IN THE SUPREME COURT OF IOWA
Supreme Court No. 24-1143
Worth County No. FECR012500

STATE OF IOWA,
Plaintiff–Appellee,

vs.

DOUGLAS NEAL WARBURTON,
Defendant–Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WORTH COUNTY
THE HONORABLE GREGG R. ROSENBLADT, JUDGE

BRIEF FOR APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

State Statutes

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. The district court did not abuse its discretion.

ROUTING STATEMENT

Because this case does not meet the criteria of Iowa Rule of Appellate Procedure 6.1101(2) for retention by the Supreme Court, transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(2).

NATURE OF THE CASE

Defendant Douglas Neal Warburton ("Defendant") appeals his sentence following a guilty plea to one count of Lascivious Acts with a Child, in violation of Iowa Code section 709.8(1)(a), a class C felony. On appeal, Defendant claims the district court abused its discretion by imposing a prison sentence and by failing to consider the late-filed victim impact statement and resentencing Defendant using the statement as a consideration.

STATEMENT OF THE FACTS

On June 23, 2023, Defendant was charged with sexual abuse in the second degree, lascivious acts with a child—fondle or touch, sexual abuse in the third degree, and indecent contact with a child. D0025 (06-23-2023 Trial Inform.). On April 30, 2024, Defendant entered an Alford plea to one count of lascivious acts with a child. D0071 (04-30-2024 Written Plea of Guilty). The plea was accepted, and Defendant was sentenced to an indeterminate term of 10 years in prison. D0079 (06-24-2024 Order of Disposition).

JURISDICTIONAL STATEMENT

Defendant raises two challenges on appeal. His first is that the district court abused its discretion when it sentenced him to prison. This Court has jurisdiction to consider this challenge. *See State v. Damme*, 944 N.W.2d 98, 105 (Iowa 2020).

Second, Defendant claims the district court erred when it failed to consider the late-filed victim impact statement and resentence Defendant using the statement as a consideration. App. Br. at 26–31. This Court does not have jurisdiction to consider this claim. On July 12, 2024, Defendant filed his notice of appeal "from the final judgment entered on June 24, 2024, and sentencing entered on June 24, 2024, and all adverse rulings therein." D0088 (07-12-2024 Notice of Appeal). Defendant filed his motion for resentencing on June 25, 2024, and the district court denied that motion on July 10, 2024. D0081 (06-25-2024 Motion), D0087 (07-10-2024 Other Order). Defendant did not include the July 10, 2024, order in his notice of appeal and did not file a separate notice of appeal for this order. Because Defendant did not file a notice of appeal disputing the district court's July 10, 2024, order, this Court does not have jurisdiction to hear any challenges to that order. *See State v. Smith*, ___ N.W.3d ___, 2025 WL 493143, at *5 (Iowa Feb. 14, 2025) (quoting *State v. Formaro*,

638 N.W.2d 720, 727 (Iowa 2002) (finding that "when the district court addresses an issue in an order 'following the entry of a judgment and sentence, any appeal from a ruling on th[at] issue must be separately appealed. A defendant cannot rely upon the notice of appeal from the judgment and sentence of the district court.'"). This claim should be dismissed.

ARGUMENT

I. The district court did not abuse its discretion.

Preservation of Error

Challenges to the district court's discretion in sentencing may be challenged on direct appeal even in the absence of an objection in the district court. *State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010).

Defendant also challenges the district court's use of his pre-sentence investigation report ("PSI") in imposing a prison sentence, but this claim is unpreserved because Defendant did not "object and ask to make a record on the matter before sentencing." *State v. Bailey*, No. 18-0956, 2019 WL 5067155, at *1 (Iowa Ct. App. Oct. 9, 2019) (citing *State v. Headley*, 926 N.W.2d 545, 552 (Iowa 2019)); *see also State v. Chawech*, 15 N.W.3d 78, 85 (Iowa 2024) (internal citations omitted) ("[I]f the defendant fails to object to alleged defects in the presentence investigative report prior to the entry of sentence, the defendant will not be allowed to attack the sentence based

on those defects."); *State v. Forkner*, No. 18-0103, 2019 WL 719022, at *2 (Iowa Ct. App. Feb. 20, 2019) (internal citations omitted) ("We conclude Forkner failed to preserve error because he did not object to the statement in his PSI concerning risk assessments at the sentencing hearing.").

