his immigration status.

The existence of a dozen unresolved pretrial motions also counseled against the State requesting custody for trial too early. Thus, the first reason ties into the second reason supporting the court's good-cause finding. Of course, the mere existence of pretrial motions does not provide good cause for a delay. Instead, courts look at the underlying reasons:

> Our approach to good cause reveals that the determination of whether pretrial motions and pretrial discovery can excuse a failure to comply with the speedy-trial rule essentially rests on the strength of the underlying reasons for the delay in disposing of the motions or completing the discovery, not the mere existence of the motions or the request for discovery.

Winters, 690 N.W.2d at 909.

Here, the pretrial motions were filed recently and in volume. Flores moved for discovery and depositions twenty-four days into the ninety-day period. Motion for Discovery (5-6-2021). And the State filed a motion to consolidate and a motion seeking to protect the victim during her testimony, each of which Flores resisted. Each of those motions potentially necessitated witness testimony. Flores also filed a motion in limine on July 6—just seven days before the agreed upon trial date—highlighting multiple classes of evidence to exclude. Motion in Limine (7-6-2021). "Generally, a defendant must accept the passage of time that is reasonably necessary for a court to hear and rule on dispositive pretrial motions." *Winters*, 690 N.W.2d at 908. In short, there were multiple moving pieces that needed to be resolved, demonstrating the delay was a practical necessity.

The district court relied on *State v. Jentz*, 853 N.W.2d 257 (Iowa Ct. App. 2013), a case where a defendant traveled to Florida and incurred additional criminal charges delaying the Iowa trial. Flores distinguishes the case on the basis of his immigration detention being civil in nature as well as the length of the distance to Florida. Appellant's Br. p. 31. Yet, the analogous criterion is that

another sovereign had custody of the defendant through no fault of the State's.

Flores relies on two out-of-state cases, each of which is also easily distinguishable. First, he cites *State v. Montes-Mata*, 253 P.3d 354 (Kan. 2011). There, the Kansas Supreme Court affirmed the dismissal of a case on speedy trial grounds after rejecting the state's argument that a federal immigration *detainer* rendered Kansas's speedy trial rule inapplicable. *Id.* at 355-56. The defendant remained in state custody, and the Kansas Supreme Court explained a detainer is a "request for cooperation, not custody." *Id.* at 357. In other words, "the predominant view has been that a defendant is not 'in custody' in the sense necessary to support a petition for habeas corpus relief merely because he or she is the subject of a detainer from the ICE." *Id.* at 356-57. By contrast, Flores was actually in ICE custody which required the State of Iowa to petition the federal government to transfer custody to the State.

Similarly, the New York district court order Flores cites is distinct. In *People v. Betka*, 992 N.Y.S.2d 634 (N.Y. Crim. Ct. Sept. 16, 2014), a complaining witness was in ICE custody for part of the ninety-day speedy trial period. *Id.* at 885. Yet, the witness was

released from ICE custody before the ninety-day period and the state still sought to delay trial (through a New York process whereby the state files a document indicating whether it is ready for trial). *Id.* at 885. The court in *Betka*, dismissed for a speedy trial claim because the state did not exercise diligence to secure the witness after the witness exited ICE custody—namely, the court charged the state with 47 days of speedy trial time for this period and 135 total. *Id.* at 886-87. Thus, without the time after ICE custody, the state would have been charged with less than 90 days. The case is also distinguishable on the basis that Flores is not a prosecution witness in this case.

Third, Flores relies on *State v. Chavez-Romero*, 285 P.3d 195 (Wash. Ct. App. Sept. 11, 2012). That case is distinct because the state of Washington's rules are highly detailed and technical—designed "to cover all the reasons why a case should be dismissed under the rule." *Id.* at 200. Those rules were amended to eliminate a general due diligence standard like Iowa's good cause standard. *Id.* That case is also distinct because the prosecution released the defendant from custody with the specific knowledge that ICE would detain him and he would miss a pretrial hearing—thus putatively extending the speedy trial period from sixty to ninety days under Washington rules.

Id. There too, the court applied a rule extending the trial date for a willful failure to appear, which the appellate court held did not apply. *Id.* at 203. That Washington case based on a distinct set of rules carries little persuasive value.

