IN THE SUPREME COURT OF IOWA
Supreme Court No. 17–1697

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DALE ROBERT TOURNIER,
Defendant-Appellant.

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

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@ag.iowa.gov

KASEY E. WADDING
Bremer County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Case

State Cases

State Statutes

State Rules

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Was the Verdict Against the Weight of the Evidence?

Authorities

State v. Ary, 877 N.W.2d 686 (Iowa 2016)
State v. Ellis, 578 N.W.2d 655 (Iowa 1998)
State v. Fierro, 15–0684, 2017 WL 512475 (Iowa Ct. App. Feb. 8, 2017)
State v. Nitcher, 720 N.W.2d 547 (Iowa 2006)
State v. Odem, 322 N.W.2d 43 (Iowa 1982)
State v. Reeves, 670 N.W.2d 199 (Iowa 2003)
State v. Sanders, 149 N.W.2d 159 (Iowa 1967)
Strawberry's Berry Big Parade, FANDOM, http://strawberryshortcakeberrybitty.wikia.com/wiki/Strawberry%27s_Berry_Big_Parade (version accessed on April 6, 2018 archived at https://perma.cc/FU9W-SKZD)

II. Did the Trial Court Abuse Its Discretion When It Denied Tournier's Post-Verdict Request to Reopen the Record to Hear Testimony from Additional Witnesses?

Authorities

United States v. Dunkel, 927 F.2d 955 (7th Cir. 1991)
Ledezma v. State, 626 N.W.2d 134 (Iowa 2001)
Meinders v. Dunkerton Cmty. Sch. Dist., 645 N.W.2d 632 (Iowa 2002)
State v. Nitcher, 720 N.W.2d 547 (Iowa 2006)
State v. Reeves, 670 N.W.2d 199 (Iowa 2003)
Staff Mgmt. v. Jimenez, 839 N.W.2d 640 (Iowa 2013)
State v. Compiano, 154 N.W.2d 845 (Iowa 1967)
State v. Folkerts, 703 N.W.2d 761 (Iowa 2005)
State v. Hassan, 128 N.W. 960 (Iowa 1910)
State v. McAfee, No. 13–0268, 2014 WL 1494901 (Iowa Ct. App. Apr. 16, 2014)
State v. Miles, 346 N.W.2d 517 (Iowa 1984)
Westergard v. Des Moines Ry. Co., 52 N.W.2d 39 (Iowa 1952)
Iowa R. Crim. P. 2.24(2)(b)

Iowa R. Crim. P. 2.24(2)(b)(1)–(8)
Iowa R. Crim. P. 2.24(2)(b)(8)
Iowa R. Crim. P. 2.24(2)(b)(9)
Iowa R. Crim. P. 2.24(2)(c)

III. Did The Sentencing Court Err in Assessing Indefinite Financial Obligations to Tournier, Including Reimbursement of Costs for Jail Room/Board?

Authorities

Goodrich v. State, 608 N.W.2d 774 (Iowa 2000)
State v. Abrahamson, 696 N.W.2d 589 (Iowa 2005)
State v. Campbell, No. 15–1181, 2016 WL 4543763 (Iowa Ct. App. Aug. 31, 2016)
State v. Dudley, 766 N.W.2d 606 (Iowa 2009)
State v. Jackson, 601 N.W.2d 354 (Iowa 1999)
State v. Jose, 636 N.W.2d 38 (Iowa 2001)
State v. Swartz, 601 N.W.2d 348 (Iowa 1999)
State v. Thomas, 520 N.W.2d 311 (Iowa Ct. App. 1994)
State v. Tripp, 776 N.W.2d 855 (Iowa 2010)
State v. Wade, 757 N.W.2d 618 (Iowa 2008)
State v. Watts, 587 N.W.2d 750 (Iowa 1998)
Iowa Code § 910.2
Iowa Code § 910.3
Iowa Code § 910.7
Iowa Code § 356.7
Iowa Code § 356.7(3)

ROUTING STATEMENT

Tournier requests retention; he argues that his claim about the proper construction of Iowa Rule of Criminal Procedure 2.24(2)(c) raises a substantial issue of first impression. *See* Def's Br. at 14. While definitive guidance would help resolve similar challenges in the future, the rule's text does not raise any of the "substantial questions" posed in Tournier's brief—it specifically provides that the trial court may reopen the record "where appropriate, in lieu of granting a new trial." *See* Iowa R. Crim. P. 2.24(2)(c). This unambiguously refers to those situations where a motion for new trial would have been granted if the matter had been tried to a jury. All of Tournier's suggestions to the contrary can be dismissed by applying established legal principles of statutory construction, which means this case meets the criteria for transfer to the Iowa Court of Appeals. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

After a bench trial, Dale Robert Tournier was convicted of sexual abuse in the second degree, a Class B felony, in violation of Iowa Code sections 709.1(3) and 709.3(1)(b) (2016). The evidence showed that, on July 4, 2016, Tournier used his finger/hand to touch six-year-old Z.K.'s genitals. At trial, Z.K. testified that this occurred.

On appeal, Tournier argues that (1) the verdict was against the weight of the evidence; (2) the trial court erred by refusing to grant Tournier's alternative request in his motion for new trial, which asked the court to reopen the record and receive additional testimony; and (3) the court erred by assessing indefinite obligations to repay jail fees.

Facts

Z.K. and her family lived next door to Tournier in Waverly, IA. On July 4, 2016, Z.K. was six years old. Tournier had a four-year-old daughter, K.T., who often played with Z.K. *See* TrialTr. p.23,ln.6–p.30,ln.15; TrialTr. p.64,ln.2–p.66,ln.16.

