IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. KARI SCHWARTZ, Defendant-Appellant.	SUPREME COURT NO. 22-0390

APPEAL FROM THE IOWA DISTRICT COURT
FOR BUCHANAN COUNTY
HONORABLE JOHN BAUERCAMP, SENIOR JUDGE

APPELLANT'S BRIEF AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 24th day of February, 2023, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Kari Schwartz, 124 Hanna Blvd., Waterloo, IA 50701.

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ROUTING STATEMENT

Two issues in this case warrant review by the Iowa Supreme Court because they are substantial issues of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c).

First, this case asks the court to consider the application of the court's decisions in State v. Thoren, 970 N.W.2d 611 (Iowa 2022) and State v. Huston, 825 N.W.2d 531 (Iowa 2013), concluding evidence of an unfavorable administrative investigation was inadmissible against a defendant, in the inverse situation. Do these cases prohibit the admission of favorable results of an administrative investigation when offered by the defendant?

As well, this case asks the court to determine whether a sentencing court may consider less punitive sentencing options available in Iowa Code § 907.3 for a defendant convicted of a violation of chapter 709. Section 907.3 excludes consideration of the lesser sentencing options, such as deferred judgments

and suspended sentences, for those convicted of an offense in chapter 709 by a person who is a mandatory reporter and when the victim is under age eighteen. In this case, Schwartz was convicted a violation of chapter 709 but there were no jury findings that she was a mandatory reporter or that the victim was under age eighteen. Schwartz argues her Sixth Amendment rights are implicated, as held in Alleyne v. United States, 570 U.S. 99 (2013) and Apprendi v. New Jersey, 530 U.S. 466 (2000).

STATEMENT OF THE CASE

Nature of the Case. Kari Schwartz appeals from her conviction, judgment and sentence for sexual exploitation by a school employee, a class D felony in violation of Iowa Code § 709.15(3)(a) (2009).

Course of Proceedings. The State charged Kari Schwartz with sexual exploitation by a school employee, by pattern, practice or scheme, a class D felony in violation of Iowa

Code § 709.15(3) & (5)(a) (2009). (Trial Information) (App. pp. 4-5).

The State moved in limine to exclude any evidence that the investigation by the Independence High School into the allegations against Schwartz in 2009 resulted in a finding of "unfounded." (State's Motion in Limine, ¶ 7) (App. pp. 12). Schwartz resisted, and the district court initially ruled that no mention of the prior investigation would be allowed. (11/4/21 Trial Tr. Day 2, p. 8 L. 18 – p. 12 L. 22). Upon further discussion, the court concluded evidence that an investigation was conducted in 2009 would be admitted, but no evidence regarding the results of the investigation would be allowed. (11/4/21 Trial Tr. Day 2, p. 12 L. 25 – p. 14 L. 20).

After a jury trial, Schwartz was found guilty as charged. (Verdict Form) (App. p. 15). Schwartz moved for a new trial, arguing the court improperly instructed the jury on the definition of "sexual conduct" and improperly excluded evidence of the results of the school's investigation into Schwartz's

interactions with A.S. (Motion for New Trial, p. 1-2) (App. pp. 16-17). The court denied the motions. (Sentencing Tr. p. 7 L. 4-14) (Judgment & Sentence) (App. pp. 29-31).

Schwartz also argued it was improper to apply Iowa Code § 907.3 (2021), prohibiting the court from considering deferred or suspended sentencing options when sentencing Schwartz as a violation of the Sixth Amendment principles under Alleyne v. United States, 570 U.S. 99 (2013), and Apprendi v. New Jersey, 530 U.S. 466 (2000). (Motion for New Trial, p. 3-4) (App. 18-19). The court also denied this motion, and proceeded to sentence Schwartz to an indeterminate term of imprisonment not to exceed five years, finding it was precluded from considering less punitive sentencing options by Iowa Code § 907.3. (Sentencing Tr. p. 8 L. 4-6) (Judgment & Sentence) (App. pp. 29-31). The court imposed and suspended the minimum fine. (Judgment & Sentence) (App. pp. 29-31). Schwartz filed a timely notice of appeal. (Notice of Appeal) (App. pp. 32-33).

Facts. In the fall of 2009, A.S. was a senior at Independence High School, and Kari Schwartz was her art teacher. (11/4/21 Trial Tr. Day 2, 31:7 – 35:20). The art room at the Independence High School was the only classroom on the second floor of the school building. The second floor also included a darkroom, a storage room, a back hallway, and an office. (11/8/21 Trial Tr. Day 4, 117:17-25; 122:17 – 123:9) (Def. Ex. D) (Conf. App. pp. 23). The south stairwell was well-lit and the bottom of the stairs opened into a hallway facing the high school office and near the gym. (11/8/21 Trial Tr. Day 4, 122:7-16). The south stairwell was more commonly used than the north stairwell, which was smaller and darker and didn't open into a hallway on the ground floor, but instead led to the basement. The door from the hallway on the ground floor into the south stairwell was regularly kept open, as was the door to the school office. (11/8/21 Trial Tr. Day 4, 123:10 – 124:24) (Def. Exs. E, F) (Conf. App. pp. 24-25). The south stairwell was not a place where one would expect privacy—it was frequently

used by students and noise traveled up and down the stairwell, as well. (11/8/21 Trial Tr. Day 4, 128:15-25).