Standard of Review

Where a challenged sentence falls within the statutory parameters, this Court "presume[s] it is valid and only overturn[s] for an abuse of discretion or reliance on inappropriate factors." *State v. Hopkins*, 860 N.W.2d 550, 554 (Iowa 2015) (citing *State v. Washington*, 832 N.W.2d 650, 660 (Iowa 2013)). Abuse of discretion is found only when the grounds for the district court's decision are clearly untenable or unreasonable. *State v. Kirby*, 622 N.W.2d 506, 511 (Iowa 2001) (quoting *State v. Thomas,* 547 N.W.2d 223, 225 (Iowa 1996)); *see also Formaro*, 638 N.W.2d at 725 ("[O]ur task on appeal is not to second guess the decision made by the district court, but to determine if it was unreasonable or based on untenable grounds."). There is a strong presumption in favor of the district court's sentencing decision. *Formaro*, 638 N.W.2d at 724.

Merits

Defendant claims the district court abused its discretion when it imposed a prison sentence, and that it should have re-sentenced him when,

after the sentencing hearing, Defendant alleged a victim impact statement had never been elicited by the State. The second claim should be dismissed with no consideration of the merits because Defendant failed to file a notice of appeal from the district court's denial of his motion for resentencing.

A. The district court properly imposed a prison sentence.

Iowa Code section 901.5 provides that, "[a]fter receiving and examining all pertinent information," the district court shall consider among a number of sentencing options, including a term of confinement or a suspended sentence or probation. Iowa Code § 901.5; *see also State v. Thomas*, 659 N.W.2d 217, 221 (Iowa 2003) (internal citation omitted) ("Following a plea or verdict of guilty, a court may, subject to exceptions, defer judgment, defer sentence, or suspend sentence."). The sentencing court determines which of the statutory options "is authorized by law for the offense," and "which of them or which combination of them, in the discretion of the court, will provide maximum opportunity for rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others." Iowa Code § 901.5.

In addition to considering "the societal goal of sentencing criminal offenders," the court must also consider "the nature of the offense, the attending circumstances, the age, character and propensity of the offender,

and the chances of reform. *Formaro*, 638 N.W.2d at 724–25. The district court must apply these sentencing factors "appropriately…." *State v. Jones*, No. 02-0959, 2003 WL 122368, at *1 (Iowa Ct. App. Jan. 15, 2003). "The application of these goals and factors to an individual case, of course, will not always lead to the same sentence." *Formaro*, 638 N.W.2d at 725. "Yet, this does not mean the choice of one particular sentencing option over another constitutes error." *Id.*; *see also State v. Wright*, 340 N.W.2d 590, 593 (Iowa 1983) ("The right of an individual judge to balance the relevant factors in determining an appropriate sentence inheres in the discretionary standard.").

The district court gave lengthy, detailed, and specific reasons for sentencing Defendant to prison:

> In looking at your case, [], I will say that it presents a very tough decision for the court. There's a number of factors here, which, as I said, tend to be in your favor and some factors which may not be so much in your favor. And I have reviewed the PSI report several times. I've gone through the PSI report and reviewed it fairly extensively. And the PSI recommendation here made by the Department of Corrections is that the prison sentence be imposed and not suspended. The State of Iowa is agreeing with that recommendation today, and your attorney is requesting a suspended sentence and a period of probation supervision.
>
> In looking at the factors that I talked about earlier, one of the things the court notes is your age.

And you are an individual that's in your mid-sixties. You do not have a prior criminal record. You don't have a juvenile record. You don't have a prior adult record for the court to consider. So for a person to be in their mid-sixties and not have a prior record is a good thing. You know, we look back at that and that shows that you've had the ability at least in the past to get through life without being charged and not being convicted of offenses.

However, also that does work against you a little bit so to speak because as a person who's up in their mid-sixties, you've had a lot of life experience. You had jobs. You've had family. You have had responsibilities in your life and that's given you an opportunity to learn things and be responsible, and so we can't really call this a thing of youthful indiscretion or sort of impulsive behavior that you can sometimes expect out of younger people that don't know their way through life yet. So the court has considered your age as part of this, and I think that does have things that cut both ways.

Prior criminal record – again, you don't have any prior criminal record for the court to consider.

You do have employment and family circumstances the court has looked at. We've [] heard testimony today from your two children from the stand and they've talked about your present circumstances, talked about your history a little bit, and what you are like as a person. We've also heard that in your allocution.

You've [] held jobs over the years. It looks like you've pretty much always been employed. Your family circumstances have changed over time obviously, and it appears that your spouse passed away just a few years ago so that's been a change for you.

You worked in trucking. You've also worked in the farming area. And it appears you've had employment throughout your lifetime. You do have some strengths then in that area.