Z.K. testified that Tournier "touched [her] privates," and that this happened "at the trampoline" and "in [K.T.]'s room." *See* TrialTr. p.31,ln.2–p.32,ln.23; TrialTr. p.39,ln.13–p.40,ln.24. Z.K. said her "privates" are the parts she uses for "going to the bathroom." *See* TrialTr. p.34,ln.2–8. Z.K. testified Tournier touched her privates with "[h]is hand." *See* TrialTr. p.35,ln.12–18. Z.K. had difficult describing what happened, but she remembered reporting that Tournier had licked her privates too. *See* TrialTr. p.41,ln.2–19. At some point, Z.K. thought that "[i]t was a secret" but then she told her mother what happened after her mother told her "you can't keep secrets." *See*

TrialTr. p.34,ln.19–p.35,ln.10. She confirmed that Tournier had touched her privates under her clothes on the trampoline, and K.T. was the only other person who was present. *See* TrialTr. p.49,ln.20–p.53,ln.2. Tournier also touched Z.K.'s privates with his hand on her bare skin in K.T.'s room, when nobody else but K.T. was present. *See* TrialTr. p.54,ln.7–p.57,ln.20.

Theresa is Z.K.'s grandmother and adoptive mother, and she remembered that K.T. was having a birthday party on July 4, 2016. Z.K. and K.T. played together throughout the day, and were going "back and forth" between both houses and outdoor play areas. *See* TrialTr. p.66,ln.16–p.68,ln.7. When Z.K. came home at the very end of the day, this exchange happened:

> [Z.K.] came in the house. She goes, Grandma, I'm not suppose to tell. And I looked at her. And I said, [Z.K.], you can tell Grandma anything. You can tell me anything. He said you'll be mad at me. I said, [Z.K.], Momma doesn't get mad at you.
>
> [. . .]
>
> [Z.K.] came in the house. She said to me I'm not suppose to tell. And I told her Grandma — you can tell Grandma anything. And she said but he said you'd be mad. I said I'm not going to be mad at you. Just tell me what happened. She said [Tournier] touched me here and she pointed to between her legs. I said what. Dale touched me here. She pointed again between her legs. And then she touched her butt.

TrialTr. p.70,ln.16–p.71,ln.9; TrialTr. p. 73,ln.22–p.74,ln.9. Theresa said Z.K. appeared "shaken" and "scared." *See* TrialTr. p.74,ln.10–13. Theresa gave Z.K. a hug and called the police to report what she said. *See* TrialTr. p.74,ln.14–p.75,ln.8. This conversation happened right after Z.K. came home, and Z.K. indicated that Tournier had told her not to tell anyone. *See* TrialTr. p.78,ln.15–p.79,ln.18.

Theresa's husband (Gary) heard the report and went to Tournier's house to ask him about what happened. *See* TrialTr. p.75,ln.15–p.76,ln.5; TrialTr. p.79,ln.19–p.80,ln.6. Gary described Z.K.'s report, just like Theresa did. *See* TrialTr. p.93,ln.4–p.95,ln.3. Gary went and asked Tournier if they could speak in private. *See* TrialTr. p.95,ln.4–16. Gary described their conversation:

> I had mentioned to him that [Z.K.] was — what [Z.K.] had said. And he denied doing anything. And said that if he had touched her, that it was all incidental. How kids play. He'd get wrestling around with them then. And that was it.
>
> [. . .]
>
> I had told him that — Well, he had said that going in the bedroom to change [K.T.], [Z.K.] wanted to come in. Kind of — She wanted — begged to come in. And she told him at that time that — [Z.K.] told him that it was all right for him to see her naked because her grandpa sees her naked all the time.

See TrialTr. p.95,ln.17–p.96,ln.24. The next time Gary talked to Tournier about this incident was a couple months later, when Z.K.

and K.T. were playing together outside and Tournier "hollered for [K.T.] to come home." *See* TrialTr. p.96,ln.21–p.97,ln.8. K.T. did not want to go home and she refused to budge from Gary's front steps, so Tournier had to come and grab her. *See* TrialTr. p.97,ln.9–20. Then, Tournier came back to talk to Gary—and he told Gary that "he has only given [Z.K.] raspberries that night and that was it." *See* TrialTr. p.97,ln.16–p.98,ln.4. Gary did not believe Tournier—he "blew it off because [he] figured [Tournier] was changing his story," and "was trying to cover why he might have some DNA testing on [Z.K.]." *See* TrialTr. p.98,ln.5–23. Tournier had not mentioned giving anyone raspberries during that prior conversation with Gary on July 4. *See* TrialTr. p.99,ln.7–21; TrialTr. p.107,ln.2–p.108,ln.19.

Police came to Theresa and Gary's house to speak with Z.K. and collect evidence. As the officers were leaving, Tournier's son (Shawn) came to the house to talk with Gary, and he mentioned that Tournier had already left because he was "scared" and "nervous." *See* TrialTr. p.113,ln.17–p.118,ln.24. Ryan Cosby was present at Tournier's house on July 4, 2016, and he heard second-hand descriptions of what Z.K. said Tournier had done. *See* TrialTr. p.169,ln.5–p.172,ln.6. He went with Shawn to Theresa and Gary's house to talk to the police. *See*

TrialTr. p.172,ln.7–p.173,ln.21. Then, he and Shawn returned to Tournier's house and stayed there for the rest of the evening. *See* TrialTr. p.173,ln.22–p.174,ln.6. Eventually, Tournier returned and entered through "the back of the garage." *See* TrialTr. p.174,ln.7–p.175,ln.1. Cosby was present for the ensuing conversation:

> [Shawn] just asked [Tourier] if he did it. And [Tourier] said no.
>
> And then maybe something about a trampoline. . . .
>
> That she could have thought maybe when they were jumping, playing around that that's when it could have happened. Like an accident.

See TrialTr. p.175,ln.2–p.176,ln.20. Tourier left again, shortly after that conversation. *See* TrialTr. p.176,ln.21–p.177,ln.21.