That fall, A.S.'s mother was undergoing chemotherapy for cancer, causing anxiety for A.S. and stress in her family. (11/4/21 Trial Tr. Day 2, 42:13-22). Initially, A.S. thought Schwartz was "great" and considered her a mentor. (11/4/21 Trial. Tr. Day 2, 37:2-10). A.S. noticed that Schwartz spent a lot of time talking to her and her tablemates during class and shared personal stories with them. A.S. also thought Schwartz hugged her a lot and gave her unusually long hugs. She testified Schwartz talked about wanting to do things with her outside of school, such as rollerblading. Schwartz complimented her, telling her she was beautiful and strong. It stood out to her because other teachers did not give her that sort of attention. (11/4/21 Trial Tr. Day 2, 38:7 – 40:17; 43:1 – 47:24).

At the end of September, A.S. invited the students in her art class to come to her family's pumpkin farm and pick

pumpkins. She recalled that Schwartz overheard and invited herself. While they worked, Schwartz sent a text message to A.S. that said, "love ya." After they were done working, someone took a picture of A.S. and Schwartz, hugging and smiling for the camera. (11/4/21 Trial Tr. Day 2, 47:25 – 51:11; 58:1-12; 60:9 – 61:13) (State's Ex. 3) (Conf. App. p. 11). Later that night, A.S. received more text messages from Schwartz telling her that A.S. meant the world to her. The next day, Monday, A.S. got a long email from Schwartz that included a statement, "So I am probably not suppose[d] to love my students, but I do you." (11/4/22 Trial Tr. Day 2, 51:11 – 52:12; 67:15-68:1) (State's Exs. 5, 6) (Conf. App. pp. 12-13). A.S. felt uncomfortable about the messages and showed them to another teacher the next day. That teacher reported it to the principal. (11/4/21 Trial Tr. Day 2, 52:13 – 53:25; 180:17 – 182:7; 11/5/21 Trial Tr. Day 3, 10:13 – 12:2).

A.S. recalled that she was withdrawn and quiet that day during art class. She testified that Schwartz noticed and tried

to get her to tell her why at the end of the class. When A.S. told Schwartz that she didn't want to talk about it, Schwartz took her by the arm and led her to the top of the south stairwell outside the classroom. A.S. sat down on the stairs and Schwartz sat behind her, straddling her and hugging her. A.S. began crying, with her face against Schwartz's arm, and Schwartz whispered in her ear, "It's going to be okay, it's going to be okay." A.S. recalled that while Schwartz whispered, she rubbed A.S.'s body with her right hand, feeling her chest and hips and reaching under her pants down toward her pubic area. Two students entered the stairwell, interrupting the encounter. Schwartz stood up, and A.S. hurried down the stairs as the other students passed her. (11/4/21 Trial Tr. Day 2, 71:16 – 74:1; 78:9 -81:5).

Within a few days, the school opened an investigation. While A.S. provided copies of the emails and described the text messages, she never told anyone about the encounter in the stairwell. (11/4/21 Trial Tr. Day 2, 86:8 – 87:4; 103:12 –

105:7; 184:15 - 188:12; 189:7-9). A.S. stopped attending Schwartz's art class, and a short time later, Schwartz left the school. (11/4/21 Trial Tr. Day 2, 88:17-25; 188:20-25).

Almost ten years later, in 2018, A.S. found out Schwartz was teaching in another school. She wrote a letter to the administration and told them about her history with Schwartz. (11/4/21 Trial Tr. Day 2, 114:12 – 116:22) (Def. Ex. A) (Conf. App. p. 20). In 2020, she contacted the police and reported the incident in the stairwell. She explained that she reported it because she knew Schwartz was still teaching and because she thought the statute of limitations on any criminal prosecution would expire upon her 28th birthday. (11/4/21 Trial Tr. Day 2, 90:17-91:20; 105:8-11).

A.S. acknowledged that when she first reported the incident to the police, she was confused about the timing of the events and some of the details. She was still confused at the time of her deposition, but she explained that she was confident of the details and the timeline at the time of her trial testimony

because she had since had a chance to "get a good grasp of her memory." (11/4/21 Trial Tr. Day 2, 105:8 – 108:1; 108:11-109:11). She also explained that she has been journaling and writing poetry about the incident throughout the years since high school. (11/4/21 Trial Tr. Day 2, 142:11 – 145:2; 148:12 – 151:24; 156:1-8) (State's Ex. 11) (Conf. App. p. 17).

Amy Balli was a student at Independence High School with A.S. She was not friends with A.S. and was upset when Schwartz left school. She knew A.S. was involved somehow, so she stole A.S.'s cell phone. Her plan was to wipe it and keep it for herself. When she looked through the text messages on the phone she saw messages between A.S. and Schwartz that "shocked" her because she found them inappropriate. At the time of trial, however, she could not recall the substance of the messages. When she found out A.S. had reported the stolen phone to the police, she returned it to her. (11/4/21 Trial Tr. Day 2, 159:17 – 165:17; 168:14 – 169:14).

Kari Schwartz testified she was an art teacher at Independence High School in the fall of 2009. She had been hired in 2005. (11/8/21 Trial Tr. Day 4, 134:12 - 134-135). A.S. was in her second period drawing class. (11/8/21 Trial Tr. Day 4, 142:12 – 143:12). She first encountered A.S. outside of the classroom at the homecoming parade when A.S. approached her and commented on the fact that she was rollerblading. She was photographed later that day sitting across the laps of A.S. and another student because the photographer suggested it. (State's Ex. 2) (Conf. App. p. 10). (11/8/21 Trial Tr. Day 4, 143:16 – 144:7; 147:9 – 148:16).

At parent-teacher conferences the next week, A.S. came in with her mother and they told Schwartz about their family's pumpkin patch and how they needed a lot of help picking the pumpkins. The next day A.S. brought it up during art class and invited the entire class to help. She specifically included Schwartz in the invitation. A.S. asked for Schwartz's cell

phone number so she could text her directions. (11/8/21 Trial Tr. Day 4, 148:17 – 151:19).

