IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	S.CT. NO. 17-1697
	)	
DALE ROBERT TOURNIER,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR BREMER COUNTY
HONORABLE CHRIS FOY, JUDGE

APPELLANT'S BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On April 30, 2018, 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 Dale Tournier, No. 0037513, Clarinda Correctional Facility, 2000 North 16th Street, Clarinda, IA 51632.

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issues raised involve a substantial issue of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c). Specifically, Tournier requests this Court determine that the appropriate application for the scope of Iowa Rule of Criminal Procedure 2.24(2)(c) requires more than just applying the standard for a motion for a new trial filed under Rule 2.24(2)(b) by looking at "exceptional circumstances" and whether vacating the judgment and taking additional testimony is in the "interests of justice."

STATEMENT OF THE CASE

Nature of the Case: Appellant Dale Tournier appeals following his bench trial, judgment, and sentence for: Sexual Abuse in the Second Degree, a Class B felony, in violation of Iowa Code sections 709.1 and 709.3(b).

Course of Proceedings: On August 22, 2016, the State charged Tournier with two counts of Sexual Abuse in the

Second Degree, a Class B felony, in violation of Iowa Code sections 709.1 and 709.3(b). (Trial Information) (App. pp. 6-7).

On February 7, 2017, Tournier filed a waiver of right to a jury trial, opting for a bench trial. (Waiver of Right to Jury Trial) (App. p. 8).

On May 31, 2017, a bench trial commenced. (Trial Tr. p. 4 L2-3). On June 1, 2017, the proceeding adjourned with July 10, 2017, set for the reading of the verdict. (Trial Tr. p. 350 L14-19). On August 7, 2017, a hearing was conducted for the reading of the findings of fact and verdict. (Hearing Tr. p. 2 L2-3). The Court found Tournier guilty of Count I and not guilty of Count II. (Hearing Tr. p. 4 L12-21; Verdict and Order) (App. pp. 13-16).

On September 18, 2017, trial counsel filed a motion for a new trial on the grounds that the verdict is contrary to the evidence. (Motion for a New Trial) (App. pp. 17-18). On October 9, 2017, the State filed a Resistance to the Motion for a New Trial. (Response to Motion for a New Trial) (App. p. 19). On October 16, 2017, a hearing was held on the Motion for a

New Trial. (Sent. Tr. p 2 L2-10). The Court denied the Defense motion for a new trial and the Defense request for the Court to vacate the judgment and take additional testimony pursuant to Iowa Rule for Criminal Procedure 2.24(2)(c). (Sent. Tr. p. 13 L20-23).

Tournier was sentenced to an indeterminate term of 25-years confinement, with a mandatory minimum of seven-tenths to be served. The Court suspended the fine associated with the conviction. A special sentence was applied pursuant to Iowa Code section 903B.1, along with a mandatory requirement to register as a sex offender. A surcharge of $100 for the registry was assessed. The Court waived attorney fees finding that Tournier "has no reasonable ability to reimburse the State for the legal assistance he's received in this case" due to his lengthy prison sentence. (Sent. Tr. p. 23 L17-p. 25 L6; Order of Disposition) (App. pp. 20-22). In the written order of disposition, the Court further ordered that Tournier pay jail fees pursuant to Iowa Code Section 356.7. The Court stated that "Defendant is found to have the reasonable ability to pay

certain obligations set forth herein, including but not limited to any crime victim assistance reimbursement, restitution to public agencies, and court costs including correctional fees." (Order of Disposition) (App. pp. 20-22). The Court further established a payment plan of $50 or more every 30 days (not monthly) with the first payment due in 30 days. (Order of Disposition) (App. pp. 20-22).

Notice of Appeal was filed on October 26, 2017. (Notice of Appeal) (App. p. 23).

Facts: The Court made the following written Findings of Fact at the conclusion of the bench trial:

1. The victim in this case is Z.K., a Caucasian female, who was born in 2010.
2. At all times relevant to this case, Z.K. was under 12 years of age, lived next door to Defendant, and was a playmate of K.T., the toddler daughter of Defendant.
3. Defendant is an adult Caucasian male. He is not related to Z.K. by either marriage or consanguinity.

4. At all times relevant to this case, Defendant and his family resided at 2809 East Bremer Avenue, Waverly, Bremer County, Iowa.

5. On July 4, 2016, Defendant knowingly and intentionally made contact between his finger or hand and the genitalia of Z.K. This contact was skin to skin, was not inadvertent or accidental, and was sexual in nature.

6. The sexual contact between Defendant and Z.K. described above took place in or near the residence of Defendant.

(Hearing Tr. p. 3 L20-p. 4 L11; Verdict and Order) (App. pp. 13-16).

Other relevant facts will be discussed below.

ARGUMENT

I. THE COURT ABUSED ITS DISCRETION WHEN IT FAILED TO GRANT TOURNIER A NEW TRIAL BECAUSE THE WEIGHT OF THE EVIDENCE WAS CONTRARY TO THE VERDICT.

Preservation of Error: Error was preserved when trial counsel moved for a new trial on the grounds that the weight

of the evidence was contrary to the verdict, and the district court denied the motion. (Sent. Tr. p. 2 L25-p. 13 L20; Motion for a New Trial; Order of Disposition) (App. pp. 17-18, 20-22).

Standard of Review: A district court should grant a motion for a new trial only in exceptional circumstances. See State v. Ellis, 578 N.W.2d 655, 659 (Iowa 1998). On appeal the standard of review of rulings on a motion for new trial asserting a verdict is contrary to the weight of the evidence is for an abuse of discretion. See State v. Shanahan, 712 N.W.2d 121, 135 (Iowa 2006).

Discussion: A district court may grant a motion for a new trial when "the verdict is contrary to law or evidence." See Iowa. R. Crim. P. 2.24(2)(b)(6) (2017). "The weight-of-the-evidence standard requires the district court to consider whether more 'credible evidence' supports the verdict rendered than supports the alternative verdict." State v. Ary, 877 N.W.2d 686, 706 (Iowa 2016) (citing Ellis, 578 N.W.2d at 658-59.) This standard allows the court to consider the credibility of the witnesses. See State v. Nitcher, 720 N.W.2d 547, 559

(Iowa 2006). "The question for the court is not whether there was sufficient credible evidence to support the verdict rendered or an alternative verdict, but whether 'a greater amount of credible evidence' suggests the verdict rendered was a miscarriage of justice." Ary, 877 N.W.2d at 706 (citing Ellis, 578 N.W.2d at 658-59).

In this case, the court limited its findings of fact to six points, the most relevant of them: "5. On July 4, 2016, Defendant knowingly and intentionally made contact between his finger or hand and the genitalia of Z.K. This contact was skin to skin, was not inadvertent or accidental, and was sexual in nature. 6. The sexual contact between Defendant and Z.K. described above took place in or near the resident of Defendant." (Verdict and Order)(App. pp. 13-16). Tournier was charged with two counts of sexual abuse, one digital and one oral. The court found him not guilty of the oral allegation. (Verdict and Order) (App. pp. 13-16). As trial counsel stated during the motion hearing, "The allegations in this case are virtually identical. However, occurring at different times and

locations. Which presents the obvious why. Why did the State meet its burden on one count but not the other. Or why did the Court find that the allegations of the child in question was more credible as to one count but not the others. And a finding of fact that were entered do not answer that question." (Sent. Tr. p. 5 L17-25).

The Court further explained during the hearing on the motion the reasons for why the Court found Tournier guilty of the one charge:

> Defendant is seeking a new trial because, um, he argues the Court's verdict was contrary to the evidence, was against the weight – the greater weight of the evidence that was submitted at trial.
>
> The, um –
>
> And applying that standard, the Court finds that the motion should be denied.
>
> Um.
>
> The – The Court made the determination that, um, the State had proven beyond a reasonable doubt that Mr. Tournier had, um – had digital contact, finger or hand contact, with the – the vagina of – of [Z.K.], the victim.
>
> Um. I – I'm not sure that any purpose would be served by the Court, um, trying to rehash all of the evidence that it relied on in reaching its verdict.
>
> I will note that, um, the initial report was made by [Z.K.] immediately upon her return to her grandparents' home that evening.
>
> Um.

In the Court's opinion, its experience, that, um, a – a child that age does not, um – does not initiate that kind of conversation unless, um, it's something they've actually experienced.

Um.

The, um –

I will acknowledge that there are certain aspects of [Z.K.'s] trial testimony that don't match – that – that do not match precisely with, um, statements she had made to other people involved.

Um.