Alicia Moburg, a social worker with DHS, spoke to Tournier about Z.K.'s allegations. *See* TrialTr. p.128,ln.3–p.131,ln.5.

> He had informed me that nothing had happened between himself and [Z.K.]. Um. He indicated that the whole thing was a misunderstanding. Um. He said that he was in his daughter's bedroom working on putting together a kitchenette for his daughter. Um. He had talked about how his girlfriend and then his girlfriend's mother were in the home the whole time that — that they were there. Um. He had talked about how his girlfriend had come in and out of the room several times while he was in there putting the kitchenette together. Um. He talked about how, um, he was just tickling his daughter and [Z.K.]. Um. And that he hadn't touched her inappropriately. Um. He stated that [Z.K.] doesn't know the difference between good touch and bad touch.

TrialTr. p.131,ln.6–25. Moburg said Tournier was increasingly becoming "agitated" during their conversation, and he tried to turn the conversation towards allegations against Z.K.'s father. *See* TrialTr. p.132,ln.2–22. DHS waited to finish its report until law enforcement concluded their own investigation. *See* TrialTr. p.137,ln.17–p.139,ln.8.

Katie Strub is a supervisor and forensic interviewer at the Allen Child Protection Center (CPC) in Waterloo, and she conducted a CPC interview with Z.K. on July 5 (one day after these incidents occurred). *See* TrialTr. p.224,ln.4–p.226,ln.8. Right away, when Katie told Z.K. that she usually talks with children about "people that bother them," Z.K. immediately began telling Katie about what happened "last night." *See* State's Ex. G, at 0:00–0:30. She said, "The neighbor dad put right down here," and she pointed to her vagina and said she "didn't like it." *See* State's Ex. G, at 0:30–0:49. She repeated: "The neighbor dad like touched right here." *See* State's Ex. G, at 2:35–2:41. She giggled at the name she said for that part of her body ("pee spot") but she also knew it meant that she would not be able to go play at K.T.'s house anymore. *See* State's Ex. G, at 2:42–2:59. And when she was told about the rule that people have to tell the truth, she immediately responded: "I am telling the truth of him touching the spot." State's Ex. G, at 7:23–7:38.

When asked to start at the beginning, Z.K. said: "I remember him touched when we were on the trampoline and when we was in [K.T.]'s bedroom." The trampoline incident happened when she, K.T., and Tournier were jumping on the trampoline and she fell on top of Tournier—Z.K. expressly described Tournier reaching his hand into her pants and inside her "panties," and she even demonstrated using her own hand. *See* State's Ex. G, at 7:42–8:40. She said that made her "pee spot" feel "not good." *See* State's Ex. G, at 8:40–8:43; State's Ex. G, at 9:07–9:29. Z.K. said Tournier also licked her in that same spot, but was less clear on how that happened. *See* State's Ex. G, at 9:29–10:20. Later, Z.K. was jumping on the bed in K.T.'s bedroom with K.T., and then K.T. stopped jumping to take a break and watch My Little Pony. *See* State's Ex. G, at 12:19–13:17. Again, Z.K. said that Tournier touched and licked her "pee spot" in the same way, while Z.K. laid on the floor. *See* State's Ex. G at 14:02–16:26; State's Ex. G, at 16:54–18:02. Z.K. also said Tournier told her not to tell anybody, and people would be mad at her. *See* State's Ex. G, at 18:06–18:36.

Waverly Police Department Captain Jason Leonard was present for that interview, behind the two-way mirror. *See* TrialTr. p.186,ln.10–p.191,ln.22. Captain Leonard had already received a call from Tournier

that morning, *before* the interview. *See* TrialTr. p.192, ln.5–p.193,ln.21. Tournier told Captain Leonard he was "called by his son" to tell him that "the cops were there after he had left." *See* TrialTr. p.194,ln.5–14.

> He basically has told me at that time that there was, um — that they were inside their home, the Tournier home. He was putting together a play set or a kitchen set for his kids. And that in the — in the process of tickling, he said that [Z.K.], the victim, as well as his own daughter were in the same room playing. And that during that time period that he had — had tickled them, both of the girls, at that moment in time. . . .
>
> . . . He explained to me that when he was touching or tickling [Z.K.] that she had made a movement, a pushing his hands down toward her genital region, towards that area, um, and that he pulled his hand away before it got any lower than her — her waistline.

See TrialTr. p.194,ln.15–p.195,ln.9. Tournier also mentioned that "[h]e basically asked her not to tell her grandparents." *See* TrialTr. p.195,ln.10–p.196,ln.2. Captain Leonard thought the conversation was strange because Tournier was describing events that happened in K.T.'s room, but Captain Leonard had only been told about touching that happened on the trampoline. *See* TrialTr. p.197,ln.5–24.

During a subsequent phone call that Captain Leonard was able to record, Tournier insisted this was nothing but "a simple accident," then described a *separate* episode in the swimming pool. *See* State's Ex. D, pbx #2, at 5:24–6:45. Then, during another call, he said:

> But I'm gonna reiterate on the fact that I didn't fucking do nothing. I didn't do anything wrong, I was tickling the girls, I gave them raspberries, I was tickling their bellies, tickling the inside of their legs, she took it the wrong way, and shit got blown way out of proportion.

See State's Ex. D, pbx #3, at 6:26–6:55.

The trial court issued a verdict finding that Tournier "knowingly and intentionally made contact between his finger or hand and the genitalia of Z.K." *See* Verdict (8/7/17) at 1–2; App. 13–14. But it found "the State did not carry its burden of proof on the other charge" that alleged contact between Tournier's mouth and Z.K.'s genitalia, and it found Tournier not guilty on that count. *See id.*; App. 13–14. Tournier filed a motion for new trial, and the parties argued that motion before the court, just prior to sentencing. *See* Motion for New Trial (9/18/17); App. 17; Response to Motion for New Trial (10/9/17); App. 19; Sent.Tr. p.2,ln.22–p.13,ln.24.