The State promptly brought Flores to trial in these cases, and the facts indicate he now attempts to use the speedy trial rule as a sword. The convictions should be affirmed.

II. The district court correctly admitted an entire videotaped statement after Flores cross-examined the victim with selective portions of the statement.

Preservation of Error

The State does not contest error preservation.

Standard of Review

Iowa's appellate courts review evidentiary rulings for an abuse of discretion. *State v. Tipton,* 897 N.W.2d 653, 690 (Iowa 2017); *State v. Austin,* 585 N.W.2d 241, 243 (Iowa 1998).

Merits

Flores argues the district court erred by admitting Court Exhibit 201, a video-recorded interview of W.R. from 2016. The district court admitted the video under Iowa Rule of Evidence 5.106 and solely for the purpose of determining credibility—i.e., not as

substantive evidence. Tr. Vol. 3 p. 126, line 18 – p. 127, line 1; p. 182, line 25 – p. 184, line 9.

The relevant portion of the rule provides:

> If a party introduces all or part of an act, declaration, conversation, writing, or recorded statement, an adverse party may require the introduction, at that time, of any other part or any other act, declaration, conversation, writing, or recorded statement that in fairness ought to be considered at the same time.

Iowa R. Evid. 5.106(a).

Rule 5.106 is a codification of the common law "rule of completeness" which may "require the introduction of the remainder of any other writing, recording, or conversation which in fairness should be considered contemporaneously with the original evidence." Laurie Kratky Dore, 7 Iowa Practice: Evidence § 5.106:1 (2019 ed.). Prior to the enactment of the rules of evidence, the doctrine was codified in Iowa law. *Id.* (citing Iowa Code § 622.20).

"The scope of Rule 5.106 is necessarily broad." *Id.* Broader than its federal equivalent, Rule 5.106 applies to any "act, declaration, conversation, writing, or recorded statement." *Compare* Iowa R. Evid. 5.106(a); with Fed. R. Evid. 106 (referring only to recorded statements). Thus, "when one party inquires as to part of a

conversation, the other is entitled to the whole thereof, bearing upon the same subject." *State v. Rutledge*, 113 N.W. 461, 464 (1907).

"The rule of completeness aims to avoid misleading impressions left by creative excerpting." *State v. Hoskins*, 2013 WL 5508691, at *4 (Iowa Ct. App. Oct. 2, 2013) (citation omitted). In other words, the rule allows additional portions of the statement "in order to present a clear understanding of an entire event." *Knudsen v. Chicago and N.W. Transp. Co.*, 464 N.W.2d 439, 443 (Iowa 1990). As Flores notes, "the rule cannot be simply used as an 'end run around the usual rules of admissibility'" such as the hearsay rule. *Huser*, 894 N.W.2d at 509 (quotation omitted). Yet, here application of the rule was no end run. It was used exactly as intended—to remedy selective use of statements from the 2016 interview and to provide a clear and complete understanding of that event.

W.R. testified Flores committed various acts of sexual abuse against her. Flores's chief theory of defense was to argue W.R.'s disclosure of the various sex acts was delayed and inconsistent. He accomplished this chiefly by comparing her trial testimony with statements she had made previously. He often referenced statements W.R. made in the Exhibit 201—the 2016 interview at Project

Harmony. Flores attacked W.R.'s 2016 statements about when, where, and how he abused her. Tr. Vol. 3 p. 70, line 15 – p. 82, line 2.

Left unexplained, this selective use of statements from the 2016 interview could give the impression that W.R. was unclear or confused in her interview. A complete review of that recording yields a different picture. Thus, it was a wise and fair exercise of discretion to allow introduction of the entire video.

The district court correctly relied on *State v. Austin*, 585 N.W.2d 241, 243 (Iowa 1998). In *Austin*, using a summary of a videotaped interview, "Austin's attorney attempted to highlight inconsistencies between A.H.'s statements at the interview and her testimony at trial." *Id.* State successfully argued Austin's use of parts of the summary allowed the State to introduce the entire videotape. *Id.* The Iowa Supreme Court approved of the use of the videotape and affirmed. *Id.* "Under rule 106(a), we believe it is not the form of the evidence that opens the door, but rather the source and substance of the evidence that allegedly provides the predicate for offering the remainder of the "act, declaration, conversation, writing, or recorded statement . . . .' " *Id.* This case is materially identical to *Austin*.