Schwartz helped with pumpkin-picking on Sunday, along with about thirty other people. It was labor-intensive work and she didn't interact with A.S. until the end of the day as she was ready to leave. She sent A.S. a text message that read, "Leaving. Love ya." Schwartz recalled that A.S.'s mother asked to take a photo of them because they were so muddy. (11/8/21 Trial Tr. Day 4, 152:14 – 158:23) (State's Exs. 1, 3) (Conf. App. pp. 9, 11).

The next day at school, Schwartz noticed A.S. was crying and when Schwartz tried to talk to her about it during class, A.S. indicated she would talk to her later. At the end of class, A.S. was waiting at Schwartz's desk. Because there were students working in the classroom and using the air compressor, they went into the stairway to talk. They stepped into the south stairwell, and A.S. sat on the stairs and Schwartz sat next to her. A.S. told Schwartz things that were troubling

her and cried. Towards the end of the conversation, A.S. was crying hard and Schwartz put her arm around her shoulder and told her it was going to be okay. Shortly after, the bell rang and kids started coming up the stairs. Because she felt the conversation was being cut short, Schwartz asked for A.S.'s email address, and Schwartz promised to write to her later that day. She sent A.S. the email submitted as State's Ex. 6. (11/8/21 Trial Tr. Day 4, 158:24 – 165:11) (State's Ex. 6) (Conf. App. p. 13). Schwartz never grabbed A.S., never groped her and never put her hand down her pants. (11/8/21 Trial Tr. Day 4, 229:13-18).

They exchanged text messages and emails later that night. (11/8/21 Trial Tr. Day 4, 168:12 – 171:24). (State's Ex. 5, 7, 10) (Conf. App. pp. 12, 14, 16). The next day, Tuesday, A.S. was quiet and wore headphones during class. Schwartz was concerned and emailed her. Schwartz never got a response and A.S. continued to be withdrawn during class the rest of the week. Schwartz eventually reached out to another teacher that

A.S. was close to, but had no further communication with A.S. herself. (11/8/21 Trial Tr. Day 4 173:16 – 175:25) (State's Ex. 10) (Conf. App. p. 16).

Schwartz testified that the emails she sent were not meant to be sexual or romantic in nature. Rather she only wanted to build A.S. up and help her with whatever was bothering her. Schwartz never intended to have any sort of relationship with A.S. other than a student-teacher relationship. She realized later that some of the language she used in the emails sounds bad out of context, but at the time she believed she was doing what A.S. needed. (11/8/21 Trial Tr. Day 4, 165:11 – 168:11; 171:20 – 173:15).

Michele Staker, a Uniserv director with the Iowa State Education Association, testified that as part of her role she conducts trainings and ethics presentations for teacher groups. (11/8/21 Trial Tr. Day 4, 14:19 – 17:6). She testified that a common issue she sees with newer teachers is that they struggle to figure out exactly how to relate to students and set

appropriate boundaries. It is especially difficult when the new teachers are younger and the students are older—the relatively small age difference makes it harder to draw the line between an appropriate student/teacher relationship rather than a friendship. (11/8/21 Trial Tr. Day 4, 17:10 – 21:14).

Dr. Kimberly MacLin testified as an expert on perception and memory for the defense. As a Ph.D. in psychology, her primary occupation was teaching psychology at the University of Northern Iowa, but she had also worked with various police departments to ensure they use best practices to collect eyewitness memory evidence and for eyewitness identifications. (11/8/21 Trial Tr. Day 4, 40:13 - 49:10). Dr. MacLin explained that memory works differently than most people think it does. Memory is not perfect and is not like a file on a computer that a person replays when they remember an event. Memory is distributed across the various locations of the brain. "And so when we use memory, we're pulling information together, we're not replaying an event from the past." She noted that memory

is extremely malleable and by its nature prone to error. Many things can contaminate memory, including the vocabulary used to ask a question about an event, how remote in time the event is, how often the person talks about the event, conversations with others, media exposure, and hearing about similar events. She noted that memory is extremely prone to error because it's impossible to pay attention to all aspects of an event when it occurs, so our brain has to fill in the gaps in memory. (11/8/21 Trial Tr. Day 4, 50:16 – 71:17). She noted that in the case of sex abuse cases, partial disclosures and the recollection of additional details over time are problematic because the opportunities for contamination are greater the longer the someone waits to disclose. There is no way to know if the additional details, recalled later, are real or if they are the result of contamination. (11/8/21 Trial Tr. Day 4, 88:15 – 89:8).

Grace Dorman was a student in Schwartz's art class in the fall of 2009. She sat at A.S.'s table and recalled Schwartz talking to them, but didn't think Schwartz spent an excessive

amount of time hanging around their table—no more time than she spent at all the tables. She also denied that Schwartz engaged in inappropriate conversation with them. (11/8/21 Trial Tr. Day 4, 102:1 – 105:14).

A.S.'s mother denied inviting Schwartz over to pick pumpkins. However, she agreed that a lot of people come to pick pumpkins, so although they were "alarmed" by Schwartz's appearance, "it was okay." (11/8/21 Trial Tr. Day 4, 240:12 – 243:11).

ARGUMENT

I. The evidence that Schwartz employed "[a] pattern or practice or scheme of conduct to engage in" sexual conduct with A.S. was insufficient.