Additional facts will be discussed when relevant.

.

ARGUMENT

I. The Weight of the Evidence Supports This Conviction.

Preservation of Error

Error was preserved. Tournier raised this challenge in his motion for a new trial, and the trial court ruled on it. *See* Motion for New Trial (9/18/17); App. 17; Sent.Tr. p.2,ln.22–p.13,ln.24.

Standard of Review

The ruling denying the motion for new trial is reviewed for abuse of discretion. *See State v. Nitcher*, 720 N.W.2d 547, 559 (Iowa 2006) (quoting *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003)).

The trial court's discretion to deny a challenge to the weight of the evidence is only abused where "the evidence preponderates heavily against the verdict." *Reeves*, 670 N.W.2d at 202 (quoting *State v. Ellis*, 578 N.W.2d 655, 658–59 (Iowa 1998)). This standard "allows the court to grant a motion for new trial only if more evidence supports the alternative verdict as opposed to the verdict rendered." *State v.* Ary, 877 N.W.2d 686, 706 (Iowa 2016). Moreover, "[o]n a weight-of-the-evidence claim, appellate review is limited to a review of the exercise of discretion by the trial court, not of the underlying question of whether the verdict is against the weight of the evidence." *See Reeves*, 670 N.W.2d at 203.

Merits

"Unlike the sufficiency-of-the-evidence analysis, the weight-of-the-evidence analysis is much broader in that it involves questions of credibility and refers to a determination that more credible evidence supports one side than the other." *See Nitcher*, 720 N.W.2d at 559; *see also Reeves*, 670 N.W.2d at 202. The trial court's discretion to deny a motion for a new trial is only abused where "the evidence preponderates heavily against the verdict." *See Reeves*, 670 N.W.2d at 202 (quoting *Ellis*, 578 N.W.2d at 658–59). That is not the case here.

Tournier accurately reproduces the trial court's explanation for its ruling that denied the motion for new trial. *See* Def's Br. at 21–24 (quoting Sent.Tr. p.10,ln.2–p.13,ln.20). None of his challenges to the court's evaluation of the evidence can establish an abuse of discretion.

First, Tournier argues that Z.K.'s statements contain "numerous inconsistencies in what she alleged happened and where those allegations occurred." *See* Def's Br. at 24–35. Indeed, the court noted that and considered it—but it ultimately concluded that "distinctions between her trial testimony and what she had told other people" were not fatal to Z.K.'s credibility, in light of her young age and the fact that these events occurred ten months before trial. *See* Sent.Tr. p.11,ln.2–14.

Z.K. was obviously nervous during her trial testimony—moments after she identified Tournier by name as K.T.'s father and pointed him out in the courtroom, she "forgot" his name while trying to describe the incident on the trampoline. *See* TrialTr. p.29,ln.8–p.31,ln.25. She confirmed she was having trouble putting what had occurred into words. *See* TrialTr. p.33,ln.13–p.34,ln.5. But during the CPC interview, Z.K. exhibited "what we call active disclosure, which means she really wanted to talk about the reason why she was there." *See* TrialTr. p.228,ln.22–p.231,ln.3. In the open, non-adversarial, non-intimidating setting of that interview, Z.K. was "very energetic and very forthcoming," and she earnestly "wanted to show [Katie] what had allegedly occurred." *See* TrialTr. p.231,ln.23–p.233,ln.10.

Directly after the CPC interview, Z.K. gave an extremely similar report to the nurse practitioner who performed her examination. *See* TrialTr. p.248,ln.5–p.252,ln.15 ("[S]he replied, and this is quoted, licked my butt."); TrialTr. p.254,ln.23–p.255,ln.7 ("And I believe she also had pointed to an area on her labia."). Z.K.'s disclosures during both of those interviews were consistent with the accounts of her very first disclosure, the night before. *See* TrialTr. p.70,ln.16–p.71,ln.9; TrialTr. p. 73,ln.22–p.74,ln.9; TrialTr. p.93,ln.4–p.95,ln.3. There is

no basis in the evidence for Tournier's suggestion that her interviews could be explained away by pointing to "an evening of being exposed to emotional parents" or "having a dream about the allegations." *See* Def's Br. at 34–35. Indeed, fabricated allegations would likely exhibit *fewer* inconsistencies—it would be far easier for a seven-year-old to stick to a canned script than it would be for her to remember a precise sequencing of events occurring on a single afternoon, ten months ago (which was a length of time spanning more than 10% of Z.K.'s *lifetime*).

Tournier references Captain Leonard's initial impression of the allegations, but he was not one of the officers involved on July 4 and he did not hear Z.K.'s statements firsthand until the CPC interview—indeed, officers who *did* respond on July 4 made a conscious effort not to inquire about the substance of the allegations until after the CPC's exploratory interview. *See* TrialTr. p.113,ln.17–p.116,ln.15; TrialTr. p.119,ln.15–p.120,ln.7; TrialTr. p.186,ln.10–p.191,ln.22.

None of Tournier's observations about the CPC interview can meaningfully dilute its impact. Z.K. expressly described Tournier reaching his hand into her pants and inside her "panties," and she even demonstrated using her own hand. *See* State's Ex. G, at 7:42–8:40. She said that made her "pee spot" feel "not good." *See* State's

Ex. G, at 8:40–8:43; State's Ex. G, at 9:07–9:29. Z.K. also said that Tournier told her not to tell anybody and that people would be mad at her if she did. *See* State's Ex. G, at 18:06–18:36. Katie testified that Z.K. described her body parts in "age appropriate" terms. *See* TrialTr. p.233,ln.11–p.234,ln.6. Katie never discovered any potential reason for Z.K. to fabricate these allegations. *See* TrialTr. p.235,ln.1–10. When Z.K. veered off-topic or did not answer a question, Katie would sometimes repeat what Z.K. previously told her—but she did not put words in Z.K.'s mouth, nor did she inject extrinsic information to sculpt Z.K.'s narrative. *See* TrialTr. p.239,ln.17–p.240,ln.23. There was no reason to disbelieve what Z.K. said during that interview, or during her trial testimony—"[t]his testimony is no more bizarre than the only alternative which is that [Z.K.] fabricated the whole story without any reason whatsoever." *See State v. Sanders*, 149 N.W.2d 159, 160 (Iowa 1967). Tournier's attacks cannot demonstrate any abuse of discretion in the trial court's view of the credible evidence.