We then look at the nature of the offense, and this is where the court is troubled by the probation recommendation. This is obviously a very serious offense. A Class C felony. Lascivious acts with a child is the charge. In looking at the facts and circumstances surrounding the offense, this is something we have to look at the nature of the offense and the age of the victim here. It appears to the court that this lascivious acts with a child appeared over – or was committed over a span of time. The victim between – in that period of time was between about five years old and about nine years old so we are talking about a very, very young victim of the offense. Again, occurred it appears over a period of time.

The court is struck, as I think the PSI author was as well, about the relationship between you and the victim of the offense.

And I'm going to segue a little bit here before I get into that particular area. You are not a person that presents the court with a lot of factors like substance abuse or mental health concerns. You really don't have any history of either one of those so no real involvement with those kinds of areas. Nothing noted in terms of mental health or substance abuse interventions or treatment. Don't have any domestic abuse on the record either.

Then in just looking at the recommendations here contained in the PSI report [] it says when this was written, [Defendant] is a 66 year old [male] who graduated from [] high school in 1976. The defendant

was employed with [] Truck Line from 2005 through 2004. He's currently employed with [] doing form work. The defendant has no prior criminal arrest. The defendant [denies] having [] a history of alcohol slash drug use and denies any mental health concerns. The defendant was married and his wife passed away in 2020. He has two adult children.

At the time of this offense, the defendant and his wife had custody of their grandchildren due to DHS involvement. The victim was in the care of her grandparents when she was sexually abused by her grandfather. She did not only experience the immediate trauma of sexual abuse, but also her trust and security had been violated which would add to the intensity of the trauma that she experiences. Crimes such as these cause a great deal of fear and apprehension to the victim, their families, and others in the community. Children have the right to be protected from those who would exploit them.

And [I do] note there the PSI does recommend [sic] sexual abuse. The court is cognizant that the title of the offense here is lascivious acts with a child.

And so this did, as well as the other factors I've talked about, [], involve a lot of violation of trust that was placed in you. To be a caretaker for the child as a grandparent, you know, you're expected to be experienced, set a good example, provide care, provide guidance, do those things for the young person kind of expected of an older person and grandparent. And it does also strike the court that really was because of your lack of other record here kind of crime of opportunity so to speak. The situation was there because of the circumstances. And you did these things then which caused your arrest and conviction on the charge.

> So in factoring all that in here and weighing all those various factors, [Defendant], the court is going to sentence you to ten years in the custody of the Director of Adult Corrections for the state of Iowa.

D0109 (06-24-2024 Sent. Tr.) at 20:6–26:19.

This thoughtful analysis does not reveal an abuse of discretion. Quite the opposite. The district court clearly considered a variety of appropriate factors that weighed both in favor of and against a prison sentence and determined, on the record, that a prison sentence was warranted. And nothing in these statements supports Defendant's claim that the district court had a fixed sentencing policy. App. Br. at 18.

Defendant assigns blame to the district court for relying on information in the PSI to determine his sentence. Defendant made a small objection to the PSI regarding communication with his daughter, but he otherwise agreed the court could "rely on the PSI as amended here on the record for purposes of sentencing this afternoon." D0109 at 4:20–6:13. Defendant cannot agree to allow the district court to rely his PSI at sentencing, then claim on appeal it was error for the district court to just that. *See State v. Herrarte*, No. 17-1394, 2018 WL 4360925, at *1 (Iowa Ct. App. Sept. 12, 2018) (quoting *State v. Sage*, 162 N.W.2d 502, 504 (Iowa 1968)) ("A party to a criminal proceeding cannot assume inconsistent positions in the trial and appellate courts and, as a general rule, will not be

permitted to allege an error in which he himself acquiesced, or which was committed or invited by him."); *see also State v. Guise*, 921 N.W.2d 26, 29 (Iowa 2018) ("Here, Guise not only failed to raise a due process issues at the time of grail, but as in *Gordon*, he told the court it could rely on the information in the PSI. For this reason, we find Guise failed to preserve his due process claim for direct appeal."). The district court's decision to sentence Defendant to prison was not an abuse of discretion.

B. Even if Defendant had timely filed a notice of appeal on this issue, it has no merit.

The day after judgment was entered, Defendant filed a motion claiming that the physical guardian of the victim—Defendant's daughter, not the guardian ad litem—claimed "no one had reached out to the victim about filling out a victim impact statement." D0081 at 1, D0109 at 11:18–23. Defendant asked to be resentenced "because the victim was not able to make a statement [so] the Court was not able to consider the victim's impact statement at the time of sentencing." *Id.*

The State resisted, asserting it had contacted the victim's guardian ad litem ("GAL") prior to sentencing, she spoke with the victim, and the victim told the GAL "she did not wish to make a victim impact statement." D0083 (07-01-2024 Resistance) at 1. The State indicated it spoke with the GAL again, and the GAL confirmed the victim told her she did not wish to make

a statement. *Id*. The State attached the victim impact statement that was later provided to the GAL. D0084 (07-01-2024 Victim Impact Statement). The State said that as far as it was aware, "the victim impact statement was not in existence at the time of sentencing. If it was, then somebody can advise differently." D0083 at 1. The State then said "it would seem that" the district court could consider the statement and resentence Defendant without a hearing as there was no request for the victim to give an in-person statement. *Id*. at 2. Defendant did not respond to the State's resistance.

