IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. JUSTIN COLE MOORE, Defendant-Appellant.	)))))))))	S.CT. NO. 17-1822

APPEAL FROM THE IOWA DISTRICT COURT
FOR FAYETTE COUNTY
HONORABLE JOHN BAUERCAMPER, JUDGE
(JURY TRIAL & SENTENCING)

APPELLANT'S BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On October 4, 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 Justin Cole Moore, No. 6840737, Anamosa State Penitentiary, 406 North High Street, Anamosa, IA 52205.

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Authorities

State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006)

State v. Ambrose, 861 N.W.2d 550, 556 (Iowa 2015)

State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012)

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State v. Brothern, 832 N.W.2d 187, 192 (Iowa 2013)

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State v. Hopkins, 576 N.W.2d 374, 379–80 (Iowa 1998)

State v. Hrbek, 336 N.W.2d 431, 435–36 (Iowa 1983)

Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981)

State v. Leckington, 713 N.W.2d 208, 218 (Iowa 2006)

Strickland v. Washington, 466 U.S. 668, 694 (1984)

State v. Carrillo, 597 N.W.2d 497, 500 (Iowa 1999)

Osborn v. State, 573 N.W.2d 917, 922 (Iowa 1998)

Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 200.44 (2015)

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Iowa R. Evid. 5.801 (2015)

State v. Bayles, 55 N.W.2d 600, 606 (Iowa 1996)

Laurie Kratky Doré, 7 Iowa Practice Series, Evidence 5.801:9 (Nov. 2016)

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U.S. District Court District of Maine, Pattern Criminal Jury Instructions for the District Courts of the First Circuit (2017), http://www.med.uscourts.gov/pattern-jury-instructions

Committee on Model Criminal Jury Instructions Third Circuit, Model Criminal Jury Instructions (2017), http://www.ca3.uscourts.gov/model-jury-instructions

Committee on Pattern Jury Instructions, District Judges Association, Fifth Circuit Pattern Jury Instructions (Criminal Cases) (2015), http://www.lb5.uscourts.gov/juryinstructions

Sixth Circuit Committee on Pattern Jury Instructions, Pattern Criminal Jury Instructions (2017), http://www.ca6.uscourts.gov/pattern-jury-instructions

Committee on Federal Criminal Jury Instructions for the Seventh Circuit, Pattern Criminal Jury Instructions of the Seventh Circuit (2012), http://www.ca7.uscourts.gov/pjury.pdf

Judicial Committee On Model Jury Instructions for the Eighth Circuit, Manual of Model Criminal Jury Instructions for the Eighth Circuit (2014), http://www.juryinstructions.ca8.uscourts.gov/criminal_instructions.htm

Ninth Circuit Jury Instructions Committee, Manual of Model Criminal Jury Instructions (2017), http://www3.ce9.uscourts.gov/jury-instructions/ model-criminal

Criminal Pattern Jury Instruction Committee of the United States Court of Appeals for the Tenth Circuit, Criminal Pattern Jury Instructions (2017), http://www.ca10.uscourts.gov/clerk/orders

Judicial Council of the Eleventh Circuit, Eleventh Circuit Pattern Jury Instructions (Criminal Cases) (2016), http://www.ca11.uscourts.gov/pattern-jury-instructions

State v. Yenger, No. 17-0592, 2018 WL 3060251, at *6 (Iowa Ct. App. June 20, 2018)

State v. Payne, No. 16-1672, 2018 WL 1182624, at *11-12 (Iowa Ct. App. March 7, 2018)

State v. Robinson, 859 N.W.2d 464, 490 (Iowa 2015)

II. Whether counsel rendered ineffective assistance in failing to object to the omission of and request a jury instruction defining "reasonable degree of medical certainty"?

Authorities

State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982)

State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987)

U.S. Const. amend VI

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Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2063 (1984)

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State v. Hopkins, 576 N.W.2d 374, 379-80 (Iowa 1998)

State v. Deases, 518 N.W.2d 784, 792 (Iowa 1994)

State v. Goff, 342 N.W.2d 830, 837-38 (Iowa 1983)

State v. Webb, 309 N.W.2d 404, 413 (Iowa 1981)

Commonwealth v. Stoltzfus, 337 A.2d 873 at 879 (1975)

Lewin, The Genesis and Evolution of Legal Uncertainty about "Reasonable Medical Certainty", 57 Md. L. Rev. 380, 402-403 (1998)

Restatement (Third) of Torts: Phys. & Emot. Harm § 28, subsection (a) comment (e) (2010)

Black's Law Dictionary (10th ed. 2014)

III. Whether the portion of the sentencing order directing Defendant to pay jail fees must be removed by way of a nunc pro tunc order, as it fails to conform to the oral pronouncement of sentence? Additionally, whether the district court erred in ordering Defendant to pay court costs and jail fees without making any ability to pay determination?