Second, Tournier challenges the trial court's assessment that his various statements were "admissions of guilt" and "were inconsistent." *See* Def's Br. at 35–37 (citing Sent.Tr. p.11,ln.19–p.20,ln.11). But he acknowledges that he admitted he told Z.K. not to tell her parents

about what happened. *See* Def's Br. at 36 (citing TrialTr. p.195,ln.3–p.196,ln.2). That is extremely damning—if this were an accident, or if it stopped above Z.K.'s waistline, there would be no need to say that. And Tournier claimed that Z.K. "begged to come in" to K.T.'s room when Tournier was changing K.T., and that Z.K. "told him that it was all right for him to see her naked." *See* TrialTr. p.95,ln.17–p.96,ln.24. This indicates that Tournier was trying to explain why Z.K. would have been partially naked for some brief period of time, when there was nobody in K.T.'s bedroom other than Tournier, K.T., and Z.K.

Tournier is correct that he first mentioned "raspberries" on the July 8, 2016 phone call with Captain Leonard. *See* Def's Br. at 36 (citing State's Ex. D, pbx #3, at 6:30–6:45). But Tournier did not mention "raspberries" during his first two phone conversations with Captain Leonard, or during his prior conversations with anyone else. It is rational to infer Tournier only mentioned "raspberries" because he realized that forensic analysis might disclose the presence of DNA from his saliva on Z.K.'s body, which he would need to explain. Even Gary figured that out when Tournier went out of his way to tell him about "raspberries," which were absent from his prior explanation. *See* TrialTr. p.98,ln.5–p.99,ln.21; TrialTr. p.107,ln.2–p.108,ln.19.

Cosby heard Tournier mention that accidental touching might have happened while "jumping, playing around" on the trampoline. *See* TrialTr. p.173,ln.23–p.176,ln.20. The next day, Tournier called Captain Leonard and insisted that any touching was accidental—but he did not mention the trampoline, and instead focused on touching that occurred in K.T.'s room. *See* TrialTr. p.197,ln.5–24. So Tournier somehow knew *exactly* which two incidents Z.K. would describe in her CPC interview. *See* State's Ex. G, at 7:42–8:40. Tournier was not in a position where he had to guess which contact Z.K. would think was offensive, and he was not scrambling to account for his activities to foreclose possible fabrications—he *knew* what Z.K. would describe because he knew what he actually did to her. Tournier has no basis for challenging the court's determination that his comments "indicated a knowledge of what had actually taken place," which "he would not have had if the events hadn't happened." *See* Sent.Tr. p.11,ln.23–p.12,ln.3.

Third, Tournier mentions that defense witnesses did not see Tournier on the trampoline that day. *See* Def's Br. at 37–39. But the court could determine those defense witnesses, who were affiliated with Tournier's family, would naturally remember events in the light most favorable to Tournier's defense. In any event, Tournier *himself*

described touching Z.K. while playing on a trampoline as a potentially innocuous explanation for Z.K.'s allegations. *See* TrialTr. p.173,ln.23–p.176,ln.20. Even without that, Tournier's attempts to minimize the testimony showing he played with Z.K. and K.T. on the trampoline would be unavailing—just because those other witnesses did not see Tournier on the trampoline, that could not invalidate Gary's testimony that he *did* observe that. *See* TrialTr. p.104,ln.6–p.105,ln.21; *see also* TrialTr. p.83,ln.12–p.84,ln.4 (establishing the trampoline was visible from inside Gary/Theresa's home, and that Theresa saw Tournier on the trampoline with Z.K. and K.T. at some point); TrialTr. p.178,ln.6–p.179,ln.4 (stating the trampoline could not be seen from the fire pit where Tournier's family/friends were congregating).

Fourth, Tournier argues that his defense witnesses established there was no opportunity for him to abuse Z.K. in K.T.'s bedroom because there were too many people around. *See* Def's Br. at 39–43. But the trial court specifically considered and rejected this argument. *See* Sent.Tr. p.12,ln.12–p.13,ln.19. The kitchenette that Tournier was assembling was a toy for K.T., and he was building it in K.T.'s room—and Amanda Harris (K.T.'s mother and Tournier's girlfriend) admitted that she "wasn't in there" at various points. *See* TrialTr. p.272,ln.23–

p.275,ln.6. Testimony from Rebecca Stille established that she was sitting in a chair with her back to K.T.'s bedroom and would have been unable to see anything that occurred inside. *See* TrialTr. p.300,ln.18–p.301,ln.12. Rebecca testified that Amanda and Kelsey Simmons were "in and out" of K.T.'s room while Tournier, Z.K., and K.T. were there. *See* TrialTr. p.302,ln.12–p.303,ln.11. That is peculiar, because Kelsey testified that she was in K.T.'s bedroom "the whole time." *See* TrialTr. p.315,ln.21–p.317,ln.17. The court would be able to infer that Kelsey's memories and testimony (like all of the defense witnesses' testimony) were shaped by the belief that Tournier was innocent. *See* TrialTr. p.320,ln.17–p.321,ln.11; *see also* TrialTr. p.54,ln.7–p.56,ln.3. Or, it could rightly determine their testimony *still* left gaps where Tournier was alone with Z.K. and K.T., and would still have had opportunities to touch Z.K.'s vagina without being seen by anyone who would have recognized that as sexual abuse. *See* TrialTr. p.56,ln.22–p.57,ln.20.