The – Any distinction between her trial testimony and what she had told other people in the Court's opinion are pretty much details and can certainly be, um, expected when, um, a child that age is being asked to recount events that took place, um, I think as of the time of trial would have been at least ten – ten months old.

Yeah.

It would have been at least ten months after the fact.

Um.

[Z.K.], um, in the Court's opinion was – was consistent about the – the digital or the finger and hand contact, um, that Mr. Tournier had with her vagina.

And quite honestly, um, in the opinion of the Court, um, the statements and the conduct of – of Mr. Tournier, um, were also, um, strong indicator of guilt.

Um.

Mr. Tournier's explanations of what had taken place, initially it's the Court's recollection that, um, some of the –the comments that Mr. Tournier had made to others about this, um, indicated a knowledge of what had actually taken place that, um, he would have not have had if the events hadn't happened.

Um.

Mr. Tournier, um, gave different explanations or justifications, rationalizations for, um, what might have happened or how he could explain away what happened.

Um.

In trying to minimize or justify – somewhat justify the contact he had with, um –with [Z.K.], the sexual contact he had with her that day. Um.

The testimony indicated that while there were other people in the vicinity of Mr. Tournier and [Z.K.] for – at different times during the day, that afternoon and evening, I don't believe the testimony showed that there was never a time that they were – that—

I guess I want to restate that.

Um.

The Court's not satisfied that the people that were present, and I guess specifically [K.T.], um, that [K.T] would have necessarily been old enough to really understand or, um, alert others, um, to what she was observing.

Um. And – And the adults that testified they were in and out of the room testified that it was their –there was a period of time when there was no adult –other adult in that room. Um.

The – I think it was Mr. Tourn –Tournier's wife was sleeping up until, I don't recall specifically, I want to say 3:30 or four o'clock that afternoon. Um.

And, um.

The other witness that testified to being out in the – the living room again was not actually in the bedroom. Um.

DEFENDANT: She was.

> THE COURT: Didn't have a direct view of what was happening or the things that could have been happening in that room.
>
> So.
>
> In the Court's analysis of the evidence, the fact that other adults were in and out of the bedroom or were in and out of the house was a factor that it considered but didn't find, um, adequate to raise reasonable doubt about, um, the testimony provided by [Z.K.] and, um, the – the inculpatory statements that Mr. Tournier had made – made over the – the days – the evening of that event and the days following.
>
> So I am going to deny the Motion for a New Trial.

(Sent. Tr. p. 10 L2-p. 13 L20). The Court's expanded analysis of the facts is not consistent with the evidence and is an abuse of discretion in denying the motion.

Statements of Z.K. The Court indicated that overall it found the statements of Z.K. to be consistent, and that the inconsistencies would be justifiable. (Sent. Tr. p. 11 L2-18). A review of Z.K.'s statements shows that she had numerous inconsistencies in what she alleged happened and where those allegations occurred.

Z.K. initially reported the alleged touching to her parents, Theresa and Gary Kampman. She told them that she was not

supposed to tell them because he would be mad at her. Z.K. further stated that Dale touched her here, and pointed between her legs and her butt. Further inquiry led to the disclosure that Tournier had his hand inside Z.K.'s pants. (Trial Tr. p. 71 L5-9; Trial Tr. p. 74 L3-9; Trial Tr. p. 93 L16-p. 94 L15; Trial Tr. p. 105 L25-p. 106 L12). According to Captain Jason Leonard, the police officer in charge of the investigation, the original allegation from Z.K. alleged that the touching occurred on the trampoline. (Trial Tr. p. 187 L11-20; Trial Tr. p. 197 L5-24). At no point in time during her initial reporting did Z.K. mention that Tournier licked her. (Trial Tr. p. 57 L21-p. 58 L5).

When Z.K. was interviewed the next day she told Katie Strub, the forensic interviewer, that the allegations occurred multiple times in different locations. Z.K. told Strub that it first happened on the trampoline and then in K.T.'s bedroom. Z.K. alleged that they were playing on the trampoline and she fell down; Tournier then touched her inside her panties and licked her. Z.K. told Strub that she could not remember

Tournier telling her anything at that time. She also indicated that K.T. was present at the time of the alleged touching on the trampoline. (Exh. G-DVD).

When asked by Strub about the allegations in K.T.'s bedroom, Z.K. was adamant that Tournier licked her. She also stated that Tournier told her to not tell her mom and dad. When asked to detail out the timeline, Z.K. had a difficult time remembering what happened. This resulted in Strub prompting Z.K. by repeating the allegations to Z.K. (Trial Tr. p. 239 L17-p. 240 L23). Shortly after the prompting by Strub, Z.K. states "It was last night. *I had a dream about it.*" (Exh. G-DVD-15:31:52; emphasis added). Z.K. then proceeded to rapidly explain the timeline of the evening, stating that she was outside and got a bug bite, went to K.T.'s room after eating, the dog licked her and she felt it's teeth. Then Z.K. alleged that she laid down on the floor and Tournier touched her and licked her. (Exh. G-DVD-15:32:00-15:32:34). Z.K. seems particularly confused as to what actually happened to her: "I didn't like it when he was licking-he licked me

everywhere I went-I mean touched me." (Exh. G-DVD-15:33:41-15:34:02). Throughout the interview with Strub, Z.K. had difficulties answering questions; she repeatedly had trouble answering the question "what part of him licked you." Z.K. would respond by sticking out her tongue. (Exh. G-DVD-15:27:27-15:27:42; 15:28:00-15:28:05). Later in the conversation she refused to answer the question, but instead said "you already said that." (Exh. G-DVD-15:35:15).

Just after her forensic interview, Z.K. was taken for a physical examination. The nurse practitioner, Julie Ritland, took a history from Z.K. as a part of the examination. Z.K. told Ritland that the neighbor did something bad-he licked her butt, and touched her with his hand. Z.K. stated that his tongue touched her skin. (Trial Tr. p. 251 L17-p. 252 L9; Trial Tr. p. 255 L13-15). Z.K. told Ritland that the licking occurred on the trampoline and in K.T.'s room, that K.T. was present both times it happened, and that **K.T. saw it occur**. (Trial Tr. p. 257 L23-p. 258 L10; Trial Tr. p. 259 L13-20) (emphasis added).

At trial Z.K. had a difficult time remembering any of the allegations that she had made against Tournier. The information obtained on both direct and cross-examination was through very specific leading questions regarding the allegations. When asked about the allegations on the trampoline during direct examination, Z.K. had to be lead to the allegations:

> **Q:** Did something happen on the trampoline that bothered you?
> **A:** Yes
> **Q:** Okay. And could you tell the Court what that was.
> **A:** I forgot.
>
> ***
>
> **Q:** And you said that you and [K.T.] and her dad were playing on the trampoline?
> **A:** Yes.
> **Q:** Okay. Did there – Did something happen there that you told your mom about?
> **A:** Yes.
> **Q:** Okay. And do you remember telling your mom what that was?
> **A:** No.
> **Q:** Okay. Can you—Can you tell the judge what – what you told your mom.
>
> Okay.
>
> **A:** Um, I told my mom that Dale touched my privates.
> **Q:** Okay. And, um. When you – Was that – Do you remember where that was that that happened at?
> **A:** Um, at Dale's house.

Q: Okay. At Dale's house?
A: Yes.
Q: Okay. And was it inside the house? On the trampoline? In the yard?
A: It was – It was like at the trampoline and in [K.T.'s]—in [K.T.'s] room.

(Trial Tr. p. 30 L24-p. 32 L22).

When questioned about what, if anything, Tournier said to her during the alleged touching, Z.K. could not remember without prompting.

Q: When that happened, did Dale say anything to you?
A: I don't think so.
Q: Okay. Do you remember—Do you remember, um, ever talking to your mom? When you told your mom, do you remember how you told her?
A: Um, in a strong voice.
Q: In a strong voice?
A: Yes.
Q: Okay. Did you ever remember whether or not it was supposed to be a secret or not?
A: It was a secret but then when my mom told me, um, you can't keep secrets, I won't—um, that I – I forgot what she said. But, um, I did tell her.
Q: Okay. And why did you think it was a secret?
A: Because – I forgot.
Q: Okay. So when you told your mom, did you think you were telling her a secret?
A: No. I was telling my mom – my mom and my dad.
Q: Okay. So. And – because you didn't want to keep a secret or –
A: Yes.

Q: Okay. And – And do you remember why you though it was a secret?
A: No.

(Trial Tr. p. 34 L11-p. 35 L10).