Authorities

State v. Cooley, 587 N.W.2d 752, 754 (Iowa 1999)

State v. Janz, 358 N.W.2d 547, 549 (Iowa 1984)

State v. Campbell, No. 15-1181, 2016 WL 4543763, at *2 (Iowa Ct. App. Aug. 31, 2016)

State v. Pace, No. 16-1785, 2018 WL 1629894, at *3 (Iowa Ct. App. April 2, 2018)

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Iowa Code section 910.2(1) (2015)

State v. Wagner, 484 N.W.2d 212, 215–16 (Iowa Ct. App. 1992)

State v. Campbell, No. 15-1181, 2016 WL 4543763, at *3 (Iowa Ct. App. Aug. 31, 2016)

State v. Van Hoff, 415 N.W.2d 647, 648 (Iowa 1987)

Goodrich v. State, 608 N.W.2d 774, 776 (Iowa 2000)

State v. Bruegger, 773 N.W.2d 862, 871 (Iowa 2009)

Tindell v. State, 629 N.W.2d 357, 359 (Iowa 2001)

State v. Van Hoff, 415 N.W.2d 647, 648 (Iowa 1987)

State v. Coleman, 907 N.W.2d 124, 149 (Iowa 2018)

State v. Dudley, 766 N.W.2d 606, 615 (Iowa 2009)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issues raised in Divisions I and II involve substantial issues of first impression or of enunciating or changing legal principles in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c) & (f).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant Justin Cole Moore from his jury trial conviction for Child Endangerment Resulting in Serious Injury, a Class C Forcible Felony in violation of Iowa Code sections 726.6(1) and 726.6(5) (2015).

Course of Proceedings: On September 27, 2016, the State charged Moore with Child Endangerment Resulting in Serious Injury, a Class C Forcible Felony in violation of Iowa Code sections 726.6(1)(a) and 726.6(5) (2015). The Trial Information was later amended to reflect the State would be relying on the alternatives set forth in both section 726.6(1)(a) and section 726.6(1)(b) (2015) of the statute. (9/27/16 TI;

9/5/17 Mot. to Amend TI) (App. pp. 11-13); (Trial Vol.1 p.107 L.2-p.109 L.22); (9/7/17 Order Amending TI) (App. pp. 14-15).

Moore entered a plea of not guilty and ultimately waived his right to speedy trial. (10/16/16 Written Arraignment; 10/11/16 Waiver of Speedy) (App. pp. 7-10). A jury trial commenced on September 7, 2017. (Trial Vol.1 p.1 L.1-25, p.4 L.1-6). On September 11, the jury returned a verdict finding Moore guilty of the offense as charged. (Trial Vol.3 p.1 L.1-25, p.66 L.13-p.67 L.3).

A sentencing hearing was held on October 30, 2017. At that time, the court imposed judgment against Moore for Child Endangerment Resulting in Serious Injury, a Class C Felony in violation of Iowa Code sections 726.6(1) and 726.6(5) (2015). Noting the offense was a forcible felony carrying mandatory prison, the court sentenced Moore to an indeterminate term of incarceration not to exceed 10 years. The court imposed but suspended a $1,000 fine and 35% surcharge, and found Moore not reasonably able to pay reimbursement of court-appointed attorney fees. However, the court ordered Moore to

pay all court costs and jail fees. Moore was also ordered to submit a DNA sample for profiling, and a five-year no contact order was entered with the victim. (Sent. Tr. p.4 L.9-p.7 L.6); (10/30/17 Order of Disposition) (App. pp. 23-25).

Moore filed a Notice of Appeal on November 9, 2017. (11/9/17 Certified NOA) (App. pp. 26-28).

Facts: On August 30, 2016 at approximately 9:30 p.m., two-year-old E.B.[1] was brought to the Mercy Hospital Emergency Room in Oelwein by his mother, Brianna. (Trial Vol.1 p.141 L.13-14, p.141 L.22-24, 143 L.17-22). Brianna told medical personnel that the child had been with her boyfriend (Justin Moore) while she had been at work; that the child had fallen off a bathroom stepstool by the toilet; that he had been fine at the time, and the boyfriend put him to bed; but when she got home the child wasn't moving. (Trial Vol.1 p158 L.19-p.159 L.5).

Upon presenting to the Oelwein emergency room at 9:30 p.m., E.B. was breathing and his eyes were open but he was

[1] E.B. was just shy of his third birthday at that time. (Trial Vol.1 p.5-11).

gray and nonresponsive. E.B.'s stomach was rigid with no audible bowel sounds. Bruising was noted on his forehead, abdomen, back, and groin area, and possible injuries were noted on his lips. (Trail Vol. 1 p.145 L.12-16, p.145 L.24-p.146 L.8, p.150 L.4-10, p.155 L.1-12, p.159 L.3-p.161 L.24, p.162 L.25-p.163 L.4). The bruises on E.B.'s body were described as "[m]ultiple stages" of bruising, indicating they may have occurred over a period of time. (Trial Vol.1 p.161 L.25-p.162 L.24). E.B.'s mother testified that additional bruises started appearing on E.B.'s abdominal area while at the emergency room. (Trial Vol.2 p.97 L.6-22, p.108 L.7-22).

Just before being taken for body imaging at the Oelwein hospital, the previously nonresponsive E.B. woke up a little bit and asked for his toy, but he remained lethargic. (Trial Vol.1 p.151 L.11-15). He also vomited multiple times while at Oelwein hospital. (Trial Vol.1 p.157 L.8-14). Body imaging by CAT scans indicated E.B. had a bleed in his head, and free air in his abdomen. (Trial Vol.1 p.152 L.6-10).