A. Error Preservation. Because Schwartz proceeded to trial and has been convicted, she may challenge to the sufficiency of the evidence supporting her conviction on direct appeal whether or not she made a sufficient motion for judgment of acquittal. State v. Crawford, 972 N.W.2d 189, 198 (Iowa 2022). Nevertheless, Schwartz moved for a judgment of

acquittal, the State resisted, and the district court denied her motion. (11/5/21 Trial Tr. Day 3, 61:3 – 64:19).

B. Standard of Review. Challenges to the sufficiency of the evidence are reviewed for correction of errors at law. Crawford, 972 N.W.2d at 201. The court will consider whether the evidence, taken in the light most favorable to the verdict, is supported by substantial evidence in the record. Crawford, 974 N.W.2d at 516. Substantial evidence is evidence that would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. Id. Evidence which only raises suspicion, speculation, or conjecture is insufficient. Id. "The evidence must at least raise a fair inference of guilt as to each essential element of the crime." Id. at 516-17.

C. Discussion. To prove Schwartz guilty of sexual exploitation by a school employee, the State must prove that Schwartz engaged in a "pattern or practice or scheme of conduct to engage in" "any sexual conduct with a student for the purpose of arousing or satisfying the sexual desires of the

school employee or the student." See Iowa Code § 709.15(3)(a)(1)–(2) (2009); State v. Wickes, 910 N.W.2d 554, 569 (Iowa 2018). (Jury Instruction No. 14) (App. p. 13).

"Pattern or practice or scheme of conduct" is not defined in section 709.15. When the Iowa Supreme Court considered this language in Wickes, the court noted the definition of "scheme" in Black's Law Dictionary: "[a] systemic plan; a connected or orderly arrangement" or "an artful plot or plan, usu. to deceive others." Scheme, Black's Law Dictionary (11th ed. 2019); see also Wickes, 910 N.W.2d at 569. The Iowa Supreme Court concluded in Wickes that "scheming to engage in 'any sexual conduct with a student,' even if it is only one student over a forty-five-day period . . . constitutes a 'pattern or practice or scheme of conduct' criminalized in Iowa Code section 709.15(3)(a)(1)." Id. The "scheme" in Wickes consisted of "dozens of hugs, thousands of messages Wickes exchanged with A.S., the contents of the messages, and the photographs. All of this constitutes substantial evidence that Wickes was

engaged in a pattern, practice, and scheme to engage in sexual conduct with A.S." Wickes, 910 N.W.2d at 570. Specifically, the thousands of messages included discussions of Wickes's sexual frustrations with his wife, described his desire to cuddle and hug and show physical affection, and provided for the arrangement of daily hugs with A.S. Wickes, 910 N.W.2d at 560. "Wickes made a plethora of statements to A.S. about how sexually attractive he found her and his desire to be in a romantic relationship with her." Id. It was also evident from his messages that he knew the hugs he sought from her were inappropriate, calling himself a "creeper," a "pedophile," "pervy," and otherwise acknowledging that he desired a relationship with her that was illegal because of their age difference. Id. at 560-61. He specifically commented on her booty and her breasts, and eventually asked her directly if she would "take their relationship further" after she graduated. Id. at 560-62.

In this case, the evidence was insufficient to establish Schwartz engaged in a "pattern or practice or scheme of

conduct" to engage in sexual conduct with A.S. The evidence of Schwartz's "scheme" consisted of a handful of emails and text messages over the course of three days and the fact that Schwartz helped A.S.'s family pick pumpkins along with dozens of other members of the public.

A.S. was Schwartz's student in the fall of 2009. A.S. had no contact with Schwartz after September 29 of that year. Thus, the entirety of their interactions took place through the course of roughly a month. Although A.S. felt Schwartz gave her extra attention during class, A.S. sat at a table with three other students, so any interactions with A.S. also necessarily included her tablemates. (11/4/21 Trial Tr. Day 2, 38:7 – 40:17). As well, that was the nature of the advanced art class—students worked on their projects during class while Schwartz circulated through the classroom, working her way from table to table to give feedback to the students. (11/8/21 Trial Tr. Day 4, 140:2-22). One of A.S.'s tablemates testified that Schwartz did not spend excessive amounts of time at their table

compared with the other tables. (11/8/21 Trial Tr. Day 4, 102:1 – 105:14).

The heart of the State's case that Schwartz was engaged in a scheme to engage in sexual conduct with A.S. involves the interactions between Schwartz and A.S. during the last few days of September. A.S.'s family owned a commercial pumpkin patch and invited members of the public to pick pumpkins from the field to transport to be sold. Although it was disputed whether Schwartz was invited by A.S.'s mother or whether she felt included in the invitation A.S. put out to the entire art class, Schwartz helped the family harvest pumpkins, along with about thirty other people. As they finished up their work, A.S., Schwartz and others hammed it up for the camera by posing with their muscles flexed and hugging each other while covered in mud. (11/4/21 Trial Tr. Day 2, 47:25 – 51:11; 11/8/21 Trial Tr. Day 4, 148:17 – 154:14; 243:6-11) (State's Exs. 1,3) (Conf. App. pp. 9, 11).

Over the next two days, Schwartz and A.S. exchanged a handful of emails and text messages. The substance of these emails do not establish that Schwartz was scheming to engage in sexual conduct with A.S. Instead, a reading of Schwartz's messages reveal they are misguided attempts to "build up" A.S. and make her feel better after A.S. indicated that she was feeling troubled, whether upset about her mother's illness or something else. (11/8/21 Trial Tr. Day 4, 145:17-22).