Z.K. also had a difficult time remembering the licking allegation when testifying during direct examination at trial:

Q: Okay. All right. Do you remember, um, when you had indicated – when you said that Dale had touched your privates, do you remember what he touched your privates with?
A: His hand.
Q: Okay. And did he touch your privates with anything else?
A: I forgot.
Q: Okay. So are you having a hard time remembering or do you think that, um, you're having a hard time saying it.
A: I – I don't remember what –
Q: Okay
A: -- I did.
Q: Do you remember when, um – Do you remember talking to, um – Do you remember, um, talking to a person that was kind of like a doctor around that –
A: Oh, yeah.
Q: -- time? Do you remember that?
A: Yes.

***

Q: Okay. And do you – do you remember what you told her had happened?
A: No.
Q: Did she – Do you remember if she asked you if anything had happened?
A: Yes.

Q: Okay. Did you remember you kind of told her what happened then or –
A: Yes.
Q: Okay. But you're not – you're not really remembering what you told her?
A: Yeah.
Q: Okay. Okay. And I – And you don't have to be exact about – about that. But, um. But you did kind of tell her what had happened?
A: Yeah.

***

Q: Okay. So you talked with somebody else about what happened too, huh?
A: Yeah.
Q: Do you remember, did you – did you – Do you remember ever showing her what had happened?
A: No.
Q: Okay. Do you remember, were you – Do you remember sitting in a room with her and talking with her?
A: Yes.
Q: Okay. You do remember that?
A: Yes.
Q: Okay. And, um. Do you remember what kinds of things you did in that room?
A: No.
Q: Okay. Do you remember, did you talk or draw pictures or both?
A: I drawed pictures.
Q: You did draw pictures?
A: Yes.
Q: Okay. Do you remember, um, was she pretty nice to you?
A: Yes.
Q: Okay. And, um, did – did you have any difficult – or did you have any problems telling her what happened?
A: No.

Q: Okay. And was that similar to – Is that like what – what you said here today, that Dale had touched you?
A: Yes.

***

Q: Okay. And, um, when – You said that, um – that Dale had touched you on the trampoline and he also touched you in [K.T's] room?
A: Yes.
Q: Okay. And when, um, that happened, um, do you – Who was all with you at the time? Do you remember?
A: No.
Q: So you – Do you remember what you were doing in [K.T.'s] room?
A: We were playing games.
Q: Okay. And was Dale playing with you?
A: No.
Q: Okay. And when – When he touched you, do you remember how that happened?
A: No.
Q: Okay. So you said that when it – when he touched you, it was with his hand?
A: Yes.
Q: Is that right? Okay. And did – when you were in [K.T.'s] room, was that – did he touch you on your privates there as well?
A: Yes.
Q: Okay. All right. And, um, do you remember ever telling anybody that, um, Dale had licked you?
A: Yeah.
Q: Okay. Do you remember who you told that to?
A: My mom and dad and the person I talked to from the doctor's office.
Q: Okay. And, um, do you remember telling them where he had licked you?
A: Yes.
Q: Okay. And on – on your – on your body?
A: Yes.

Q: Okay. And where did – And where was that?
A: On my privates.
Q: Okay. And, um, do you remember which private that was?
A: No.

(Trial Tr. p. 35 L11-p. 41 L18).

On cross-examination, Z.K. provided conflicting information as to the events:

Q: ...And you told your – your mom and dad that Dale touched you again while you're in [K.T's] room?
A: First we went in [K.T.'s] room.
Q: Okay.
A: And then we went on the trampoline.
Q: Oh, okay. So you're in [K.T.'s] room first and then the trampoline second.
A: Yes.
Q: Okay. Well, thanks for clearing that up. I'm talking about [K.T.'s] room.
A: Uh-huh.
Q: And are you – Are you telling us, this judge and Mr. Wadding, that Dale touched your pee pee in [K.T.'s] room?
A: Yes.
Q: Okay. And where do you remember being when that happened?
A: I forgot.
Q: Okay. And when he did that, did he touch it with his hand?
A: Yes.
Q: And did he pull your shorts down when he did that?
A: Yes.
Q: And did he pull your panties down—
A: Yes.

Q: --when he did this? Okay. And where was [K.T.]?
A: [K.T.] was in her room.
Q: Okay. Was [K.T.] close to you?
A: Yes.
Q: Okay. Did [K.T.] see what was going on?
A: No.
Q: Okay. And did this happen real fast?
A: Yes.
Q: Okay. And did Dale lick you in [K.T.'s] room?
A: No. He licked me on the – when we were on the trampoline.
Q: Okay. So – Just so we're clear, are you telling this judge and Mr. Wadding that Dale never licked you in [K.T.'s] room?
A: Yes.
Q: Okay. Did you tell your mom that too?
A: Um, I – No.

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Q: And when – you're – You're saying that Dale licked your pee pee on the trampoline; correct?
A: Yes.
Q: And he didn't lick your pee pee in the bedroom?
A: Yes.
Q: Did he at any point lick your butt?
A: No.
Q: Never?
A: No.
Q: Okay. Whether it's on the trampoline or in [K.T.'s] room, that never happened?
A: No.

(Trial Tr. p. 56 L11-p. 59 L10).

Z.K's allegations of touching and licking morphed over time. The original allegation was of skin-on-skin touching of

both her "pee spot" and her butt while on the trampoline.[1] After an evening of being exposed to emotional parents and her aunt, meeting with police, being told about "good-touch, bad-touch," and having a dream about the allegations, the next day the allegations were more elaborate. (Trial Tr. p. 32 L24-p.33 L1; Trial Tr. p. 74 L14-p. 75 L11; Trial Tr. p. 110 L10-22; Exh. G-DVD-15:31:52). However, by the time Z.K. testified, she could not remember the specifics of what happened without significant prompting, confused the timeline of events, and denied that the licking allegation occurred in the bedroom.

Statements of Tournier. The Court explained that it found Tournier's statements to be admissions of guilt and that his statements were inconsistent. (Sent. Tr. p. 11 L19-p. 20 L11). A review of Tournier's statements shows that he was consistent with what he said happened. First, Tournier repeatedly denied that anything intentional happened, starting

[1] The original allegations as presented to Captain Leonard involved two versions of the touching: one where Z.K. was touched on the outside of the shorts and one where she had been touched inside her short. (Minutes)(Conf. App. pp. 4-22).

with his statement to Gary Kampman: "I mentioned to him that [Z.K.] was –what [Z.K] had said. And he denied doing anything." (Trial Tr. p. 95 L19-20). Tournier repeated this statement during his interview with DHS and Captain Leonard. (Trial Tr. p. 131 L7-9; Trial Tr. p. 131 L17-18; Trial Tr. p. 194 L8-14; Exh. D-7/7/16 Call-5:40; Exh. D-7/8/16 Call-6:30-6:45, 7:20-7:30; Exh. E-7:22-7:25, 8:25).

Tournier also explained that any touching that did occur was inadvertent and occurred while he was goofing around with the children. (Trial Tr. p. 95 L20-p. 96 L6; Trial Tr. p. 16-19; Trial Tr. p. 194 L21-p. 195 L9; Exh. D-7/8/16 Call-6:30-6:45; Exh. E-10:15). Tournier also stated that he was giving the girls "raspberries" while they were goofing around. (Trial Tr. p. 97 L22-p. 98 L5; Exh. D-7/8/16 Call-6:30-6:45). Tournier did admit to Captain Leonard that he told Z.K. not to tell her parents what happened, however, he indicated that he told her that because the touching was an accident. (Trial Tr. p. 195 L10-p. 196 L2).

The Court indicated that the only way that Tournier could have had knowledge of the allegations was because he was present and they actually occurred. (Sent. Tr. p. 11 L23-p. 12 L3). In fact, Tournier was aware of the allegations because of the initial confrontation between Gary Kampman and himself. (Trial Tr. p. 95 L4-p. 96 L7). Tournier had further conversations with his family members while the investigation was ongoing and obtaining information from them about the allegations and what questions were being asked during the investigation. (Exh. D-7/7/16 Call-6:21; Exh. D-7/8/16 Call-4:00).