And Flores cannot say he was surprised. The State sought a pretrial ruling on the issue. And the district court preliminarily advised Flores that cross-examination with select statements from the 2016 interview would render the entire recording admissible for the limited purpose of evaluating W.R.'s credibility. Tr. Vol. 2 p. 24, lines 7-24.

Flores argues the State goaded him into cross-examination using statements from the 2016 interview. To the contrary, Flores was free to choose how to cross-examine the victim. Indeed, he seems to have chosen his strategy even before the State's case-in-chief. As early as jury selection, Flores "hit pretty hard on" how the victim's inconsistent statements would be relevant. Tr. Vol. 2 p. 11, lines 16-24.

Even if Rule 5.106 did not apply, any error was harmless. "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Iowa R. Evid. 5.103(a); *State v. Parker*, 747 N.W.2d 196, 209 (Iowa 2008). Here, the case against Flores was strong and the evidence was not admitted as substantive proof.

III. The district court correctly admitted a co-conspirator's statements made in furtherance of the conspiracy.

Preservation of Error

Flores made a timely objection to the hearsay evidence he challenges in Division III of his brief. *See* Tr. Vol. 4 p. 12, lines 21-22. Error was preserved. *See* Iowa R. Evid. 5.103 (providing error not preserved unless, "In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.").

Standard of Review

Iowa's appellate courts review the admission of hearsay evidence for errors at law. *State v. Long*, 628 N.W.2d 440, 446 (Iowa 2001).

Merits

Third, Flores argues statements W.H. made to W.R.'s foster mother should not have been admitted under the hearsay exception for co-conspirator statements. Specifically, W.H. told Jennifer Bullock that she and Flores planned to leave the State of Iowa with W.R. and E.H. Tr. Vol. 4 p. 7, lines 16-23. The district court held:

> [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 [W.H.] 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.

Tr. Vol. 4 p. 15, line 16 – p. 16, line 4. The district court did not err.

Adjudicating hearsay, including the exclusion for co-conspirator statements, often requires a district court to make preliminary determinations of fact under Iowa Rule of Evidence 5.104(a). Appellate courts "give deference" to such factual findings in the sense that those determinations of preliminary facts will not be disturbed if they are not supported by substantial evidence in the record. *Parker*, 747 N.W.2d at 203.

The relevant exclusion from the hearsay rule is found in Iowa Rule of Evidence 5.801(d)(2)(E), which provides that a statement is not hearsay if it is "offered against a party and is … a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

Flores does not argue that no conspiracy existed, and he does not assert he and W.H. were not parties to the conspiracy. Instead,

he argues W.H.'s statements to Jennifer Bullock were not in furtherance of the conspiracy.

"Acts or declarations of a co-conspirator, to be admissible, must be in furtherance of the conspiracy; that is, in some measure or to some extent, it must aid or assist toward the consummation of the object of the conspiracy." *State v. Kidd*, 239 N.W.2d 860, 864 (Iowa 1976) (quotation marks omitted) (citing *State v. Gilmore*, 132 N.W. 53, 55-56 (Iowa 1911)). "Statements made in furtherance of a conspiracy can take a variety of forms. Some examples include comments designed to assist in recruiting potential members, to inform other members about the progress of the conspiracy, to control damage to or detection of the conspiracy, to hide the criminal objectives of the conspiracy, or to instill confidence and prevent the desertion of other members." *United States v. Johnson*, 200 F.3d 529, 533 (7th Cir. 2000). However, "[s]tatements which further the conspiracy must be distinguished from mere idle chatter, narrative declarations, and superfluous casual remarks which do not further the conspiracy." *Id.*