The State's evidence consisted of three emails and four text messages over several days in which Schwartz told A.S. that she wished she "could fix all [her] hurts," that she "would do anything" for A.S., that A.S. was worth the world and she "loved" her, and that she was "wonderful" and had "a heart of gold." (State's Exs. 5, 6, 10) (Conf. App. pp. 12-13, 16). Schwartz indicated she wanted "to be here for" A.S., that A.S. "tugs at her heart strings" and gives "the best hugs ever." She offered to be there for A.S. "anytime day or night." "I am probably not suppose[d] to love my students, but I do you." (State's Ex. 6,

10) (Conf. App. pp. 13, 16). While the content of these messages may evidence an imprudent interest in A.S. they are do not show a scheme to engage in sexual conduct.

In this case, the limited interactions between Schwartz and A.S., the short time frame, and the content of the messages stand in sharp contrast to the thousands of sexually-charged messages and hugs exchanged over the court of forty-five days in Wickes. Accordingly, the evidence was insufficient to show Schwartz engaged in scheme or course of conduct to engage in sexual conduct with A.S.

D. Conclusion. Because the evidence was insufficient to establish that Schwartz engaged in a scheme to engage in sexual contact with A.S., her conviction should be vacated and her case remanded for judgment entry on the lesser included offense of sexual exploitation by a school employee.

II. The district court erred by instructing the jury that "hugging" constituted "sexual conduct."

A. Error Preservation. Schwartz objected to the court's inclusion of "hugging" in the definition of "sexual conduct" in

Jury Instruction No. 16. (11/9/21 Trial Tr. Day 5 9:13 – 10:10). The State resisted, and the court overruled Schwartz's objection. (11/9/21 Trial Tr. Day 5 10:11 – 11:18; 14:16-22). Error has been preserved. State v. Ondayog, 722 N.W.2d 778, 785 (Iowa 2006).

B. Standard of Review. Challenges to jury instructions are reviewed for correction of errors at law. State v. Benson, 919 N.W.2d 237, 241 (Iowa 2018). If a jury instruction misleads the jury or materially misstates the law, the appellate court will reverse and remand for a new trial. Id. at 241-42.

C. Discussion. Schwartz was prosecuted for sexual exploitation by a school employee under Iowa Code § 709.15 (3)(a)&(b) (2009). The statute defines sexual exploitation as follows:

> Sexual exploitation by a school employee occurs whenever any of the following are found:
>
> a. A pattern or practice or scheme of conduct to engage in any of the conduct described in paragraph "b".
>
> b. Any sexual conduct with a student for the purpose of arousing or satisfying the sexual desires of the school employee or student. *Sexual conduct*

> *includes but is not limited to the following: kissing, touching of the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubes, or genitals;* or a sex act as defined in section 702.17.

Iowa Code § 709.15 (3) (2009) (emphasis added).

In this case, instead of using the statutory definition of sexual conduct, the district court altered the language of the statute and added "hugging" to the list of per se sexual conduct: " 'Sexual conduct' includes, but is not limited to kissing, *hugging*, touching of the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubes, or genitals, or a 'sex act.' "[1] (Jury Instruction No. 16) (App. p. 14). This instruction incorrectly expanded the definition of the sexual conduct and allowed the jury to convict Schwartz based on a misunderstanding of the law.

The district court relied on the holding in State v. Wickes, 910 N.W.2d 554, 567 (Iowa 2018). In Wickes, the Iowa Supreme Court concluded "hugs *can* constitute sexual conduct

[1] There was no allegation in this case that Schwartz engaged in a "sex act" as defined in Iowa Code § 702.17. (11/9/21 Trial Tr. Day 5, 26:1-27:19) (State's closing argument).

under Iowa Code section 709.15(3)(a)(2)."[2] Wickes, 910 N.W.2d at 567 (emphasis added). But the court did not conclude hugs always constitute sexual conduct. Instead, the court concluded that the determination of whether a hug constituted sexual conduct depended on a consideration of the context and circumstances of the hug. Wickes, 910 N.W.2d at 566. Specifically, the State had to show that the hugs were given for sexual gratification, and the court concluded the hugs Wickes gave his student were for sexual gratification after considering Wickes comments and description of the hugs indicating they were sexual in nature and a substitute for more intimate touching. Wickes, 910 N.W.2d at 567 (quoting Wickes's statements including that he knew the hugs were "wrong" and that they made him a "pedophile.") But the court recognized that a hug could also be innocent of any sexual intent: "It is important to note that nothing should prohibit teachers from

[2] The Supreme Court was considering the 2015 version of this statute. The definition of "sexual conduct" did not change between 2009 and 2015. Compare Iowa Code § 709.15 (2009) with § 709.15 (2015).

hugging students for reassurance, comfort or in congratulation without putting themselves at risk of being charged with the crime of sexual exploitation." Wickes, 910 N.W.2d at 566.

In this case, the given instruction informed the jury that hugs were definitively "sexual conduct." Erroneous jury instructions are presumed prejudicial unless the record affirmatively establishes a lack of prejudice. State v. Murray, 796 N.W.2d 907, 908 (Iowa 2011). The record in this case does not show that lack of prejudice. Schwartz did not deny that she hugged A.S. on several occasions. (11/8/21 Trial Tr. Day 4, 195:13 – 196:14) (admitting hugging A.S. three times); State's Ex. 3 (photo of Schwartz and A.S. hugging). She did deny that the hugs were sexual in nature and insisted they were either done in an attempt to reassure or comfort A.S. or were done in a playful spirit at the prompting of others during homecoming festivities or after picking pumpkins. (11/8/21 Trial Tr. Day 4, 152:14 – 158:23) (State's Ex. 3) (Conf. App. p. 11). The State

emphasized to the jury that hugging was a sexual conduct in its closing arguments. (11/9/21 Trial Tr. Day 5, 39:6 – 40:21).