E.B. was transported by helicopter to University of Iowa hospital in Iowa City, arriving there at approximately 11:40 p.m. on August 30. (Trial Vol.1 p.151 L.16-24, p.153 L.1-3; Vol.2 p.203 L.10-13). After medical staff verified the head injury did not prohibit surgery, E.B. underwent abdominal surgery performed by Dr. Julia Shelton. During surgery, a severe 350 degree tear was observed on E.B.'s small bowel, with only about 10 degrees of tissue keeping that intestine intact at that location. There were also more minor bruises, swelling or hematoma, and smaller tears or lacerations to the small bowel. (Trial Vol.2 p.194 L.11-p.196 L.2). The damaged 10-15 centimeter section of the bowel was removed during surgery, and the remaining bowel was sewed back together. (Trial Vol.2 p.196 L.21-p.197 L.6, p.198 L.8-10). E.B. thereafter had to be hospitalized for about three weeks and fed with a feeding tube to allow time for the intestine to heal. (Trial Vol.2 p.98 L.14-p.99 L.8, p.197 L.7-p.198 L.7).

Medical personnel, suspecting the child's injuries may

have been the result of physical abuse, contacted law enforcement to investigate the incident.

At the time of the incident, E.B. lived with his mother Brianna, his five-year-old brother S.B., and his mother's boyfriend Justin Moore, at a house in Oelwein, Iowa. (Trial Vol.2 p.69 L.13-p.70 L.6). E.B. and S.B. each had their own bedrooms, and Brianna and Justin shared a bedroom. (Trial Vol.2 p.71 L.7-11).

On August 31, law enforcement responded to E.B.'s residence, where they spoke with Justin and obtained his written consent to search the residence. At that time, Justin told DCI Agent Chris Calloway that he had been in the living room playing video games when he'd heard a loud bang or boom, went into the bathroom, and found E.B. on the floor with a bashed lip. (Trial Vol.2 p.5 L.9-11, p.7 L.4-p.9 L.8).

Justin left the house while law enforcement remained there searching the premises. Justin returned later around 3:00 or 3:30 looking to see whether a delivery he had been expecting had arrived. Agent Calloway requested and Justin

provided another interview at that time. That interview took place in Agent Calloway's unmarked vehicle parked in front of the house, and lasted approximately 1 hour and 45 minutes. (Trial Vol.2 p.24 L.10-18, p.25 L.2-23, p.26 L.22-p.27 L.3). Agent Calloway testified that Justin told him that the child's grandmother (Kris) had watched the child for most of the day while Brianna was at work. Kris dropped the child and his brother (S.B.) off at bedtime, and then left after they were asleep. Justin was home at the time but Brianna had not yet returned from work. Agent Calloway testified that, according to what Justin told him, there was approximately a twenty minute period of time between when Kris dropped the children off and when Brianna returned from work that Justin would have been home alone with the children. Justin told Agent Calloway that, during that time, he was sitting on the sofa playing video games when he heard a boom. He went back to the bathroom and saw E.B. splayed out on the floor with his pants down. E.B. had urinated on himself and had blood coming out of his mouth and lip, some of which got on the

carpet in the bathroom. (Trial Vol.2 p.30 L.9-p.31 L.14, p.31 L.23-25). Justin did not see the fall, but assumed that E.B. had fallen off of one of the step risers in front of the toilet while trying to urinate. (Trial Vol.2 p.34 L.23-p.35 L.9). Justin picked up E.B., tried to clean the blood off his mouth, and carried him into the master bedroom where he changed him into new pajamas (because his old ones had blood and urine on them). Justin was holding E.B. when he received a phone call on the house phone in the other room. (Trial Vol.2 p.32 L.1-15). Justin put E.B. down in the master bedroom and went to the other room to get the phone. It was Brianna calling advising she was coming home, and the conversation only lasted 20-30 seconds. Justin then went back to the master bedroom, and said E.B. was then on the ground seizing. E.B.'s eyes had rolled back, and he was lifeless, breathing but stiff. (Trial Vol.2 p.32 L.16-p.33 L.19). Justin picked up E.B., held him, and decided to keep him awake until Brianna (who was a nurse) came home, as he knew she would arrive shortly. Justin blew on E.B.'s face and

monitored him. (Trial Vol.2 p.33 L.24-p.34 L.3). Brianna arrived about ten minutes later and took E.B. to the emergency room. (Trial Vol.2 p.34 L.4-15).

After that interview with Agent Calloway, Justin left the house but returned back again at 7:30 that night while law enforcement was still present, again checking to see if his delivery had arrived. At Agent Calloway's request, Justin went into the house and answered some additional questions, including clarifying the location on the bathroom carpet where the spot of E.B.'s blood had been. Justin indicated the blood stain was underneath the area rug in the bathroom. Upon lifting the carpet, there was a stain underneath that appeared to be blood. (Trial Vol.2 p.35 L.18-p.37 L.23). Law enforcement thereafter completed their search of the residence. They noted the bathroom contained two step stools or risers in the vicinity of the toilet – one that was approximately 7 inches tall and the other being approximately 7 1/2 inches tall. (Trial Vol.2 p.16 L.9-19). The floor of the bathroom was carpeted, and contained an area rug over the

carpet. (Trial Vol.2 p.13 L.3-12). From a laundry basket of dirty clothes in the master bedroom, they collected: E.B.'s pajamas which had apparent blood on them as well as a possible urine stain around the crotch, a bath towel with possible blood, and a gray t-shirt belonging to Justin that also had possible blood on it. From E.B.'s room, they collected the sheets from the toddler bed, which appeared to have some possible blood on them as well. (Trial Vol.2 p.17 L.21-p.20 L.1).