Here, W.H.'s statement was no mere idle chatter. W.H. had engaged in a pressure campaign to get her daughter to recant the

allegation of sexual abuse against her paramour. Tr. Vol. 2 p. 211, line 14 – p. 241, line 15. She succeeded for a time, only for Flores's unrelenting sexual abuse to cause W.R. to disclose again. Tr. Vol. 4 p. 28, line 2 – p. 31, line 18. That is when life changed for W.R. She was able to live with her great uncle, who happened to be married to Jennifer Bullock—a counselor at the Center Against Abuse and Sexual Assault. Tr. Vol. 4 p. 20, line 25 – p. 22, line 7; p. 28, line 2 – p. 31, line 18. This meant any attempt by W.H. to leave the state with W.R. would have to contend with Jennifer Bullock. And the record supports a finding that this conversation—actually there were four to five similar conversations—took place after Jennifer Bullock became involved. Tr. Vol. 4 p. 44, lines 4-22; p. 49, lines 6-12.

"Courts assess a statement's ability to advance the conspiracy in the context in which the statement was made." *Johnson*, 200 F.3d at 533. In this context, there is substantial evidence to support the district court's finding that W.H.'s statement to Jennifer Bullock was furthering the conspiracy. It could be seen as gauging the foster mother's response to the idea of extracting W.R. from Iowa. Or as "buttering her up" as the district court described it. Either way, it was a concrete step in incorporating Jennifer Bullock into the conspiracy.

Even if Rule 5.801(d)(2)(E) did not apply, any error was harmless. "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Iowa R. Evid. 5.103(a); *Parker*, 747 N.W.2d at 209. Here, a mother's hearsay statement of intent to retake custody of her child paled in comparison to W.R.'s in-court testimony accusing Flores of multiple acts of sexual abuse.

IV. The evidence was sufficient to support the jury's guilty verdicts.

Preservation of Error

The State does not contest error preservation.

Standard of Review

"Challenges to the sufficiency of the evidence are reviewed for correction of errors at law." *State v. Hansen*, 750 N.W.2d 111, 112 (Iowa 2008).

Merits

Fourth, Flores argues the evidence was insufficient to support the jury's verdicts. He argues "the State's entire case was based upon the credibility of one witness." The failure of this claim inheres in its recitation. The State only needs the testimony of the victim. *State v. Trane*, 934 N.W.2d 447, 455 (Iowa 2019) ("Here, the jury heard K.S.

testify that Trane repeatedly and forcibly inserted his finger in her vagina and repeatedly grabbed her hand and put it over his groin area. K.S.'s testimony, standing alone, is sufficient to support Trane's conviction on this count.").

And here, W.R. testified to each element of each of the crimes Flores committed against her. Tr. Vol. 2 p. 190, line 1 – p. 194, line 13; Tr. Vol. 3 p. 16, line 6 – p. 17, line 21; Tr. Vol. 3 p. 31, line 17 – p. 32, line 5. Indeed, Flores does not assert that proof of any element of any of the eleven crimes was missing, only that W.R.'s proof was not credible. It was the jury's role to determine credibility.

As the ultimate arbiter of credibility, the fact-finder was entitled to credit W.R. *See Schlup v. Delo*, 513 U.S. 298, 330 (1995) ("[U]nder *Jackson*, the assessment of the credibility of witnesses is generally beyond the scope of review."). In other words, the due-process-based standard explained in *Jackson v. Virginia* "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." 443 U.S. 307, 318-19 (1979). To hold otherwise would be to restore the archaic rule holding a victim's testimony is not enough to convict. *See State v. Hildreth*, 582

N.W.2d 167, 170 (Iowa 1998) (stating that "the alleged victim's testimony is by itself sufficient to constitute substantial evidence of defendant's guilt"); *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995) (en banc) ("The law has abandoned any notion that a rape victim's accusation must be corroborated.").

" 'Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury [is] free to reject certain evidence, and credit other evidence.' " *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012) (quoting *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006)). Indeed, "review on questions of sufficiency of the evidence is to determine if there is substantial evidence to support the verdict of the jury." *State v. Martens*, 569 N.W.2d 482, 484 (Iowa 1997) (internal string cite omitted). This occurs when "a rational trier of fact" viewing the evidence in the light most favorable to the State "could have found that the elements of the crime were established beyond a reasonable doubt." *State v. Keopasaeuth*, 645 N.W.2d 637, 640 (Iowa 2002) (citing *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994)). Here, the light most favorable to the State reveals truthful testimony by W.R. and guilt beyond a reasonable doubt.