Trampoline Allegations: Not only is Z.K. not a credible witness, but her testimony of events that allegedly occurred on July 4, 2016, is not consistent with other witnesses—who did not have any issues remembering the events of the day. Both of the Kampman's acknowledged that they had seen Tournier on the trampoline approximately two times; however, Theresa could not remember if he was on the trampoline that day. (Trial Tr. p. 83 L12-p. 84 L4). Gary initially testified that he

watched Tournier and Z.K. on the trampoline that evening, but then changed his statement:

> **Q:** And **on this evening did you ever have occasion to see [Z.K.] on the trampoline with – with Dale?**
> **A: Yes.**
> **Q:** Okay. Who else did you see on the trampoline?
> **A:** He had his kids on there with him.
> **Q:** And that would be [K.T.] and [K.T]?
> **A:** Yes.
> **Q:** Okay. And – And you're how far away?
> **A:** Another 40, 50 feet if I was in our house. A lot of times I stood over beside the trampoline when they were on it.
> **Q:** Can you see what's occurring on the trampoline?
> **A:** Yes.
> **Q:** Okay. And did you see any physical contact?
> **A:** We were not watching that night.
> **Q: Okay. But you were there. Were you just sitting in a lawn chair out in your front yard?**
> **A: We were not—we were in the house.**

(Trial Tr. p. 105 L4-24)(emphasis added).

Additional witnesses testified that they had seen Tournier on the trampoline with the kids, but not that evening. (Trial Tr. p. 280 L20-p. 282 L11; Trial Tr. p. 289 L16-p. 291 L22) The testimony of all the witnesses, with the exception of Z.K., was consistent that Tournier was not on the trampoline that

day with Z.K. (Trial Tr. p. 280 L15-19; Trial Tr. p. 298 L18-20; Trial Tr. p. 320 L6-9). The evidence does not support the verdict that Tournier touched Z.K. on the trampoline on July 4, 2016.

K.T.'s Bedroom. The question comes down to whether the evidence supports the verdict-that the touching occurred in K.T.'s bedroom. The answer is that it does not. A review of the timeline of the evening paints a clear picture that Tournier was not alone with Z.K. in the bedroom, and even if he was, his alleged comments regarding not telling her parents would have been overheard by one of the other adults present.

Around 1:00 p.m. on the afternoon of July 4, 2016, Tournier and his family returned from spending the weekend camping. (Trial Tr. p. 267 L3-15; Trial Tr. p. 296 L17-19). Amanda Harris lay down to take a nap around 2:30 p.m.; Rebecca Stille was relaxing in the recliner in the living room, occasionally going outside to checking on Z.K. and K.T. (Trial Tr. p. 269 L7-11; Trial Tr. p. 297 L1-p. 298 L5). During this time Z.K. and K.T. may have been playing on the trampoline

and going back and forth between the two yards. (Trial Tr. p. 67 L11-p. 68 L16; Trial Tr. p. 298 L6-16). Between 3:00 p.m. and 4:00p.m Kelsey Simmons arrived to pick up her daughter. (Trial Tr. p. 314 L5-13). She arrived to find Amanda asleep, the kids playing outside, and Tournier outside talking to the neighbors. (Trial Tr. p. 298 L21-25; p. 314 L15-p. 315 L13). Between 5:30 p.m. and 6:30 p.m. Amanda woke up; she found K.T. and Z.K. playing in K.T.'s room. (Trial Tr. p. 269 L10-11; Trial Tr. p. 270 L4-10). Tournier was also outside, and Amanda yelled at him to put together the kitchenette for K.T. (Trial Tr. p. 270 L13-14; p. 272 L23-p. 273 L5; p. 299 L9-18; p. 315 L22- p. 316 L2).

Between 6:30 p.m. and 8:00 p.m. for approximately 20-60 minutes, Tournier and the girls were in K.T.'s bedroom. (Trial Tr. p. 275 L24-p. 276 L2; p. 302 L24-p. 303 L1; p. 316 L23-p. 317 L2). The little girls were playing My Little Ponies, watching t.v., and jumping on the bed.[2] (Trial Tr. p. 274 L1-

[2] Z.K. testified that they were playing Strawberry Shortcake; however, both Amanda and Kelsey testified that it was My Little Ponies-Amanda going so far as to not knowing what

22; p. 275 L7-14; p. 305 L4-12; p. 318 L5-10). During this time, Amanda was in and out of the room assisting Tournier with reading the directions to put together the kitchenette and was able to hear the conversation going on in the room when she was in the bathroom getting ready. (Trial Tr. p. 274 L22-p. 275 L6; p. 276 L18-p. 277 L2; p. 302 L12-16; p. 316 L17-19). Kelsey was observing the construction of the kitchenette because she had one at home that she needed to put together for her daughter. (Trial Tr. p. 276 L9-16; p. 303 L2-11; p. 316 L4-14; p. 317 L6-17). Kelsey testified that she could hear everything going on in the room the entire time. (Trial Tr. p. 318 L14-22). Rebecca was in and out of the room a time or two to assist with putting stickers on the kitchenette. (Trial Tr. p. 304 L6-14). Rebecca was in the living room the rest of the time, within earshot of the bedroom. (Trial Tr. p. 303 L13-p. 304 L5; p. 316 L21-22). Tournier was also in and out of the room to get tools to put together the kitchenette. (Trial Tr. p. 276 L3-7; p. 302 L17-23; p. 317 L3-5). At no point in time

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Strawberry Shortcake is. (Trial Tr. p. 54 L10-17; p. 274 L11-15)

was the door to the room closed. (Trial Tr. p. 302 L8-11; p. 317 L18-19).

Amanda testified that at one point in time K.T. jumped on Tournier, but that Amanda yelled at K.T. to stop bothering Tournier because he was putting the kitchenette together. Neither Rebecca or Kelsey saw any physical contact between Tournier and K.T. or Z.K. (Trial Tr. p. 275 L15-22; p. 308 L12-19; p. 318 L11-13).

After Tournier finished putting together the kitchenette, he went outside. (Trial Tr. p. 277 L6-18; p. 278 L4-6; p. 305 L13-20; p. 318 L25-p. 319 L10). The girls continued playing in the bedroom until Z.K. headed home, sometime between 8:00 p.m. and 9:00 p.m. (Trial Tr. p. 305 L21-p. 306 L8; p. 319 L11-25).

There was no time when Tournier and the girls were in the bedroom when Tournier would have had an opportunity to touch and lick Z.K. as she alleged. Even if it did happen, one of the women in the proximity of the bedroom would have overheard Tournier allegedly tell Z.K. to keep it a secret. By all

accounts, Amanda was in the bathroom getting ready for work, Rebecca was in the living room and could hear everything going on in the room, and Kelsey was in the same general area when she was not in the room itself; any of those women would have overheard a comment made by Tournier, and likely would have asked questions about what was such a secret.

When factoring in the rest of the evidence presented at trial, it does not support the verdict. Theresa Kampman's testimony had serious credibility issues. She testified that the girls went swimming that, which was directly contradicted by Z.K.'s testimony that they did not go swimming on the day that she was touched. (Trial Tr. p. 54 L1-6; p. 67 L25-p. 68 L16; p. 84 L6-p. 85 L1). Theresa Kampman also was emphatic that the clothes that were collected by the police were taken directly off Z.K.'s body and placed in the evidence bags, which was directly contradicted by the testimony of Officer Hansel. (Trial Tr. p. 76 L16-20; p. 87 L13-25; p. 116 L16-p. 117 L4; p. 120 L13-p. 121 L18). Gary Kampman's inconsistencies and

poor recollections of the evening were discussed above. Even though the police obtained evidence from Z.K., there was no DNA match with Tournier. (Ex. C-1; Ex. C-2) (App. pp. 9-12).

The police investigation was less than thorough.[3] Captain Leonard failed to interview K.T. a potential eyewitness

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[3] The actions of Captain Leonard clearly indicate a police officer who had made a determination of guilt related towards Tourier and was not willing to run a full investigation and interview all relevant witnesses because of his preconceived determination of guilt. Captain Leonard had researched Tournier's background before interviewing witnesses and running his investigation. In his police report he stated that:

> After the phone conversation [with Tournier] and before the CPC interview, I began to investigate Tournier's background, in particular, the cases involving sex abuse. The background included a case in 1984 when Tournier was 17 years old. The allegations claimed Tournier sexually assaulted his 5-year old cousin with acts of oral intercourse. From what I can gather, Tournier was sent to Eldora Detention Facility for this crime. In 1994, Tournier was 22 years old and living in Denver, Colorado. Tournier was sentenced to a prison term in Colorado after an investigation into a sexual relationship he had with a 14 year old girl. ... I later received an Iowa Medical Classification Center report dated 01/24/2005, which described Tournier's history to that point in better detail. I also received copies of reports taken by Independence Police from 1984 and a different report from Oelwein Police in 2014 that describe

to the alleged incidents, even though he had been repeatedly told through different sources that K.T. was present when the alleged touching occurred. (Trial Tr. p. 213 L2-p. 214 L9; Trial Tr. p. 216 L20-24). Captain Leonard failed to follow up on relevant information provided to him by Rebecca Stille and Amanda Harris-that K.T. was present at the time the allegations occurred. Captain Leonard also made sure to reference the prior convictions and allegations to Amanda Harris, who, in his words, "seemed to be indifferent to whatever conclusion was come to." (Minutes) (Conf. App. pp. 4-22). He did not interview Kelsey Simmons or K.T., another child witness. (Trial Tr. p. 215 L5-9). Captain Leonard claimed that he was unable to record the first phone conversation he had with Tournier because he did not have a recorder present. (Trial Tr. p. 193 L11-24; Trial Tr. p. 215 L10-17). Conveniently, that first phone call was when Tournier allegedly provided the most details about what

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similar allegations against Tournier. No charges were filed in the Oelwein PD case.