While in the house on August 31, Oelwein Police Officer Ted Phillips entered and examined the bathroom to take measurements and diagram it. (Trial Vol.2 p.51 L.4-8, p.51 L.1-2, p.52 L.18-p.54 L.1). Officer Phillips identified a "blood spot" in the bathroom 15 inches above the floor. (Trial Vol.2 p.55 L.11-14, p.56 L.9-14); (Exhibit 60) (App. p. 16). DCI Agent Chris Calloway testified he believed that spot to be a chip in the paint, not blood. (Trial Vol.2 p.43 L.8-p.44 L.2). But Officer Phillips, a 20-year veteran of the police force, testified he'd seen a lot of blood spots and would think he

would recognize the difference between a paint chip and blood. (Trial Vol.2 p.56 L.21-p.57 L.5). None of the suspected blood from anywhere in the house was ever tested to confirm whether it was or was not in fact blood. (Trial Vol.2 p.49 L.3-7).

Agent Calloway, the DCI agent who had spoken with Justin on August 31, testified that he spoke with Justin again on September 2. First, in the morning, he spoke with Justin by telephone to coordinate another interview for later in the day. Agent Calloway testified that during the phone conversation, Justin indicated the gray t-shirt he'd been wearing (which had been collected from the master bedroom) would probably have blood on it. (Trial Vol.2 p.39 L.1-p.40 L.16). Second, later that morning, at about 10:30 a.m., Justin underwent a face-to-face interview with Agent Calloway. Agent Calloway testified that during that interview, Justin provided new or additional information in that Justin stated that, after the bathroom fall E.B. had run from the bathroom into E.B.'s bedroom and started jumping on the bed. Agent Calloway

testified that during the first interview, Justin had not mentioned E.B. being in his own room after the fall or jumping around on the bed after he'd fallen. (Trial Vol.2 p.40 L.17-p.41 L.20).

Brianna testified that she typically got off work at about 9:00 p.m., but couldn't leave until her replacement arrived. On the evening of August 30, she called Justin at 9:07 p.m. before she left work. Brianna testified that during that conversation, Justin said he was playing video games, said that the boys were asleep, and asked Brianna to stop at his mom's house on her way home to pick up some brownies she'd made. (Trial Vol.2 p.82 L.24-p.83 L.4, p.83 L.22-p.84 L.12, p.85 L.20-p.86 L.2).

Brianna left work shortly after that and called Justin again at 9:11 p.m. to tell him she'd left work. During that call, Justin told her that E.B. had woken up and gone to the bathroom, that Justin was in the living room playing video games when he heard a noise from the bathroom that sounded like something fell. Justin told her E.B. was injured and

bleeding on his chin or nose, but that Justin had cleaned up the injury and E.B. was okay now. Brianna testified Justin had told her he'd laid down with E.B. (she assumed in Justin and Brianna's bed) until he calmed down, and that Justin then put E.B. back in E.B.'s own bed. (Trial Vol.2 p.84 L.13-16, p.86 L.21-p.88 L.3, p.89 L.25-7).

Brianna testified that she stopped to pick up brownies and then arrived at home. S.B. was asleep in his own room when she arrived. She walked back to the master bedroom, where Justin was cradling E.B. and trying to talk to him. Brianna testified E.B. didn't look or sound right. He sounded as if he were gasping for breath, his neck was limp "[l]ike a newborn neck", his mouth was bloody and kind of banged up, his eyes were open and rolled back in his head, and his arms and legs were stiff like a board. (Trial Vol.2 p.89 L.8-22, p.92 L.3-6, p.113 L.16-21).

Brianna testified that she thought he was having a seizure, because E.B.'s older brother had seizures and that is

how he appeared during them. (Trial Vol.2 p.91 L.23-p.92 L.2).

Brianna told Justin he was going to take E.B. to the hospital. She walked by the bathroom on the way to the door, and Justin told her not to look in there because that's where E.B. had fallen. Brianna walked into the bathroom and saw there was some blood on the counter. She testified something was amiss with the two stools in front of the toilet, and thought they may have been tipped over, though she could not recall for sure. (Trial Vol.2 p.92 L.10-18, p.93 L.8-p.95 L.24).

Brianna testified that when she wasn't with E.B., he would typically be cared for by her mother (Kris), by E.B.'s dad Jacob Baker, by Justin, or sometimes by Brianna's friends Amy and Alex. (Trial Vol.2 p.74 L.9-15). Brianna testified that E.B.'s biological father, Jacob, has a drinking problem. (Trial Vol.2 p.113 L.9-15). Brianna also testified she had a strained relationship with her mother and always had. She testified she doesn't have any relationship at all with her mother's boyfriend, Jim Walters. (Trial Vol.2 p.113 L.22-23, p.115 L.7-

15). According to Jim Walters, he did not get along well with Brianna because Brianna doesn't do the right thing sometimes. (Trial Vol.1 p.217 L.21-p.218 L.17).

E.B.'s biological father Jacob and Jacob's girlfriend had watched E.B. and his brother on the evening of August 29 at Brianna's house, while Brianna and Justin had been out painting another residence they were getting ready to move to. Brianna testified the children were already asleep in their own beds when Brianna arrived home that evening. (Trial Vol.2 p.74 L.22-p.76 L.24).