The only other evidence of possible sexual conduct between Schwartz and A.S. involved A.S.'s allegations that Schwartz groped her in the stairwell. This allegation was strongly contested at trial. Schwartz denied she touched A.S.'s body at all but acknowledged she put her arm around A.S.'s shoulders, in a sort of side hug. (11/8/21 Trial Tr. Day 4, 158:24 – 165:11). A.S. did not report the alleged groping in the stairwell until more than ten years later, despite being involved in the school's investigation in 2009. (11/4/21 Trial Tr. Day 2, 86:8 – 87:4; 103:12 – 105:7; 184:15 – 188:12; 189:7-9). Thus, the record does not affirmatively establish a lack of prejudice.

D. Conclusion. Because the district court erroneously instructed the jury that hugging was per se sexual conduct, Schwartz's conviction should be vacated and her case remanded for a new trial.

III. The district court erred by refusing to allow Schwartz to introduce evidence that the school's investigation in Schwartz's misconduct resulted in an "unfounded" finding.

A. <u>Error Preservation</u>. The State moved in limine to exclude as irrelevant any evidence that an investigation by the Independence School District and the Iowa Board of Education determined the allegation of misconduct was "unfounded." (State's Motion in Limine ¶ 7) (App. p. 12). Schwartz resisted. (11/4/21 Trial Tr. Day 2, 7:22 – 12:14). The district court granted the State's motion. (11/4/21 Trial Tr. Day 2, 12:15-22). The court initially ruled that no mention of the school's investigation was allowed, but upon reconsideration decided that the investigation could be referenced but prohibited any discussion of the results. (11/4/21 Trial Tr. Day 2, 12:25 – 14:20). Schwartz renewed her objection in her motion for new trial. (Motion for New Trial) (App. pp. 16-19). This motion was overruled. (Sentencing 7:4-14). Because Schwartz resisted the State's motion in limine, a hearing was held on the issue, and the court issued a definitive ruling on the admissibility of

the evidence, error was preserved. State v. Alberts, 722 N.W.2d 402, 407 (Iowa 2006).

B. Standard of Review. The appellate court will review evidentiary rulings for an abuse of discretion. State v. Thoren, 970 N.W.2d 611, 620 (Iowa 2022). " 'A district court abuses its discretion when it bases its decisions on grounds or reasons clearly untenable or to an extent that is clearly unreasonable … [or] if it bases its conclusions on an erroneous application of the law.' " Id. (quoting Stender v. Blessum, 897 N.W.2d 491, 501 (Iowa 2017)).

C. Discussion. Evidence is relevant if it "has any tendency to make a fact more or less probable than it would be without the evidence." Iowa R. Evid. 5.401. Relevant evidence is generally admissible but may be excluded "its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Iowa Rs. Evid. 5.402, 5.403. The court will employ

a two-part test after determining the evidence is relevant to determine whether it should be excluded. State v. Thoren, 970 N.W.2d 611, 622 (Iowa 2022). "First we consider the probative value of the evidence. Second, we balance the probative value against the danger of its prejudicial or wrongful effect upon the triers of fact." Thoren, 970 N.W.2d at 622 (internal citations omitted). Normally, the appellate court "will defer to the district court's balancing of these factors, [but] deference is difficult . . . where the district court did no balancing." Id. In this case, the district court did not explain its ruling or conduct any balancing on the record. (11/4/21 Trial Tr. Day 2, 12:25 – 14:20).

The State argued the evidence should have been excluded because it was irrelevant, it invaded the province of the jury, it was prejudicial, and it would result in "a trial within a trial." (State's Motion in Limine ¶ 7) (App. p. 12) (11/4/21 Trial Tr. Day 2, 7:22 – 8:17; 11:6 – 12:11).

1. *The evidence was relevant.* The evidence that the prior investigation ended in an "unfounded" conclusion was relevant. " '[R]elevance is a relatively low bar....' " State v. Thoren, 970 N.W.2d 611, 622 (Iowa 2022) (quoting State v. Neiderbach, 837 N.W.2d 180, 238 (Iowa 2013) (Appel, J., concurring specially)). Although the Supreme Court concluded in State v. Huston that a DHS founded child abuse report against the defendant was not relevant and should have been excluded, that holding does not end the inquiry in Schwartz's case. State v. Huston, 825 N.W.2d 531, 537 (Iowa 2013) ("Whether or not the abuse report was deemed founded is irrelevant to any issue for the jury to decide."). First, more recent Supreme Court authority indicates the result in Huston is not a blanket holding regarding the relevance of all administrative investigations in criminal cases. In Thoren, the Supreme Court reached a different conclusion about the relevance of an administrative investigation: "That Thoren was investigated by the Board using different standards does not in

itself make evidence from the investigation irrelevant to the criminal charges." Thoren, 970 N.W.2d at 622.

In this case, the evidence that an investigation occurred was admitted but the evidence of the conclusion of the investigation was excluded. That meant the jury learned that A.S. reported Schwartz's conduct to a teacher who reported it to the principal. (11/4/21 Trial Tr. Day 2, 52:13 – 53:25; 180:17 – 182:7; 11/5/21 Trial Tr. Day 5, 10:13 – 12:2). The jury also learned that Schwartz was investigated and shortly after she left her employment with Independence School District. (11/4/21 Trial Day 2, 88:20 – 89:1; 188:20-25). The obvious inference the jury would make is that the school concluded Schwartz had acted improperly and was forced to leave her job. Thus, the evidence that the result of the investigation was an "unfounded" finding was exculpatory and relevant to the jury's determination of guilt in the criminal case.