(Minutes) (Conf. App. pp. 4-22).

happened. Nor did Captain Leonard reiterate the original allegations made during the initial phone call during either of the later recorded phone calls. (Trial Tr. p. 215 L25-p. 216 L18). Finally, Captain Leonard only took pictures of the interior of the house seven days prior to trial, after Tournier and his family had moved out and another family had moved in. (Trial Tr. p. 218 L13-22).

The evidence relied on by the judge does not support the verdict rendered. The main witness, Z.K., was inconsistent and likely influenced by the adults in her life when she modified her allegations between just the touching to touching and licking. There was no physical evidence against Tournier. The police ran a biased, shoddy investigation, failing to interview critical witnesses, including an eyewitness. The evidence does not support the allegation that touching occurred on the trampoline, because Tournier and Z.K. were not on the trampoline together that day. The evidence does not support the allegation that touching occurred in K.T.'s bedroom, because other adults were continuously in the

bedroom with Tournier and the girls, or, at the very least, within hearing distance of the statement for Z.K. to not tell her parents what happened. This Court should overturn Tournier's conviction and remand the case to District Court.

II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT SUMMARILY DENIED THE DEFENSE REQUEST TO SET ASIDE THE JUDGMENT AND TAKE ADDITIONAL TESTIMONY PURSUANT TO IOWA RULE OF CRIMINAL PROCEDURE 2.24(2)(c).

Preservation of Error: Error was preserved when trial counsel requested the district court vacate the judgment of the court pursuant to Iowa Rule of Criminal Procedure 2.24(2)(c) and take additional testimony and the court denied the motion. (Sent. Tr. p. 6 L20-p. 7 L13; Sent. Tr. p. 13 L21-23).

To the extent this Court concludes that error is not preserved for any reason, Tournier respectfully requests that the issue be considered under an ineffective assistance of counsel framework. An ineffective assistance of counsel claim is an exception to the general requirement of error preservation. See State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

Standard of Review: The appellate courts review the district court's interpretation of the criminal rules of procedure for errors at law. State v. Folkerts, 703 N.W.2d 761, 763 (Iowa 2005); Iowa R. App. P. 6.907.

The standard of review for a motion for a new trial is an abuse of discretion. State v. Carter, 158 N.W.2d 651 (Iowa 1968). To find the district court abused its discretion, the defendant must show that the district court's decision was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. State v. Blum, 560 N.W.2d 7, 9 (Iowa 1997).

The standard of review in this case should be an abuse of discretion. The rule in question in this case allows the court the discretion to determine when it is appropriate to vacate a judgment and take additional testimony. See Iowa R. Crim. P. 2.24(2)(c) (2017) ("...the court may where appropriate...").

If the issue is evaluated under an ineffective assistance of counsel framework, review is de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). A defendant claiming a

violation of his constitutional right to the effective assistance of counsel must establish: (1) counsel's performance fell below an objective standard of reasonableness and (2) counsel's deficient performance prejudiced the defense. Id. at 685. Prejudice is established by showing "a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 669, 104 S.Ct. 2052, 2055 (1984). A reasonable probability is one sufficient to undermine confidence in the outcome. Gering v. State, 382 N.W.2d 151, 153-54 (Iowa 1986).

Discussion: Iowa Rule of Criminal Procedure 2.24(2)(c) states:

> On a motion for a new trial in an action tried without a jury, the court may where appropriate, in lieu of granting a new trial, vacate the judgment if entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter judgment accordingly.

Iowa R. Crim. P. 2.24(2)(c) (2017). It appears that the scope of the application of Rule 2.24(2)(c) is an issue of first

impression, with the limited exception of the application related to a motion for a new trial for newly discovered evidence.[4]

Other Jurisdictions Rule and Application. As an issue of first impression, with the exception of the newly discovered evidence issue, it is beneficial to look at other

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[4] In a series of unpublished opinions the Court of Appeals has issued rulings on various issues related to Rule 2.24(2)(c). In State v. Watkins, the Court of Appeals found that it was appropriate for the district court to set aside the verdict and take additional testimony upon a motion for a new trial based on newly discovered evidence under Rule 2.24(2)(b)(8). State v. Watkins, No. 01-0139, 2002 WL 1427560, at *10 (Iowa Ct. App. Jul. 3, 2002). In State v. Mujkanovic, the defendant raised the issue of a denial of a motion for a new trial because the verdict was contrary to the weight of the evidence, citing to Rule 2.24(2)(c); however, the Court did not expand upon the request for setting aside the verdict and taking new evidence, but ruled based on the evidence presented at trial. State v. Mujkanovic, No. 10-0768, 2011 WL 441358, at *5 (Iowa Ct. App. Feb. 9, 2011). The Court has repeatedly addressed the question of whether a defendant must request the court amend its findings for error to be preserved. See State v. Leikvold, No. 16-2018, 2017 WL 4315060, at *2 nt. 1 (Iowa Ct. App. Sept. 27, 2017); State v. Young, No. 03-0673, 2004 WL 360493, at *1-*2 (Iowa Ct. App. Feb. 27, 2004) (decision vacated on other grounds by State v. Young, 686 N.W.2d 182 (Iowa 2004). The Court has also addressed the issue of ineffective assistance of counsel for failing to move for additional testimony under Rule 2.24(2)(c). See State v. Howard, No. 03-0734, 2004 WL 894127, at *3 (Iowa Ct. App. Apr. 28, 2004).

jurisdictions to see if and how they have handled similar matters.

The Federal Rules of Criminal Procedure, Rule 33, is similar to the Iowa rule, stating: "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. **If the case was tried without a jury, the court may take additional testimony and enter a new judgment.**" See Fed. R. Crim. P. 33(a) (emphasis added). Other states have adopted the Federal Rule or similar versions of the Federal Rule. See District of Columbia Super. Ct. Crim. R. 33(a) (verbatim to Federal rule); Rhode Island Super. R. Crim. P. 33 ("If trial was by the court without a jury, the court on motion of a defendant for a new trial may vacate the judgment, take additional testimony, and direct the entry of a new judgment."); N.J. Ct. R. 3:20-1 ("If trial was by the judge without a jury, the judge may, on defendant's motion for a new trial, vacate the judgment if entered, take additional testimony and direct the entry of a new judgment."); Wyo. R. Crim. P. 33 ("If trial was by the court

without a jury, the court, on motion of a defendant for a new trial, may vacate the judgment if entered, take additional testimony, and direct the entry of a new judgment."). The Michigan Rule is modeled after the Uniform Rules of Criminal Procedure of 1987, which are modeled after the Federal Rule, and add a requirement that the defendant consent to the vacation of the judgment and taking additional testimony. See MI R. RCRP MCR 6.431(C) ("If the court tried the case without a jury, it may, **on granting a new trial and with the defendant's consent**, vacate any judgment it has entered, take additional testimony, amend its findings of fact and conclusions of law, and order the entry of a new judgment.") (emphasis added); see also Unif. Rules. Crim. Procedure 1987 Rule 552. The majority of these jurisdictions treat a motion for a new trial based on newly discovered evidence differently than other grounds for a new trial. See District of Columbia Super. Ct. Crim. R. 33(b); Rhode Island Super. R. Crim. P. 33; Wyo. R. Crim. P. 33; Fed. R. Crim. P. 33(b).

In a recent case, Green v. United States, 164 A.3d 86 (D.C. 2017), the D.C. Court of Appeals discussed when it is appropriate for a judgment to be vacated based on the "interest of justice" standard.[5] In reaching its decision that the defendant was not entitled to relief, the Court reviewed the historical cases that addressed what was considered in the "interests of justice." Id. at 93-94.