Brianna testified that the following morning (on Tuesday August 30, 2016), Brianna, Justin, and E.B. took S.B. to school. Brianna tried to give E.B. breakfast that morning, but he wouldn't eat it. Then Brianna, Justin, and E.B. went to look at the house they'd been painting. (Trial Vol.2 p.77 L.10-25). Brianna's mother then came and picked up E.B. before Brianna got ready and left for work. Brianna and E.B. also stopped by Brianna's work briefly that afternoon. She testified that E.B. had not looked sick or unwell that day. (Trial Vol.2

p.77 L.1-8). She did not observe any new or unusual bruises on him, just the normal or typical childhood bruising (including on his arms, leg, and his back on the center of the spine) she usually saw on him from falling. (Trial Vol.2 p.78 L.9-15, p.107 L.5-15). Brianna testified that E.B. tended to be clumsy, more so than other children, and that it was not uncommon he would fall or injure himself. (Trial Vol.2 p.88 L.4-20). She testified he was getting over cold sores, but there had been no other injuries on E.B.'s lips that morning. (Trial Vol.2 p.80 L.2-3).

After picking up E.B. on the morning of August 30, Kris took him to lunch, ran errands, stopped with E.B. to see his mother at her work, then picked up his brother S.B. from school, took both boys to the park, and later took them to Jim Walters' house where the three of them spent time with Walters. She then took the boys to her home (where Kris's mother was also present). She testified the boys were not hungry at that time, but she gave them some supper. She testified the boys played for a bit and then got into their

pajamas. She then drove them home to Brianna's house, took them inside where Justin was present, put them to bed, waited to make sure they were asleep, and then left the residence at approximately 8:45 p.m. Kris testified that during the time she was with E.B. on August 30, E.B. had seemed normal, exhibited his normal appetite and activity level, and did not seem to have any unusual pain, injuries, or bruising. (Trial Vol.1 p.175 L.23-p.176 L.2, p.178 L.16-p.181 L.4, p.181 L.25-p.182 L.7, p.182 L.21-p.190 L.20, p.191 L.10-p.192 L.20, p.193 L.21-p.193 L.13, p.194 L.21-p.196 L.16, p.198 L.1-13). She testified that, while in the car, E.B. said he needed to go to the bathroom, so they stopped at a restaurant and E.B. sat on the toilet but was unable to make a bowel movement. However, she did not find that alarming. (Trial Vol.1 p.178 L.16-p.180 L.19). She testified E.B. was always in her sight, and had not ever been alone with Jim or her mother that day. (Trial Vol.1 p.190 L.21-p.191 L.3). She denied doing anything to harm E.B. that day. (Trial Vol.2 p.105 L.14-16).

Jim Walters testified he did not observe E.B. having any apparent injury or difficulty moving around on August 30, 2016. He denied ever being alone with E.B., or hurting him. (Trial Vol.1 p.215 L.16-p.216 L.14).

During trial, the State presented expert medical testimony from two physicians.

Dr. Julia Shelton (who had performed the abdominal surgery on E.B.) testified that E.B.'s intestinal laceration could have result from something applying a great amount of force to the front of the abdomen, compressing the hollow organ (described as being like a water balloon) against the back of the spine, causing it to pop. (Trial Vol.2 p.199 L.4-16). She had observed similar injuries at least two to four times a year in situations such as high speed car accidents when a child's abdomen impacts forcefully with a lap belt, or when a child riding their bike falls and lands with their abdomen on their handlebars. (Trial Vol.2 p.198 L.11-p.199 L.7).

Dr. Resmiye Oral, a child abuse pediatrician and the director of the Child Protection Program at University of Iowa

Children's Hospital, performed a child abuse consult regarding E.B. on September 6, 2016 (several days after he was initially admitted to the hospital on August 30). (Trial Vol.2 p.119 L.9-13, p.120 L.22-p.121 L.1, p.128 L.19-p.131 L.5).

As to E.B.'s head injuries, Dr. Oral testified at trial to the opinions, to a reasonable degree of medical certainty: that E.B. had been subjected to abusive head trauma (meaning trauma inflicted by somebody else doing something to the child); that the cause of the child's abusive head trauma was rotational acceleration/deceleration forces of moderate degree as seen in some shaking cases with or without an impact from a soft surface; and that the abusive head trauma was suffered within about 48-72 hours of the onset of symptoms. (Trial Vol.2 p.141 L.16-p.142 L.18, p.145 L.3-15, p.152 L.10-20). The head injury was classified as mild. (Trial Vol.2 p.155 L.16-18). Dr. Oral testified that a fall against a padded surface could be severe enough to cause a hematoma. (Trial Vol.2 p.164 L.6-12).

As to the child's abdominal injuries, Dr. Oral opined to a reasonable degree of medical certainty: that E.B. had been the victim of abusive abdominal trauma; and that the mechanism of the abdominal injuries was blunt force trauma (meaning direct impact from a person or object). (Trial Vol.2 p.146 L.22-p.147 L.23).

Dr. Oral further opined that, to a reasonable degree of medical certainty, the child's constellation of injuries (including his head, abdominal, and soft tissue or bruising injuries) could not plausibly be explained by a single short fall from a bathroom step stool. (Trial Vol.2 p.150 L.9-18, p.173 L.5-8).