The district court denied Defendant's request for a resentencing. It noted that Defendant did not object to the use of the PSI, nor did he object when "the State indicated that no victim impact statement would be presented." D0087 at 1. The court also said that it "appears" "the victim impact statement in this case may have been generated post-sentencing…It appears to the Court that the defendant and perhaps defendant's supportive family members wish to have a second attempt at sentencing in order to present additional information to the Court." *Id*. at 2. The district court further said it "gave the State and the defendant ample opportunity at the time of the sentencing hearing to object to the presentence investigation report and considered all evidence and arguments presented at the time of

sentencing. The father of the minor child victim and the guardian/ custodian of the minor child victim were also present at the sentencing to observe the entire process, and in fact, testified in support of the defendant." *Id.*

First, Defendant does not have standing to assert this claim. Iowa Code section 915.21 allows a victim to make an impact statement at sentencing. *See* Iowa Code § 915.21(1)(b). Defendant has no right to have a victim impact statement made at sentencing, so he does not have standing to challenge whether one should have been made here. *See State v. Ortiz*, 618 N.W.2d 556, 559 (Iowa 2000) (stating that to have standing to challenge a decision, the defendant must show their own rights were violated, not the rights others); *see also State v. Zaehringer*, 280 N.W.2d 416, 419 (Iowa 1979) ("While Zaehringer is generally aggrieved by the existence of the statue, he is in no manner specifically aggrieved by the distinction which he seeks to draw."), *State v. Henderson*, 269 N.W.2d 404, 406 (Iowa 1978) (finding a defendant had no standing to challenge a statute that did not apply to her conduct).

Second, Defendant does not identify what authority would allow the district court to resentence him under these circumstances. Iowa Code section 902.4 does not apply because Defendant posted an appeal bond so

had not begun "to serve a sentence of confinement[,]" nor does this qualify as "shock probation." Iowa Code § 902.4; *see also Tindell v. Iowa Dist. Ct. for Scott Cty.*, 600 N.W.2d 308, 310 (Iowa 1999). Defendant does not allege his sentence was illegal, nor likely could he. Without express authority, the district court is unable to resentence Defendant.

Finally, if Defendant has standing, and the district court has authority to resentence Defendant under these circumstances, Defendant has failed to show the district court abused its discretion when it denied his request for resentencing. The State asserted that it spoke twice—once before sentencing and once after Defendant raised this claim—to the GAL and both times the GAL verified the victim told her she did not wish to make a statement. D0083 at 1. And the GAL was not the one who notified the district court the victim may have changed her mind. Instead, Defendant's daughter made the claim, then a victim impact statement arrived the same day. D0081, D0084. This statement—purportedly written by the young victim—said that she did not think Defendant should go to prison because "he should be able to have his job back and be in our community." D0084. The district court was right to be skeptical of the timing of this statement and to view it as a second attempt by his children—one of whom was the victim's physical guardian—to change the district court's mind after the

fact. Because Defendant has failed to show he was entitled to a resentencing, even if this court could determine the merits of this claim, it would fail.

CONCLUSION

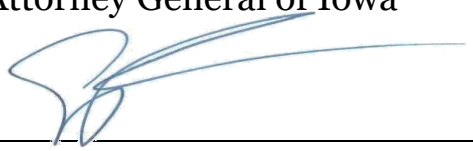
For all the reasons stated above, the State respectfully requests that this Court affirm Defendant's conviction and sentence and deny the claims properly before this Court on the merits and dismiss the balance for lack of jurisdiction.

REQUEST FOR NONORAL SUBMISSION

The State requests that this case be submitted without oral argument.

Respectfully submitted,

BRENNA BIRD
Attorney General of Iowa



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CERTIFICATE OF COMPLIANCE

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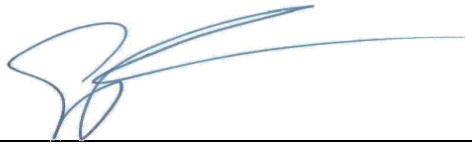
Dated: March 13, 2025



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