2. *The probative value of the evidence was not substantially outweighed by the risk of unfair prejudice,*

confusing the issues, or misleading the jury. Courts have generally been reluctant to allow evidence of other investigations into evidence in a criminal trial because of a concern that the evidence will unduly influence the jury to rely on the results of the other investigation to reach their verdict in the criminal case, particularly when the evidence is offered against a defendant. See Thoren, 970 N.W.2d at 623-24 (discussing high risk that juries will treat agency decisions as "official, state-sanctioned results"); Huston, 825 N.W.2d at 537-38 (discussing danger jury would be unfairly influenced by agency conclusion that defendant was guilty of child abuse). Although courts have also affirmed the exclusion of agency investigations when offered by the defendant, concluding the district court's exclusion of the evidence did not amount to an abuse of discretion, the concern about the risk of unfair prejudice is reduced. See, e.g., United States v. MacDonald, 688 F.2d 224, 230 (4th Cir. 1982) ("While the Court properly could have admitted the evidence [of prior military

investigation], we do not question the ruling of declination."); United States v. Vasquez, 540 Fed.Appx. 623, 626-27 (9th Cir. 2013) (deferring to district court's balancing of probative value and risk of prejudice of administrative investigation into fight that led to criminal charges and concluding the exclusion of the evidence was not an abuse of discretion).

"[T]he purpose of all evidence is to sway the fact finder." State v. Mitchell, 633 N.W.2d 295, 301 (Iowa 2001) (Neuman, J., dissenting). Exclusion of the evidence is only necessary when the evidence is unfairly prejudicial "in a way that substantially outweighs its probative value." Huston, 825 N.W.2d at 537 (internal citations omitted). Unfair prejudice arises when the evidence prompts the jury to make a decision on an improper basis. State v. Liggins, 978 N.W.2d 406, 422 (Iowa 2022).

The balancing process must take into account the need for the evidence in light of the other evidence in the case and the particular circumstances in the trial. See State v. Rodriquez,

636 N.W.2d 234, 240 (Iowa 2001) (considering the State's need for the evidence of prior bad acts in light of other evidence available and the reduced likelihood of prejudice given defendant's admission that he committed the assault he was charged with).

> Analyzing and weighing the pertinent costs and benefits is no trivial task. Wise judges may come to differing conclusions in similar situations (or the same conclusions in different situations). Even the same item of evidence may fare differently from one case to the next. It may become cumulative of what has gone before. It may be easy for the advocate to make the same point with other, less prejudicial evidence. The issues on which the evidence bears may be more important in one case than another, and the efficacy of cautionary instructions to the jury may be unclear.

1 Kenneth S. Broun, et al., McCormick on Evidence § 185 (Robert P. Mosteller ed., 8th ed. 2022)

Considering the circumstances of this case, the need for the evidence of the results of the school's investigation into Schwartz's misconduct was high. Evidence that the school investigated Schwartz's interactions with A.S. and that Schwartz left her employment with the school shortly after

strongly implied that the school concluded Schwartz had engaged in misconduct. Thus, the admission of the findings of the investigation would not have created confusion but would have actually alleviated the confusion that resulted from the admission of the details of the investigation and reduced the risk of unfair prejudice to Schwartz. The confusion that resulted from the omission of the results of the investigation is demonstrated by the jury's questions during deliberations requesting to know the results of the investigation. (Court Ex. 2) (Conf. App. p. 26).

Further, because the evidence of the investigation was already admitted, including the final results of the investigation would not have further confused the issues or misled the jury or resulted in "a trial within a trial." The complicated aspect of this evidence was that A.S.'s allegations had expanded from her initial report in 2009 until she went to the police in 2020. (11/4/21 Trial Tr. Day 2, 86:8 – 87:4; 103:12 – 105:7; 184:15 – 188:12; 189:7-9). Her inconsistences were able to be fully

explored during trial without confusing the issues or creating a "trial within a trial." The additional detail of the ultimate finding of the investigation would not have unduly complicated the record in this situation. Instead, would have clarified the record and reduced the potential for unfair prejudice to Schwartz.

The circumstances of this case also reduce the risk that the jury might defer to the school's findings rather than independently review the evidence and reach their own verdict. See Thoren, 970 N.W.2d at 623-24; Huston, 825 N.W.2d at 537-38. As described above, the jury was fully aware that the school's investigation only considered some of the allegations against Schwartz by A.S. The evidence at trial made it clear A.S. did not allege any improper touching by Schwartz at the time of the school's investigation in 2009, while that was a central allegation in the criminal proceedings. With this distinct factual scenario, the jury would be less likely to substitute the school's judgment for its own. Any remaining

concern about the potential prejudicial impact of the results of the investigation could have been alleviated with the use of a limiting instruction. See State v. Richards, 879 N.W.2d 140, 152-53 (Iowa 2016) (relying on limiting instruction given to jury to alleviate the danger of unfair prejudice resulting from admission of prior bad acts evidence).

3. *The record does not affirmatively establish Schwartz was not prejudiced by the exclusion of the evidence.* In the case of nonconstitutional error, "we presume prejudice—that is, a substantial right of the defendant is affected—and reverse unless the record affirmatively establishes otherwise." State v. Sullivan, 679 N.W.2d 19, 30 (Iowa 2004). Often the existence of "overwhelming evidence" will support a finding of harmless error. See State v. Thompson, 836 N.W.2d 470, 479 (Iowa 2013) (finding error harmless when substance of excluded evidence was allowed in through another witness and evidence of guilt, including defendant's videotaped confession was overwhelming); State v. Howard, 825 N.W.2d 32, 41–42 (Iowa

2012) (noting evidentiary error is harmless when State establishes overwhelming evidence of guilt); State v. Parker, 747 N.W.2d 196, 210 (Iowa 2008) (overwhelming guilt was present when multiple eyewitnesses identified the defendant, the defendant admitted to another that he committed the crime, and the defendant's alibi could not be corroborated).