As to E.B.'s head injury, Dr. Shelton during trial said that it was unlikely a fall from a short distance could result in a subdural hemorrhage or brain bleed. (Trial Vol.2 p.216 L.16-19). However, during an earlier deposition, she had testified that it was more a matter of how one falls rather than distance that determines whether a person could sustain a subdural hemorrhage. (Trial Vol.2 p.217 L.20-p.217 L.12).

As to the abdominal injuries, Dr. Shelton testified to the opinion, within a reasonable degree of medical certainty, that such injuries were the result of blunt force trauma. (Trial Vol.2 p.200 L.25-p.201 L.6). She opined that a punch from an adult to a child's abdomen could create the force necessary for E.B.'s intraabdominal injuries. (Trial Vol.2 p.200 L.19-23). She opined, within a reasonable degree of medical certainty, that a fall by E.B. from an 8-inch bathroom step stool would be highly improbable to have caused his abdominal injuries. (Trial Vol.2 p.218 L.13-22). She opined, within a reasonable degree of medical certainty, that the injuries would have occurred within about 2-4 hours prior to E.B.'s arrival at the Iowa City Hospital (which arrival was at 11:40 p.m. on August 30, 2016). (Trial Vol.2 p.202 L.19-p.203 L.16). She testified that the symptoms could have been minor initially, but would have worsened quickly. (Trial Vol.2 p.203 L.1-3). She testified she would be surprised if a child with the level of internal abdominal injury she observed on August 30 would have been

walking around without complaints of abdominal pain. (Trial Vol.2 p.205 L.19-p.206 L.3).

Dr. Shelton testified that she could not say whether it was possible a child could receive an injury causing a small laceration or partial tear to his bowel, with that laceration subsequently expanding or growing larger upon receiving some additional type of trauma. (Trial Vol.2 p.204 L.17-25).

Brianna testified that, in the months preceding August 30, E.B. had hurt himself or been to the Emergency Room on multiple occasions. (Trial Vol.2 p.105 L.24-p.106 L.4).

On April 29, 2016, E.B. was taken to the Emergency Room due to an eye issue, possibly a sty. (Trial Vol.2 p.106 L.5-9).

On July 9, 2016, E.B. was taken to the ER due to a mouth issue. (Trial Vol.2 p.106 L.10-11). Specifically, E.B.'s dad (Jake) had thought E.B. had hand, foot, and mouth disease and insisted on taking E.B. to the emergency room for it. However, the ER diagnosed the issue as just being cold sores. (Trial Vol.1 p.160 L.3-p.161 L.24; Vol.2 p.80 L.2-19).

On August 18, 2016, Brianna brought E.B. to the Emergency Room for severe stomach pain. E.B. was having spurts of screaming saying his stomach hurt while with his grandmother (Kris). He had complained a few times during the afternoon that his stomach hurt, but then the pain would go away. Then after he went to bed, he woke up with pain and was crying. Kris called Brianna and asked her to take E.B. to the emergency room. Brianna took E.B. to the emergency room, and he was diagnosed with constipation. (Trial Vol.1 p.201 L.14-p.202 L.2; Vol.2 p.100 L.15-p.101 L.7). Brianna testified E.B. had never had issues with constipation or problem with bowel movements before that, and she had no indication he was constipated. (Trial Vol.2 p.100 L.24, p.101 L.5-7). Kris denied that, in the period between that ER visit for constipation and the August 30 ER visit, E.B. had any complaints of further stomach pain. (Trial Vol.1 p.202 L.3-8). However, Brianna, testified that E.B.'s severe stomach pain continued on and off in that subsequent period leading up to August 30. (Trial Vol.2 p.101 L.8-14, p.107 L.2-4).

Brianna testified there was also at least one occasion (and probably more than one occasion) during that summer that E.B. had fallen down the steps at Kris's house. The steps at Kris's house led from the garage to the basement apartment where Kris stayed, and were concrete steps covered in thin carpet. She testified there were a lot of steps on that stairway. (Trial Vol.2 p.113 L.24-p.114 L.21, p.115 L.21-p.116 L.20).

Brianna testified that on August 26 (the Thursday before the August 30 incident), she had been driving with E.B. in her car and had to slam on the breaks to avoid a car accident. She testified that she was going maybe 35 or 40 miles per hour when she slammed on her brakes and came to a complete stop without impacting the vehicle in front of her. She testified that right after that occurred, E.B "freaked out" and complained of pain saying "Mom, that hurts". She testified he was in a forward-facing car seat and did not have his chest clip where it was supposed to be. She testified she did not notice any bruising after that incident. (Trial Vol.2 p.102 L.1-p.104 L.22). But according to Dr. Shelton, a blunt

force abdominal trauma (including by motor vehicle accidents wherein impact against a seatbelt causes bowel rupture) could well occur without any bruising or mark being left on the outside of the abdomen. (Trial Vol.2 p.215 L.13-p.216 L.5).

Brianna also testified there was a pre-existing bruise to the center of E.B.'s spine that had something to do with his injuring himself while jumping on the bed when he was home with Justin, Amy, and Alex (Brianna's friends). (Trial Vol.2 p.107 L.5-24). She testified that had happened in approximately July, and that the bruise was taking a long time to heal. (Trial Vol.2 p.117 L.6-24).

The Child Protection Center spoke with or attempted to speak with E.B. on four to five occasions, and they also interviewed his five-year-old brother S.B. (Trial Vol.2 p.110 L.25-p.111 L.18). Neither child ever implicated Justin in connection with E.B.'s injuries.