In Benton v. United States, 188 F.2d 625, 627 (D.C. Cir. 1951), the court found exceptional circumstances where the mother of the child victim provided an affidavit after the trial that called into question the child's testimony, and the testimony was the crux of the case. In Brodie v. United States, 295 F.2d 157, 159-160 (D.C. Cir. 1961), the situation involved a case of misidentification. The motion was filed as newly

[5] Green was convicted of possession with intent to distribute 3,4-methylenedioxymethcathinone hydrochloride (MDMC). The judge relied on two pieces of evidence to reach his conviction: text messages by Green discussing "molly", and the quantity in Green's possession. On his motion for a new trial, Green presented two affidavits from experts who asserted that MDMC was not "molly" and that the amount the defendant possessed would have been for personal use not distribution. Green v. United States, 164 A.3d at 89-90.

discovered evidence, but the standard that should have been applied was the interests of justice standard. Id. The Court found that while the standard for newly discovered evidence is stricter than the interest of justice, a factor to be considered under the interest of justice standard is the due diligence of the defense. Id.

In Lyons v. United States, 833 A.2d 481 (D.C. 2003), the Court found that a hearing should be conducted to determine if the defendant was denied a fair trial because he had been threatened prior to trial. Id. at 488-89. Finally, the Green court analyzed Huggins v. United States, 333 A.2d 385 (D.C. 1975), finding that where the defendant had access to evidence to impeach a critical witness at the time of trial, and opted not to, it did not qualify as an exceptional circumstance because counsel did not exercise due diligence. Id. at 387.

The Green Court held that Rule 33(a) is not a "do-over" rule, giving the defense an opportunity to present a better defense after having a negative judgment issued against it. Green v. United States, 164 A.3d at 94. The Court further

concluded that a new trial under the "interests of justice" will only be justified only if "'exceptional circumstances' prevented the defendant from receiving a fair trial." Id. (citing Tyer v. United States, 912 A.2d 1150, 1167 (D.C. 2006)).

The Court concluded:

> Appellant has completely failed to meet that standard. This record is not comparable to the unique situation presented in Benton. There was no question of misidentification. No codefendant intimidated appellant or prevented him from presenting a full defense. The evidence he submitted after trial was equally available prior to trial. In short, nothing interfered with appellant's ability to present his defense. Indeed, he won acquittals or partial acquittals on many of the charges against him.

Green v. United States, 164 A.3d at 94. Finally, the Court reasserted the established principle that the trial court is not required to hold a hearing, after examining the proffered affidavit of a witness and determining that the potential testimony would not result in an acquittal. Id. at 95 (citing Poteat v. United States, 363 A.2d 295, 297 (D.C. 1976)).

Rhode Island utilizes a different standard than D.C. The standard of review on appeal to be applied in a bench trial motion for a new trial is:

> [T]he same as would be applied to the trial justice's factual findings on the merits. Such determinations are entitled to great weight and will not be disturbed unless the trial justice has overlooked or misconceived relevant and material evidence or was otherwise clearly wrong.

State v. Duffy, 705 A.2d 992, 993 (R.I. 1997) (citations omitted). The Rhode Island Supreme Court has further explained the standard to be applied by the trial court:

> weigh and evaluate the evidence, pass upon the credibility of the trial witnesses, and engage in the inferential process, impartially, not being required to view the inferences in favor of the nonmoving party, and against the moving party. After so doing, if the trial justice *** concludes that the trial evidence is sufficient to establish guilt beyond a reasonable doubt, he or she denies the defendant's motion to dismiss and, if both sides have rested, enters decision and judgment of conviction thereon. If the evidence is not so sufficient, he or she grants the motion and dismissed the case.

State v. Forand, 958 A.2d 134, 141 (R.I. 2008) (citations omitted).

The Rhode Island Supreme Court has indicated that in order to be granted a new trial under Rule 33, unless the defendant also asserts an offer of newly discovered evidence, "he must overcome a high hurdle in demonstrating that the trial justice abused her discretion when she denied his motion." State v. Medeiros, 996 A.2d 115, 123 (R.I. 2010); see also State v. Erminelli, 991 A.2d 1064, 1070 (R.I. 2010). It is unclear whether the Rhode Island Supreme Court means newly discovered evidence within the meaning of Rule 33[6], or if there is a separate standard for evidence not provided at trial but not technically within the "newly discovered evidence"

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[6] To qualify as newly discovered evidence for a motion for a new trial, the evidence must meet the following criteria:

> The first prong is a four-part inquiry that requires that the evidence be (1) newly discovered since trial, (2) not discoverable prior to the trial with the exercise of due diligence, (3) not merely cumulative or impeaching but rather material to the issue upon which it is admissible, (4) of the type which would probably change the verdict at trial. *** once this first prong is satisfied, the second prong calls for the hearing justice to determine if the evidence presented is 'credible enough to warrant a new trial.'

State v. DiPetrillo, 922 A.2d 124, 138-39 (R.I. 2007) (citations omitted).

standard, such as the exceptional circumstances standard applied in D.C.

Application in Iowa. Rule 2.24(2)(c) is different from the Federal Rule and the identical D.C. Rule analyzed in the Green case, in that the Iowa Rules of Criminal Procedure establish more specific grounds for a motion for a new trial. Cf. Iowa R. Crim. P. 2.24(2)(b) (2017); Fed. R. Crim. P. 33; and District of Columbia Super. Ct. Crim. R. 33. Under the Federal Rule the "interest of justice" standard is the standard applied to determine if a new trial should be granted in all cases other than newly discovered evidence.

The standard applied in Rhode Island is more similar to Iowa's in that Rhode Island applies a standard that is a blend of the sufficiency of the evidence and verdict against the weight of the evidence in Iowa. The Rhode Island standard appears to be couched in a sufficiency of the evidence label but does not require the trial judge to view the evidence in the light most favorable to the State, like is required in Iowa. Cf.

State v. Forand, 958 A.2d at 141; State v. Robinson, 288 N.W.2d 782,787 (Iowa 1992).

In Iowa, the grounds on which a defendant may move for a new trial in a bench trial is limited to those found in Rule 2.24(2)(b), subsections (1), (6), (8), and (9). The remaining subsections specifically reference matters related to a jury. See Iowa R. Crim. P. 2.24(2)(b) (2017). Of those four subsections, subsection (6) and subsection (8) have their own standards to be applied by the trial court upon a motion for a new trial. Subsection (6) addresses when the verdict is contrary to law or evidence,[7] and subsection (8) is for newly discovered evidence.[8] Subsection (9) is most similar to the Federal "interests of justice" rule, allowing for any other claim that the trial was not fair and impartial.

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[7] See Division I for the established standard to be applied when the motion for a new trial is based on subsection (6).

[8] To prevail on a motion for a new trial based on newly discovered evidence, the defendant must show that: "(1) the evidence was discovered after the verdict, (2) it could not have been discovered earlier in the exercise of due diligence, (3) the evidence is material to the issues in the case and not merely cumulative or impeaching, and (4) the evidence probably would have changed the result of the trial." State v. Allen, 348 N.W.2d 243, 246 (Iowa 1984).

The real issue, when analyzing Rule 2.24(2)(c), is whether a separate standard other than that under 2.24(2)(b) should apply when the court is considering taking additional testimony because of the nature of a bench trial. The difference between a motion for a new trial in a jury trial and a motion for a new trial in a bench trial is the position of the judge. On a motion for a new trial for a jury trial, the judge sits as the thirteenth juror "determin[ing] whether a fair trial requires that the [claim presented in the motion for a new trial] be made available to the jury." Green v. United States, 164 A.2d at 92. A motion for a new trial for a bench trial requires the judge to reevaluate his or her own evaluation of the evidence and conclusions. Human nature dictates that it is difficult for a person to question his/her own judgment and decision making process.

If this Court determines that the standard under Rule 2.24(2)(c) should be the same as under Rule 2.24(2)(b), the district court will rarely, if ever, find it necessary to vacate the judgment and take additional testimony, without an additional

motion for a new trial due to newly discovered evidence, because it is unlikely that the Court will ever find that any additional evidence (not newly discovered evidence) will change the outcome of the case. See State v. Mujkanovic, No. 10-0768, 2011 WL 441358, at *5 ("Senahid also challenges the district court's denial of his motion for a new trial because the verdict was contrary to the weight of the evidence. Based on the evidence in the record already discussed, we find the district court did not abuse its discretion in denying the motion for a new trial."). The cases in Rhode Island are a good example of this. [9]

However, if it were the intent of the Legislature to apply the same standard to both, then why create a rule separate from that of Rule 2.24(2)(b)? See State v. Adams, 810 N.W.2d 365, 370 (Iowa 2012) (citation omitted) ("In construing statutes, we assume the legislature is familiar with the

[9] Counsel was unable to find any relevant caselaw in Rhode Island that addressed a Rule 33 motion for a new trial at a bench trial where the defendant offered to provide the court with additional evidence for the court's consideration. See State v. Medeiros, 996 A.2d at 123; State v. Erminelli, 991 A.2d at 1070.

existing state of the law when it enacts new legislation."). Rule 2.24(2)(c) does not state on its face that the evidence to be considered by the Court be "new evidence" or "newly discovered evidence." Iowa R. Crim. P. 2.24(2)(c) (2017). The Rule states that the Court can take "additional testimony." The standard applied to "newly discovered evidence" is strict and requires the evidence to not be discoverable prior to trial with due diligence. However, as the D.C. Courts have found, there are other exceptional circumstances that can result in the necessity of taking "additional testimony" that is not "newly discovered evidence", such as intimidation of the defendant, misidentification, and a witness coming forth after trial to indicate that the victim was inconsistent. See Green v. United States, 164 A.3d at 94.