V. The district court correctly overruled the motion for new trial because the verdict was not contrary to the evidence.

Preservation of Error

The State does not contest error preservation.

Standard of Review

The district court enjoys broad discretion in ruling on a motion for new trial, and appellate courts reverse only when that discretion was abused. *State v. Reeves*, 670 N.W.2d 199, 202-03 (Iowa 2003) ("On a weight-of-the-evidence claim, appellate review is limited to a review of the exercise of discretion by the trial court, not of the underlying question of whether the verdict is against the weight of the evidence."). A new trial is a remedy that should only be granted in the rarest of circumstances, and our Supreme Court has "caution[ed] trial courts to exercise this discretion carefully and sparingly when deciding motions for new trial based on the ground that the verdict of conviction is contrary to the weight of the evidence." *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998).

Merits

Fifth, Flores argues W.R.'s testimony cannot be credited. His only substantive argument in this section of his brief is that there was no corroborating evidence. Such a requirement is "pernicious and

outdated." *State v. Kraai*, 969 N.W.2d 487, 490-91 (Iowa 2022). In 1974, the Iowa legislature amended the code to explicitly remove such a requirement. *Id.* at 491. Instead, the applicable standard is the familiar one:

A motion for new trial must be denied unless the weight of the credible evidence preponderates heavily against the jury's verdict. *Ellis*, 578 N.W.2d at 659. The *Ellis* standard for new-trial motions requires the trial court to examine issues of credibility in assessing whether the verdict is contrary to the weight of the evidence. *Id.* "A trial court should not disturb the jury's findings where the evidence they considered is nearly balanced or is such that different minds could fairly arrive at different conclusions." *State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006). It is a power to be used "carefully and sparingly" lest it diminish the role of juries to decide facts. *Ellis*, 578 N.W.2d at 659.

To the extent Flores relies on W.R.'s temporary recantation, expert testimony explained that disclosure of child sexual abuse is a process. Tr. Vol. 2 p. 93, line 20 – p. 94, line 6. And a lack of familial support is "a really big factor" influencing a child to recant. Tr. Vol. 2 p. 96, line 24 – p. 97, line 22. Threats can also cause a child to recant.

Tr. Vol. 2 p. 98, lines 11-23. Flores's pressure campaign against W.R.—coordinated with the victim's mother and grandmother—explains the recantation in this case.

Similarly, redisclosure is recognized in the research and literature on child sexual abuse. Tr. Vol. 2 p. 99, lines 15-21. This can be explained by increased support or growth and maturity to realize the abuse is wrong. Tr. Vol. 2 p. 99, line 22 – p. 100, line 12. Again, this tracks perfectly with the facts of this case and supports the jury's credibility determination in favor of W.R. The district court correctly denied the motion for new trial.

VI. Flores's ineffective-assistance-of-counsel claim cannot be decided on direct appeal.

Preservation of Error

Error was not preserved, and ineffective assistance of counsel no longer excuses such failures. *See* Iowa Code § 814.7

Standard of Review

Ineffective assistance of counsel claims cannot be decided on direct appeal. Iowa Code § 814.7 (effective July 1, 2019). When properly before a court, ineffective assistance of counsel claims are reviewed de novo. *Krogmann v. State*, 914 N.W.2d 293, 306 (Iowa 2018). "Even under de novo review, the standard for judging

counsel's representation is a most deferential one." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Merits

Finally, Flores argues his trial counsel failed to object to witness vouching. This claim must be decided in postconviction relief proceedings:

> An ineffective assistance of counsel claim in a criminal case shall be determined by filing an application for postconviction relief pursuant to chapter 822. The claim need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for postconviction relief purposes, and the claim shall not be decided on direct appeal from the criminal proceedings.

Iowa Code § 814.7; *State v. Damme*, 944 N.W.2d 98, 109 (Iowa 2020) (holding section 814.7 precluded review of ineffective-assistance claim).

CONCLUSION

Flores received a speedy and fair trial, where he was convicted by sufficient evidence. The convictions must be affirmed.

REQUEST FOR NONORAL SUBMISSION

This case is appropriate for submission without oral argument.

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:

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