Other relevant facts will be discussed below.

ARGUMENT

I. Trial counsel rendered ineffective assistance in failing to object to Jury Instruction 15, which incorrectly instructs jurors that they could consider Defendant's out-of-court statements "just as if they had been made at this trial".

A. Preservation of Error: The traditional rules of preservation of error do not apply to claims of ineffective assistance of counsel. State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006) (citation omitted).

B. Standard of Review: "The right to assistance of counsel under the Sixth Amendment to the United States Constitution and article I, section 10 of the Iowa Constitution is the right to 'effective' assistance of counsel." State v. Ambrose, 861 N.W.2d 550, 556 (Iowa 2015) (citations omitted). Because they involve a constitutional right, the Court reviews claims of ineffective assistance of counsel de novo. State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012) (citing State v. Brubaker, 805 N.W.2d 164, 171 (Iowa 2011). While the Court usually considers claims alleging ineffective assistance of counsel in post-conviction relief proceedings, the Court will

address ineffective-assistance-of-counsel claims on direct appeal when the record is sufficient. Iowa Code § 814.7(2)–(3) (2015). See also Clay, 824 N.W.2d at 494 (citations omitted).

C. Discussion: The U.S. Constitution and the Iowa Constitution both guarantee defendants of criminal cases the right to effective assistance of counsel. U.S. Const. amends. VI, XIV; Iowa Const. art. 1, § 10; Ambrose, 861 N.W.2d at 555. To prevail on an ineffective-assistance-of-counsel claim, a defendant must establish (1) counsel failed to perform an essential duty and (2) the defense was prejudiced as a result. State v. Brothern, 832 N.W.2d 187, 192 (Iowa 2013) (quoting Lamasters v. State, 821 N.W.2d 856, 866 (Iowa 2012)).

"Competent representation requires counsel to be familiar with the current state of the law." Clay, 824 N.W.2d at 496 (citing State v. Hopkins, 576 N.W.2d 374, 379–80 (Iowa 1998)). The Iowa Supreme Court has stated "that 'failure to preserve error may be so egregious that it denies a defendant the constitutional right to effective assistance of counsel.'"

State v. Hrbek, 336 N.W.2d 431, 435–36 (Iowa 1983) (quoting Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981)).

The prejudice prong of an ineffective assistance claim is satisfied if "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" State v. Leckington, 713 N.W.2d 208, 218 (Iowa 2006) (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding." State v. Carrillo, 597 N.W.2d 497, 500 (Iowa 1999) (citing Osborn v. State, 573 N.W.2d 917, 922 (Iowa 1998)).

The Iowa State Bar Association model jury instruction 200.44 addresses the jury's consideration of evidence of a criminal defendant's out-of-court statements. Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 200.44 (2015). Jury Instruction 15, given in this case, is a reproduction of the model instruction:

> Evidence has been offered to show that the defendant made statements at an earlier time and place.
>
> If you find any of the statements were made, then you may consider them as part of the evidence, *just as if they had been made at this trial.*

Id. (emphasis added)[2]; (Jury Instruction 15) (App. p. 22).

The comment to the model instruction provides no specific authority for the last phrase of the instruction, but instead refers to Iowa Rule of Evidence 5.801(d)(2)—Admission by a Party Opponent. Comment, Iowa State Bar Ass'n, Iowa Criminal Jury Instructions No. 200.44 (2015). Rule 5.801(d)(2) provides that certain statements are not hearsay, including any statements by a party-opponent:

> d. *Statements that are not hearsay.* A statement that meets the following conditions is not hearsay:
> . . .

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[2] The model jury instruction suggests additional language if the defendant testifies: "You may also use these statements to help you decide if you believe the defendant. You may disregard all or any part of the defendant's testimony if you find the statements were made and were inconsistent with the defendant's testimony given at trial, but you are not required to do so. Do not disregard the defendant's testimony if other evidence you believe supports it or you believe it for any other reason." Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 200.44.

> (2) *An opposing party's statement.* The statement is offered against an opposing party and:
> (A) Was made by the party in an individual or representative capacity.

Iowa R. Evid. 5.801 (2015).

This exception is broadly applied. Statements admitted under this exception may or may not be against the party's interest; that is, they need not be "confessions" or "admissions" in order to be admissible for the truth of the matter asserted.[3] The admitted statements constitute "substantive evidence of the facts asserted but are not conclusive evidence of those facts . . . ." State v. Bayles, 55 N.W.2d 600, 606 (Iowa 1996). See also Laurie Kratky Doré, 7 Iowa Practice Series, Evidence 5.801:9 (Nov. 2016).

The exception for the statements of a party-opponent in Iowa's rules of evidence is modeled on the same exception found in Federal Rule of Evidence 801(d)(2).

> Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the

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[3]Rule 5.804(b)(3) provides a separate exception to the hearsay rule for declarations against interest. See Iowa R. Evid. 5.804(b)(3) (2015).

> adversary system rather than satisfaction of the conditions of the hearsay rule. No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive *influences of the opinion rule and the rule requiring* firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

Fed. R. Evid. 801(d) advisory committee note (internal citations omitted). The rationale for the hearsay exception is not based on the inherent reliability or trustworthiness of the statements themselves, but rather is rooted in an estoppel argument that a party to a lawsuit should be able to rely on the words of her opposing party. Jewel v. CSX Transp., Inc., 135 F.3d 361, 365 (6th Cir. 1998); United States v. DiDomenico, 78 F.3d 294, 303 (7th Cir. 1996).