Tournier urges this Court to adopt a standard similar to the "exceptional circumstances" standard utilized in D.C. when analyzing a motion raised pursuant to Rule 2.24(2)(c). Pursuant to a showing of exceptional circumstances, the district court should vacate the judgment, take additional

testimony, and issue amended findings and conclusions or new findings and conclusions.

In this case, counsel filed an appropriate motion for a new trial when the verdict is contrary to the evidence; forming the grounds for the application of Rule 2.24(2)(c). (Motion for a New Trial) (App. pp. 17-18). The heart of the argument by counsel was the inconsistencies in the testimony of Z.K., the lack of physical evidence, the lack of due diligence by the investigators to interview potential eyewitnesses, and the fact that the two charges stem from the same set of facts but the Court only found Tournier guilty of one of the two counts. (Sent. Tr. p. 2 L25-p. 6 L19) Due to the fact that it was a bench trial, trial counsel also requested the court set aside the verdict and take additional testimony. (Sent. Tr. p. 6 L20-p. 7 L13).

Trial Counsel indicated that he would call an additional nine witnesses to provide testimony to the Court "who were

present during all of this."[10] (Sent. Tr. p. 7 L10). Counsel stated that he would call K.T., the eyewitness who was with Z.K. during all the timeframes related to the allegations, along with W.T and K.T. two more minors, Shawn Tournier, Amanda Jenison, and others. (Sent. Tr. p. 7 L6-10).

The State argued that the evidence defense counsel wanted to present to the Court was all discoverable at the time of trial. The State went on to argue that "[t]here's really no newly discovered evidence here and that's really what we're talking about when we talk about opening up the cases is – is for, um, the purposes of allowing the Court to receive a newly discovered evidence. There's nothing new here to discover." (Sent. Tr. p. 9 L17-21).

The District Court denied the defense counsel's request for reopening the case under Rule 2.24(2)(c) stating "I don't

[10] Unlike the defendant in Green, here trial counsel did not file affidavits, or even provide an offer of proof, as to the expected testimony of the proposed witnesses. Should this Court find this to be critical to determining whether the district court abused its discretion in denying the request, Tournier asks that this issue be considered under an ineffective assistance of counsel framework and be preserved for post-conviction relief.

believe that there's any purpose that would be served by, um, reopening the record or allowing additional testimony." (Sent. Tr. p. 13 L21-23).

While the State is correct in that all the proposed witnesses by the defense were available to testify at trial, as discussed above, the newly discovered evidence standard is inappropriate to apply under Rule 2.24(2)(c) when the grounds for the motion for a new trial was not newly discovered evidence under Rule 2.24(2)(b)(8). Trial counsel was not asking for a "do-over" like the Court found in Green, but a finding of exceptional circumstances that would require the court to vacate the judgment and take the additional testimony. The exceptional circumstances in this case was that at the time Defense Counsel tried the case, Counsel could not anticipate that the Court could or would divide the allegations since the allegations were so intertwined. Depending on which version of her story is believed, Z.K. alleged that the touching and licking occurred either on the trampoline or in K.T.'s bedroom or both.

The findings of fact make it clear that the Court was not focused on when or where the alleged touching occurred, given the general nature of the findings: "The sexual contact between Defendant and Z.K. described above **took place in or near the residence of Defendant.**" (Verdict and Order) (App. pp. 13-16). While the findings of fact do specify that the Court found the allegations to have occurred on July 4, 2016, the evidence presented at trial does not support such a finding related to the allegation on the trampoline.[11] (Verdict and Order) (App. pp. 13-16). The court was unwilling or unable to determine exactly where and when the alleged touching occurred.

In planning his defense of Tournier, trial counsel could not have contemplated that the Court would "split the baby" when it came to a verdict, because the evidence does not support a finding of guilt for one charge but not the other. The findings of fact presented by the Court do not explain why

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[11] See Division I discussion regarding the evidence showing that Tournier was not on the trampoline on July 4, 2016, with Z.K.

the Court found Z.K. more credible regarding the touching allegation and not the licking allegation. Furthermore, the explanation given by the Court during the motion hearing did not clarify this point. If anything, it further muddied the waters when it stated "In the Court's opinion, its experience, that, um, a – a child, [Z.K.], that age does not, um – does not initiate that kind of conversation unless, um, it's something they've actually experienced." (Sent. Tr. p. 10 L21-24). The Court claimed that children do not make up these types of allegations; however, that statement is completely at odds with the Court's verdict, acquitting Tournier of Count II-the allegation of oral sexual abuse.

Tournier was not asking for a do-over of his case because he was unhappy with the outcome, he was requesting the Court take additional testimony because the conclusion reached by the Court was not one that the Defendant could have anticipated having to defend against prior to hearing the Court's verdict.

The Court also considered evidence outside the record when it reached its conclusion. When considering potential testimony from K.T., the eyewitness to the allegations, the Court stated: "The Court's not satisfied that the people that were present, and I guess specifically [K.T.], um, that [K.T.] would have necessarily been old enough to really understand or, um, alert others, um, to what she was observing." (Sent. Tr. p. 12 L19-22). The Court was not presented with any evidence that K.T. would be unable to comprehend what was going on, if she saw anything happen between Tournier and Z.K. Furthermore, evidence was presented by Strub that children as young as two years old have provided actionable information during interviews. (Trial Tr. p. 241 L24-p. 242 L7).

The Court's statement that K.T. would be too young to understand indicates that the Court does not believe that young children can make credible sex abuse allegations or be competent witnesses. This is in direct contradiction with Iowa Code and caselaw. See Iowa R. Crim. P. 5.601 (2017) ("Every

person is competent to be a witness unless a statute or rule provides otherwise."); State v. Dodson, 452 N.W.2d 610 (Iowa Ct. App. 1989) (Five-year-old sexual abuse victim was found to be competent when she told the court that to tell the truth meant not to lie and she would tell the truth.); State v. Brotherton, 384 N.W.2d 375 (Iowa 1986) (Four-year-old was competent to testify about sexual abuse where she promised to tell the truth, had remarkable independent recollection of tangible details of the sexual abuse incident, and remembered details about the night in question.)

In denying the request to vacate the judgment and take additional testimony under Rule 2.24(2)(c) the Court stated "I don't believe that there's any purpose that would be served by, um, reopening the record or allowing additional testimony." (Sent. Tr. p. 13 L21-23). Allowing the testimony of K.T. to, at the very least, determine if she did witness anything and could recall it, before making a competency and credibility determination about her proposed testimony, would be a very justifiable reason to reopen the record.

Similar to the trial court's findings in Green, here the district court relied upon two combined pieces of evidence: Z.K.'s testimony and the statements made by Tournier. (Sent. Tr. p. 11 L16-p. 12 L3; Sent. Tr. p. 13 L13-19). Without even being presented with an offer of proof as to the testimony of the nine witnesses trial counsel requested calling, the District Court summarily determined that nothing would change the outcome of the case-including the potential exculpatory testimony of K.T. Given that it was a bench trial, it would have been relatively easy for the Court to reopen the record and admit testimony.

Tournier acknowledges that the district court should not allow any bench trial to be reopened after the fact because the defendant can now produce evidence in his favor; however, where exceptional circumstances exist Rule 2.24(2)(c) should allow for the taking of "additional testimony" when it's in the interests of justice. The District Court abused its discretion when it summarily denied Tournier's request pursuant to Rule 2.24(2)(c) because it failed to take into consideration any

additional testimony under the exceptional circumstances of the confusing nature of the verdict, which under the circumstances was unreasonable. See State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979).