Fifth, Tournier turns his attention to Captain Leonard, and argues that his actions "clearly indicate a police officer who had made a determination of guilt related towards [him] and was not willing to run a full investigation and interview all relevant witnesses because of his preconceived determination of guilt." *See* Def's Br. at 44–46 & n.3.

Even if the material that Tournier culls from minutes of testimony had been raised in Tournier's challenge to the weight of the evidence or presented at trial, it would not demonstrate any unfair bias—it was Tournier's *son* who told police that Tournier was already a registered sex offender, and Tournier cannot claim some unfair bias introduced from discovery of relevant facts in the investigation. *See* Minutes Att. (8/22/16) at 1–2; CApp. 6–7. Tournier's attack on Captain Leonard's conduct also overlooks his good faith attempt to interview Tournier *before* filing criminal charges, and the investigative work involved in interviewing relevant adult witnesses before filing those charges. *See* Minutes Att. (8/22/16) at 4–6; CApp. 9–11. And Captain Leonard's inability to record his first phone conversation with Tournier was a direct result of Tournier's decision to *initiate* that conversation before Captain Leonard was prepared to record phone calls—and if the court had observed anything during Captain Leonard's testimony about that first conversation that made it doubt his truthfulness or veracity, the trial court was free to disregard his testimony entirely. Clearly, it credited his testimony about Tournier's intermittently inconsistent and inculpatory statements. *See* Sent.Tr. p.11,ln.19–p.12,ln.11. None of Tournier's attacks can establish a duty to disbelieve that testimony.

Tournier is reduced to challenging a seven-year-old's memory regarding whether the make-believe game she played 10 months ago with a four-year-old was My Little Pony or Strawberry Shortcake. *See* Def's Br. at 40 n.2. Even if it mattered, Rebecca said Z.K. and K.T. were having "a pony parade," which would describe using their pony dolls to act out the plot of an episode of a Strawberry Shortcake cartoon. *See* TrialTr. p.305,ln.4–12; *Strawberry's Berry Big Parade*, FANDOM, http://strawberryshortcakeberrybitty.wikia.com/wiki/Strawberry%27s_Berry_Big_Parade (version accessed on April 6, 2018 archived at https://perma.cc/FU9W-SKZD). But either way, it is obvious that Z.K. and K.T. were playing a make-believe game that could synthesize multiple sources. *See* TrialTr. p.276,ln.17–p.277,ln.2. And Tournier's attacks on Z.K.'s credibility should be assessed without forgetting that Z.K. was still young enough to use sacharrine cartoons as the basis for freeform make-believe play—and her descriptions/demonstrations of hand-to-genital contact are so far outside that realm that it raises an inescapable inference: Z.K. could never describe this sexual touching unless it actually happened. *Cf.* Sent.Tr. p.10,ln.17–24.

In truth, none of Tournier's challenges matter. The trial court was present to observe Z.K.'s testimony along with all of the testimony

from other witnesses—and its determination that Z.K. was credible when describing the hand-to-genital contact is minimally susceptible to being second-guessed by this Court on appeal, even granting the existence of minor inconsistencies in her story. *See State v. Fierro*, 15–0684, 2017 WL 512475, at *1–2 (Iowa Ct. App. Feb. 8, 2017) (rejecting weight-of-the-evidence challenge to sex abuse conviction because"[t]he inconsistencies in some details were pointed out by Fierro's counsel and were for the jury to consider"). Additionally, the recording of Tournier's phone call was wildly inculpatory, and it did not match any of the testimony from defense witnesses who claimed to have been present and never saw any physical contact whatsoever.

> . . . I was tickling the girls, I gave them raspberries, I was tickling their bellies, tickling the inside of their legs, she took it the wrong way, and shit got blown way out of proportion.

See State's Ex. D, pbx #3, at 6:26–6:55; *see also State v. Odem*, 322 N.W.2d 43, 47 (Iowa 1982) ("A false story told by a defendant to explain or deny a material fact against him is by itself an indication of guilt."). The CPC interview is compelling evidence that sexual abuse occurred. *See* State's Ex. G. Nothing Tournier says can establish that the verdict was against the weight of the evidence. Therefore, the trial court did not abuse its discretion by denying the motion for new trial.

II. The Court Did Not Err in Denying Tournier's Request to Present Additional Testimony in Lieu of a New Trial Under Iowa Rule of Criminal Procedure 2.24(2)(c).

Preservation of Error

Tournier requested the court re-open the record and "receive additional testimony" in the event that it did not order a new trial. *See* Sent.Tr. p.6,ln.20–p.7,ln.13. Error was preserved when the court considered and denied that request. *See* Sent.Tr. p.12,ln.19–p.14,ln.2.

Standard of Review

Because this is analogous to a ruling on a motion for new trial, review is for abuse of discretion. *See Nitcher*, 720 N.W.2d at 559 (quoting *Reeves*, 670 N.W.2d at 202). "We review the district court's interpretation of our criminal rules of procedure for correction of errors at law." *State v. Folkerts*, 703 N.W.2d 761, 763 (Iowa 2005).

Merits

Iowa Rule of Criminal Procedure 2.24(2)(b) sets out a list of nine potential grounds for granting a motion for new trial. Rule 2.24(2)(c) provides a special rule for bench trials:

> *Trials without juries.* 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). Tournier argues the court should have construed this rule to create a free-standing *tenth* ground for granting a motion for new trial and re-opening the record to receive evidence. *See* Def's Br. at 58–71. But Rule 2.24(2)(c) specifically states that this alternative remedy can be employed "in lieu of granting a new trial"—which means that grounds for "granting a new trial" must be present. Tournier claims this erodes the difference between jury trials and bench trials, and he asks: "[I]f 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* Def's Br. at 61–62. Tournier ignores the clear intent of Rule 2.24(2)(c): to make an additional *remedy* available for bench trials "where appropriate," to eliminate the need to receive the same testimony/evidence that the trial court has already received (without inadvertently authorizing similar procedures for jury trials).