In this case, the exclusion of the evidence was not harmless. The evidence against Schwartz was not overwhelming—the determination of guilt came down to a credibility determination between A.S. and Schwartz. There were no eyewitnesses to the interaction in the stairwell. A.S.'s disclosure of the alleged groping was significantly delayed, even though she reported her discomfort with the emails and text messages immediately. Her recollection of the incident varied, and Schwartz presented evidence from a memory expert to contest A.S.'s claim that her more recent recollection was more accurate than her earlier descriptions of the incident. Under

these circumstances, the record does not affirmatively establish a lack of prejudice.

D. Conclusion. The district court abused its discretion in excluding the evidence of the results of the school's investigation. Because the record does not affirmatively establish a lack of prejudice, Schwartz's conviction should be vacated and her case remanded for a new trial.

IV. The application of Iowa Code section 907.3's exclusion of deferred or suspended sentencing options without a jury finding that Schwartz was a mandatory reporter and A.S. was under eighteen years of age violates Schwartz's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

A. Error Preservation. In a posttrial motion, prior to sentencing, Schwartz argued that prohibiting the court from considering deferred and suspended sentencing options pursuant to Iowa Code § 907.3 violated her Sixth Amendment rights. (Motion for New Trial, p. 3-4) (App. pp. 16-19). (Sentencing Tr. 4:10-19). The State resisted. (State's Resistance, p. 7-9) (App. pp. 26-28). (Sentencing Tr. 5:19-23). The court denied "each and every motion filed by the defense"

and concluded it had no discretion to suspend or defer Schwartz's sentence. (Sentencing Tr. 7:4-14; 16:2-13). Because Schwartz lodged her objection to the application of the Iowa Code § 907.3 prior to sentencing, error has been preserved. See State v. Davison, 973 N.W.2d 276, 280 (Iowa 2022). As well, illegal sentences may be challenged at any time, including claims that a sentence is unconstitutional. State v. Bruegger, 773 N.W.2d 862, 872 (Iowa 2009).

B. Standard of Review. Constitutional claims are reviewed de novo. State v. Davison, 973 N.W.2d at 280.

C. Discussion. Iowa Code section 907.3 provides that suspended and deferred sentencing options are available to the district court when sentencing a defendant. Iowa Code § 907.3(1-3) (2021). However, "this section does not apply to a . . . a violation of chapter 709 committed by a person who is a mandatory reporter of child abuse under section 232.69 in which the victim is a person who is under the age of eighteen." Iowa Code § 907.3 (2021). Because there were no jury findings

in this case that Schwartz was a mandatory reporter and that A.S. was under eighteen at the time of the offense, the court's refusal to consider the lesser sentencing options authorized in section 907.3 was a violation of Schwartz's Sixth Amendment rights.

The Sixth Amendment guarantees that those accused a crime have the right to a trial by an impartial jury. U.S. Const. Amend VI. "This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt." Alleyne v. United States, 570 U.S. 99, 104 (2013).

In Apprendi, the U.S. Supreme Court determined that the Sixth Amendment requires that any fact that increases the prescribed range of penalties for a crime beyond the statutory prescribed maximum must be submitted to a jury and proven beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

Later, in Alleyne, the Court overruled Harris v. United States, 436 U.S. 545 (2002), and held that any fact that increases the minimum prescribed punishment must also be proven beyond a reasonable doubt to comport with the Sixth Amendment. Alleyne, 570 U.S. at 114.

> Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury.

Alleyne, 570 U.S. at 102 (citing Apprendi, 530 U.S. at 120). "[F]acts increasing the legally prescribed floor *aggravate* the punishment." Alleyne, 570 U.S. at 113. It does not matter that the defendant could have received the same sentence with or without that fact. Alleyne, 570 U.S. at 114–15.

"Elevating the low-end of a sentencing range heightens the loss of liberty associated with the crime: the defendant's 'expected punishment has increased as a result of the narrowed range' and 'the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher

punishment than he might wish.' " Alleyne, 570 U.S. at 113 (quoting Apprendi, 530 U.S. at 522 (Thomas, J., concurring)).

In this case, the district court was not allowed to consider lesser sentencing options if certain facts existed—if Schwartz was convicted of an offense under chapter 709, if she was a mandatory reporter and if her victim was under eighteen years of age. Iowa Code § 907.3. Thus, section 907.3 "increas[es] the legally prescribed floor" and "heightens the loss of liberty" associated with a conviction under chapter 709. See Alleyne, 570 U.S. at 113. Because there are no jury findings that Schwartz was a mandatory reporter and A.S. was under age eighteen, the sentencing scheme violates Schwartz's rights under the Sixth Amendment. Alleyne, 570 U.S. at 114-15.

"When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." Davison, 973 N.W.2d at 287 (quoting Blakely v. Washington, 542 U.S. 296, 304 (2004)).

Accordingly, Schwartz's sentence should be vacated and her case remanded for a new sentencing hearing in which the court considers the lesser sentencing options available in section 907.3. See Davison, 973 N.W.2d at 288.

D. Conclusion. Because the district cannot be prohibited from considering suspended and deferred sentencing options without jury findings that Schwartz was a mandatory reporter and A.S. was under age eighteen, as required by the Sixth and Fourteenth Amendments, Schwartz's sentence should be vacated and her case remanded for a new sentencing hearing in which all the options under section 907.3 are considered.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $6.90, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

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) because:

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/s/ Melinda J. Nye Dated: 02/24/23

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