Tournier requests this Court vacate the judgment of the District Court and remand his case for the District Court to take the additional testimony of the additional nine defense witnesses. If this Court finds that trial counsel failed to adequately preserve the issue by failing to provide either affidavits or offers of proof as to the proposed witnesses testimony, Tournier requests this Court consider this issue under an ineffective assistance of counsel framework, and preserve the issue for post-conviction relief.

III. THE DISTRICT COURT ERRED IN ASSESSING FINANCIAL OBLIGATIONS TO TOURNIER FOR UNKNOWN AMOUNTS OF RESTITUTION, INCLUDING JAIL FEES PURSUANT TO IOWA CODE SECTION 356.7, WITHOUT FIRST OBTAINING A REQUEST FOR REIMBURSEMENT FROM THE JAIL.

Standard of Review: This Court reviews restitution orders for correction of errors at law. When reviewing a

restitution order, the appellate court determines whether the district court has properly applied the law. State v. Jenkins, 788 N.W.2d 640, 642 (Iowa 2010); State v. Klawonn, 688 N.W.2d 271, 274 (Iowa 2004). The Court's review of constitutional claims is de novo. State v. Dudley, 766 N.W.2d 606, 612 (Iowa 2009).

Preservation of Error: The general rule of error preservation is not applicable to void, illegal or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). The sentence is illegal in the instant matter by virtue of the fact that the Court violated the procedures established in Iowa Code section 356.7 for assessing jail fees. (Order of Disposition) (App. pp. 20-22).

Review of sentencing is properly before this court upon direct appeal despite the absence of objection in the trial court. State v. Cooley, 587 N.W.2d 752, 754 (Iowa 1999).

Discussion: "A constitutional prerequisite for a restitution order is the court's determination of a defendant's reasonable ability to pay." State v. Van Hoff, 415 N.W.2d 647,

648 (Iowa 1987). "A determination of reasonableness, especially in a case of long-term incarceration, is more appropriately based on the inmate's ability to pay the current installments than his ability to ultimately pay the total amount due." Id. at 649.

A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment. State v. Dudley, 766 N.W.2d 606, 615 (Iowa 2009) (citing Hanson v. Passer, 13 F.3d 275, 279 (8th Cir.1994).

"By statute, incarceration creates no obstacle to performance under the restitution plan." Walters v. Grossheim, 525 N.W.2d 830, 832 (Iowa 1994) (citing Iowa Code § 910.5(1)). "Nevertheless the restitution plan of payment is required to reflect individualized factors bearing on the inmate's ability to pay." Id. (recognizing provisions in § 910.5(1) addressing "...income, physical and mental health, education, employment and family circumstances").

When a criminal defendant contests an order of restitution he "...has the burden to demonstrate a failure of the trial court to exercise discretion or abuse of discretion." State v. Storrs, 351 N.W.2d 520, 522 (Iowa 1984). However, this burden is not insurmountable. "In an extreme case this burden may be met on appeal through a record showing a defendant's indigency and disability from earning income." State v. Kaelin, 362 N.W.2d 526, 528 (Iowa 1985).

Iowa Code section 356.7 sets forth the enforcement procedures for charging an individual with room and board fees who has been convicted of a criminal offense. See Iowa Code § 356.7 (2017). The sheriff or municipality is not required to file for reimbursement, but has the option to do so. The district court has the obligation to act on the request for reimbursement **after** the receipt for the claim has been filed. See Id. ("Upon receipt of a claim for reimbursement, the court shall approve the claim in favor of the sheriff or the county, or the municipality, for the amount owed by the prisoner as identified...").

In State v. Abrahamson, the Supreme Court addressed the issue of what "shall approve" means within Section 356.7 when the district court reviews the application for reimbursement. State v. Abrahamson, 696 N.W.2d 589 (Iowa 2005). The Court found that

> the 'shall approve' language of section 356.7(3) as a grant of authority to the court to resolve the merits of the claim-not a mandate that it simply sign the order as a ministerial function. This is consistent with the interpretation of the words as set out above and yet preserves the court's constitutional authority. Moreover, it confirms in the district court 'the inherent discretionary authority to review any order ... and to set the matter for hearing if necessary.'

Id. at 593 (citing State ex rel. Allee v. Gocha, 555 N.W.2d 683, 686 (Iowa 1996)).

Unlike other recent cases, the issue here is not about the Court failing to make the constitutional reasonable ability to pay determination, but whether the Court can make a determination on the Defendant's reasonable ability to pay when the amount is unknown. See State v. Kurtz, 878 N.W.2d 469, 472-72 (Iowa Ct. App. 2016); State v. Johnson, 887

N.W.2d 178, 183 (Iowa Ct. App. 2016); State v. Tanner, No. 14-1963, 2016 WL 4384468, at *5 (Iowa Ct. App. Aug. 17, 2016).

In this case, the District Court made two inapposite determinations as to Tournier's reasonable ability to pay. First, regarding his reasonable ability to pay attorney's fees, the Court found that because of the lengthy prison sentence Tournier was sentenced to, that he did not have the ability to reimburse the State. (Sent. Tr. p. 25 L2-6; Order of Disposition) (App. pp. 20-22). Second, as to jail fees and court costs, the Court found Tournier *did* have the reasonable ability to pay, without providing a reason. See State v. Kaelin, 362 N.W.2d at 528 ("Although we believe judges should state their reason as defendant, suggests, we refuse to hold that their failure to do so will invalidate a restitution order."). At the time of sentencing, neither attorney fees nor jail fees had been provided to the Court.[12]

[12] To date, the sheriff's office or municipality have not filed for reimbursement pursuant to section 356.7.

A review of the record shows that Tournier is totally bereft of any reasonable ability to pay these obligations. On July 12, 2016, Tournier made his initial appearance before the court, applied for, and was granted court appointed counsel. The Court found that "the Defendant has income between 125% and 200% of the guidelines, not appointing would cause financial hardship." (Record of Initial Appearance and Order) (App. pp. 4-5).

The Presentence Investigation Report indicates that Tournier "denied having a savings or checking account balance and reported owning approximately $12,000.00 in back child support." (PSI) (Conf. App. pp. 23-32).

On October 16, 2017, the Court sentenced Tournier to twenty-five years in prison, with a mandatory seven-tenths to be served prior to being eligible for parole; due to the nature of the offense, he was not eligible for post appeal bond. (Order of Disposition) (App. pp. 20-22).

On October 31, 2017, the Appellate Defender's office was appointed to represent Tournier on appeal. (Order Appointing Iowa Appellate Defender) (App. pp. 24-25).

Additionally, the sentencing order did not levy a fine on Count I and found Tournier did not have the reasonable ability to pay attorney fees. (Sent. Tr. p. 24 L1-3; Sent. Tr. p. 25 L2-6; Order of Disposition) (App. pp. 20-22).

The court either abused its discretion, in the instant case, or abdicated its duty to exercise its discretion. In an appellate challenge to the sentence imposed in a criminal case, the defendant must demonstrate that the sentencing court abused its discretion in selecting the particular sentence imposed. State v. Wright, 340 N.W.2d 590, 592 (Iowa 1983). To demonstrate an abuse of discretion, the defendant must show that the sentencing court's discretion "was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979).

By not following the provisions of the section 356.7 and waiting until the Sheriff or municipality filed for reimbursement before ordering the payment of jail frees, the district court abused its discretion. Additionally, the district court's failure to address the facts has produced a result which is violative of Tournier's due process right to a meaningful restitution hearing. Unlike the defendant in State v. Jenkins, 788 N.W.2d at 643, Tournier objects to the nature of the sentencing hearing in this case.

The above-referenced applications for counsel and accompanying orders prove that Tournier has no reasonable ability to pay. The fact that he has been sentenced to serve a 25 year sentence on a non-bailable offense exacerbates his indigency.

The district court's statutory and constitutional deficiencies, in this matter, have produced an outcome which is unacceptable. Finding an indigent defendant has the reasonable ability to pay unknown obligations without the basis for the determination is unreasonable.

CONCLUSION

For the reasons argued above, Tournier respectfully requests this Court find that the verdict was not supported by the evidence, vacate his conviction, and remand for a new trial. Alternatively, Tournier requests that this Court find that the district court abused its discretion when it failed to vacate the judgment and take additional testimony under Rule 2.24(2)(c), and vacate the judgment and remand the case with the instruction that the district court take additional testimony pursuant to Rule 2.24(2)(c). At the very least, Tournier requests this Court remand the case for a new sentencing hearing.

NONORAL SUBMISSION

Oral submission is not requested.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $60.56, and that amount has been paid in full by the Office of the Appellate Defender.

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