In any event, Rule 2.24(2)(b)(9) moots this entire argument: it empowers the trial court to order a new trial if, "from any other cause" aside from those listed in Rule 2.24(2)(b)(1)–(8), "the defendant has not received a fair and impartial trial." Iowa R. Crim P. 2.24(2)(b)(9). It does not matter if Rule 2.24(2)(c) creates a free-standing catch-all grounds for granting a motion for new trial—Iowa already has one.

Tournier cannot show he did not receive a "fair and impartial" trial, under any plausible reading of that phrase. Tournier argues that there are "exceptional circumstances that can result in the necessity of taking 'additional testimony' that is not 'newly discovered evidence.'" *See* Def's Br. at 61–63. Certainly, that is conceivable—but Tournier's best attempt to show any "exceptional circumstances" is 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." *See* Def's Br. at 65–67. But Tournier does not provide any reason to believe that failure to anticipate that possibility somehow impacted his counsel's trial strategy, and (more importantly) he does not provide any basis for believing that could have rendered his trial unfair or otherwise suspect. What could Tournier have said that would not be part of his defense to *both* charges, but would have been part of his defense to the hand-to-genital-contact charge alone? Tournier does not explain, and this Court should not speculate. *See, e.g.*, *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs."). Tournier never had any incentive to sandbag exculpatory evidence, no matter how many counts of sexual abuse he was charged with.

Tournier was acutely aware that K.T.'s version of events was not explored or offered to the trial court—indeed, Tournier's counsel had emphasized that fact to attack the strength of the State's case and the rigor of Captain Leonard's investigation. *See* TrialTr. p.213,ln.15–p.216,ln.24; TrialTr. p.240,ln.24–p.242,ln.7; TrialTr. p.257,ln.16–p.258,ln.10; TrialTr. p.336,ln.6–p.337,ln.5. Tournier claims that he is "not asking for a do-over of his case because he was unhappy with the outcome." *See* Def's Br. at 67. But that is precisely what he is doing—Tournier's strategy was unsuccessful, and now he wants a retrial to pursue a different strategy and determine whether the other version of his defense advocacy would have been more successful. Of course, Tournier would invoke protections against double jeopardy if the State sought a "do-over" on the charge alleging mouth-to-genital contact. This asymmetric effect of retrial incentivizes criminal defendants to perpetually seek to relitigate adjudicative facts supporting conviction and has been repeatedly recognized as a reason why "[m]otions for new trials based upon newly discovered evidence are not favored in the law and should be closely scrutinized and granted sparingly." *See State v. Compiano*, 154 N.W.2d 845, 849–50 (Iowa 1967) (citing *Westergard v. Des Moines Ry. Co.*, 52 N.W.2d 39, 42 (Iowa 1952)).

In reality, Tournier is trying to manufacture a reason to apply a standard that would grant a new trial for "newly discovered evidence" that is not "newly discovered." *See* Def's Br. at 59 n.8, 63–71. But the inclusion of a grounds for new trial that would require *new* evidence is a strong indicator that failure to present evidence known to counsel throughout the trial is *not* adequate grounds for ordering a new trial—or for granting any remedy "in lieu of" ordering a new trial. *See, e.g.*, *Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 649 (Iowa 2013) (quoting *Meinders v. Dunkerton Cmty. Sch. Dist.*, 645 N.W.2d 632, 637 (Iowa 2002)) (discussing principle of *expressio unius est exlusio alterius*: "legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned"). Indeed, Rule 2.24(2)(b)(8) elaborates on what must be shown, including "the affidavits or testimony of the witnesses by whom such evidence is expected to be given" and that the evidence is something "the defendant could not with reasonable diligence have discovered and produced at the trial." Iowa R. Crim. P. 2.24(2)(b)(8). Tournier's reading would reduce all of that language to surplusage by inventing a new claim with no discernable basis in the rules and would permit him to seek multiple successive trials and incremental verdicts.

Tournier's argument conveys frustration with the absence of any explanation as to why the trial court "split the baby." *See* Def's Br. at 65–67. But Tournier never moved for expanded findings on that particular issue. *See State v. Miles*, 346 N.W.2d 517, 518–19 (Iowa 1984); *State v. McAfee*, No. 13–0268, 2014 WL 1494901, at *2 n.1 (Iowa Ct. App. Apr. 16, 2014) ("[T]o the extent McAfee challenges the trial court's failure to make specific findings on each element of the offenses in its verdict, he was required to file motion for a new trial, seeking to amend or enlarge, to preserve error."). Perhaps the trial court noted that DNA analysis showed the presence of *unknown* contributor DNA on Z.K.'s clothes and body, but was unable to identify Tournier's saliva with any specificity. *See* State's Ex. C-1, C-2; App. 9–12. Or perhaps the trial court believed Z.K.'s descriptions of where Tournier "licked" had not shown prohibited mouth-to-*genital* contact with the same degree of specificity as Z.K.'s pantomime-supported description of where he touched her with his hand. *See* State's Ex. G at 7:42–9:29. Alternatively, perhaps the trial court noted that Z.K. focused on the hand-to-genital contact during her trial testimony and never wavered from that, while she specifically testified that Tournier had never licked her in K.T.'s room. *See* TrialTr. p.30,ln.22–p.35,ln.23;

TrialTr. p.56,ln.22–p.58,ln.5. While the State still believes Tournier committed both offenses as charged, the court's findings and verdict do not amount to an inherently nonsensical outcome and cannot be characterized as an abuse of discretion in evaluating the evidence.

Tournier also argues the trial court "considered evidence outside the record when it reached its conclusion." *See* Def's Br. at 68–69. But all fact-finders, whether jurors or judges, are required to apply their common sense and human experience to the facts and evidence adduced throughout the trial. *See, e.g.*, *State v. Hassan*, 128 N.W. 960, 966 (Iowa 1910) ("The idea sought to be conveyed is that a juror is not an artificial being, whose judgment is to be governed by technical and artificial rules, but that he is a man, and should, while acting as a juror, act as a man, exercising his reason, his intelligence, his everyday judgment and his common sense."). Indeed, the trial court's remarks make so much sense that Tournier needed to misrepresent them to attack them—the court never said and never implied that it "does not believe that young children can make credible sex abuse allegations or be competent witnesses." *See* Def's Br. at 68–69. Rather, the trial court pointed out that K.T., at four years old, would have been unlikely to understand the *significance* of what she observed—which means she

would be unlikely to alert anyone else if she witnessed touching that amounted to sexual abuse and unlikely to remember useful details about that particular afternoon with any clarity, ten months later. *See* Sent.Tr. p.12,ln.19–22. If K.T. *did* have a clear memory of that day, Tournier was free to provide an affidavit (or comparable offer of proof) to support his motion for new trial—but he did not, and the record is devoid of any material suggesting K.T.'s testimony (or the testimony of any other counterfactual witness Tournier mentioned during the hearing on his motion for new trial) would have had exculpatory value.

If such testimony would have mattered, Tournier will be able to advance a postconviction relief action that alleged his trial counsel was ineffective for failing to present that testimony during his trial. *See, e.g.*, *Ledezma v. State*, 626 N.W.2d 134, 148–49 (Iowa 2001). But Tournier cannot allege his trial was unfair because of evidence that he knew about and declined to present—especially when he also declined to provide *proof* of what that testimony would have been at the hearing on his motion for new trial. On the record available to this Court on direct appeal, there is no grounds for concluding that the trial court abused its broad discretion when it denied Tournier's motion for new trial and his request to re-open the trial record.

III. The Trial Court Would Need to Assess Tournier's Reasonable Ability to Pay Before Assessing Restitution for Jail Fees, But It Has Not Assessed Those Costs—So Tournier's Challenge Is Not Ripe.

Preservation of Error

Tournier may challenge a procedurally defective sentencing order on direct appeal without preserving error by objecting below. *See, e.g.*, *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994).

Standard of Review

A district court's restitution order is reviewed for errors at law. *State v. Jose*, 636 N.W.2d 38, 43 (Iowa 2001) (citing *State v. Watts*, 587 N.W.2d 750, 751 (Iowa 1998)). Constitutional issues are reviewed de novo. *State v. Dudley*, 766 N.W.2d 606, 626 (Iowa 2009).

Merits

Generally, "a court must determine a criminal defendant's ability to pay before entering an order requiring such defendant to pay criminal restitution pursuant to Iowa Code section 910.2." *See Goodrich v. State*, 608 N.W.2d 774, 776 (Iowa 2000). But Tournier clarifies that "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* Def's Br. at 75–77.

He specifically refers to the jail fees under section 356.7, which were referenced in the sentencing court's order and which Tournier was "ordered to pay," in as-yet-indefinite amounts. *See* Sentencing Order (10/18/17) at 1; App. 20. Tournier is correct that the sheriff and/or municipality have not yet filed any request to have the amount of Tournier's jail fees included in his restitution obligations, pursuant to section 356.7(2)(i). *See* Def's Br. at 74 (citing Iowa Code § 356.7). Alternatively, "[t]he sheriff or municipality may choose to enforce the claim in the manner provided in chapter 626." Iowa Code § 356.7(3); *see also State v. Abrahamson*, 696 N.W.2d 589, 591 (Iowa 2005). Because jail room-and-board fees have not yet been included in any plan of restitution, any finding that Tournier is reasonably able to pay those fees would be premature. *See State v. Campbell*, No. 15–1181, 2016 WL 4543763, at *3–4 & n.5 (Iowa Ct. App. Aug. 31, 2016) (noting "the sentencing court made an affirmative finding of Campbell's ability to pay without knowing the total amount—or a reasonable estimate—of the restitution owed," which was "troubling" to the court because "logically, the amount of victim restitution ordered could affect a defendant's reasonable ability to pay attorney fees and court costs"). And yet, there is no request for those fees—so the issue is not ripe.

This means that *Jackson* and *Swartz* control this challenge. In each of those cases, a defendant challenged the sentencing court's failure to make a determination regarding "reasonable ability to pay" before entering a temporary restitution order—and, in both cases, the challenge was dismissed because it had been brought prematurely.

> First, it does not appear in the present case that the plan of restitution contemplated by Iowa Code section 910.3 was complete at the time the notice of appeal was filed. Until this is done, the court is not required to give consideration to the defendant's ability to pay. . . . Second, Iowa Code section 910.7 permits an offender who is dissatisfied with the amount of restitution required by the plan to petition the district court for a modification. Unless that remedy has been exhausted, we have no basis for reviewing the issue in this court.

State v. Jackson, 601 N.W.2d 354, 357 (Iowa 1999) (citing *State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999). If a request for jail fees is ever filed for inclusion in a modified restitution order, Tournier will be entitled to a determination of his reasonable ability to pay them. But until then, the challenged language in the sentencing order has no real effect, and this dispute is "merely hypothetical or speculative." *See State v. Tripp*, 776 N.W.2d 855, 858–59 (Iowa 2010) (citing *State v. Wade*, 757 N.W.2d 618, 626–27 (Iowa 2008)). Therefore, Tournier's challenge is not ripe and this Court should decline to consider it.

CONCLUSION

The State respectfully requests that this Court affirm Tournier's conviction and sentence.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **7,380** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: April 26, 2018

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@ag.iowa.gov