Thus, the authority for the directive that the jury consider the defendant's statements just as if they had been made at trial is unclear. The directive is unsupported by both the text of the rule and the rationale and history of the

hearsay exception. Notably, the Iowa model jury instructions addressing other hearsay exceptions do not include similar language unless the exception applies to previous statements that were made under oath. Compare Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 200.42 (2015) with Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 200.43 (2015).

Moreover, the model instruction addressing "confessions" by a defendant does not include a directive for the jury to consider the statements just as if they had been made at trial. See Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 200.16 (2015). Instead a jury is told to consider various circumstances under which the confession is made when deciding how much weight to give it. See id.

Although the federal rules provide for the same exception to hearsay for a party-opponent's out of court statements, the model jury instructions in the various circuits do not provide a model instruction for the consideration of the statements, and certainly not one instructing the jury to consider the

statements the same as sworn testimony by the defendant. See U.S. District Court District of Maine, Pattern Criminal Jury Instructions for the District Courts of the First Circuit (2017), http://www.med.uscourts.gov/pattern-jury-instructions; Committee on Model Criminal Jury Instructions Third Circuit, Model Criminal Jury Instructions (2017), http://www.ca3.uscourts.gov/model-jury-instructions; Committee on Pattern Jury Instructions, District Judges Association, Fifth Circuit Pattern Jury Instructions (Criminal Cases) (2015), http://www.lb5.uscourts.gov/juryinstructions; Sixth Circuit Committee on Pattern Jury Instructions, Pattern Criminal Jury Instructions (2017), http://www.ca6.uscourts.gov/pattern-jury-instructions; Committee on Federal Criminal Jury Instructions for the Seventh Circuit, Pattern Criminal Jury Instructions of the Seventh Circuit (2012), http://www.ca7.uscourts.gov/pjury.pdf; Judicial Committee On Model Jury Instructions for the Eighth Circuit, Manual of Model Criminal Jury Instructions for the Eighth Circuit (2014), http://www.juryinstructions.ca8.uscourts.gov/

criminal_instructions.htm; Ninth Circuit Jury Instructions Committee, Manual of Model Criminal Jury Instructions (2017), http://www3.ce9.uscourts.gov/jury-instructions/model-criminal; Criminal Pattern Jury Instruction Committee of the United States Court of Appeals for the Tenth Circuit, Criminal Pattern Jury Instructions (2017), http://www.ca10.uscourts.gov/clerk/orders; Judicial Council of the Eleventh Circuit, Eleventh Circuit Pattern Jury Instructions (Criminal Cases) (2016), http://www.ca11.uscourts.gov/pattern-jury-instructions.

Accordingly, the district court erred in instructing the jury that they could consider Moore's out of court statements "just as if they had been made at this trial." While the rules of evidence provide that statements of party opponents are admissible, the rule of evidence and the rationale underlying the hearsay exception provides no authority to require the jury to consider the statements as bearing the same weight as testimony received at trial, made under oath and under penalty of perjury. Instead the jury should have been free to

assign whatever weight and reliability to the statements as it saw fit. Particularly, the jury should have been free to consider reliability of the statements from within the context in which they were made.

> Critically, substantive evidence is not the same as sworn testimony. [The defendant's statements] were not made under oath and, therefore, did not have the same binding effect on the declarant. . . . In the absence of the oath, any ability to observe the declarant's demeanor, and cross examination to aid in determining credibility, the probative force of out-of-court statements differs from the probative force of testimony. It was a mistake to instruct the jury on a false equivalency.

State v. Yenger, No. 17-0592, 2018 WL 3060251, at *6 (Iowa Ct. App. June 20, 2018) (Tabor, J., dissenting) (footnote omitted). See also State v. Payne, No. 16-1672, 2018 WL 1182624, at *11-12 (Iowa Ct. App. March 7, 2018) (Tabor, J. dissenting).

Uniform instructions are not "preapproved" by the Iowa Supreme Court. See State v. Robinson, 859 N.W.2d 464, 490 (Iowa 2015) (Wiggins, J., dissenting) (asserting "we can never

delegate the formulation of the law to the instruction committee").

"The clear implication of the challenged instruction was that [the defendant's] extrajudicial admissions were to be given the same force and effect as if he had uttered the words from the witness stand under the penalty of perjury. Yenger, No. 17-0592, 2018 WL 3060251, at *6–7 (Tabor, J., dissenting).

Further, jury instruction 15 implicated Moore's Fifth Amendment right against self-incrimination. Moore exercised his constitutional right not to testify, yet the court nevertheless instructed the jurors that they could consider his unsworn statements as a substitute for admissions made in open court. As a result, Moore was effectively stripped of his right not to testify. Yenger, No. 17-0592, 2018 WL 3060251, at *6–7 (Tabor, J. dissenting). See also Payne, No. 16-1672, 2018 WL 1182624, at *12 (Tabor, J. dissenting).

Because the jury instruction misstates the law and violates Moore's constitutional rights, his trial counsel was ineffective for failing to object to the instruction.

Moore was prejudiced by his attorney's failure. The source of E.B.'s injuries was disputed, and there were no witnesses who observed the cause of E.B.'s injuries. E.B. and S.B. were both interviewed, but neither ever implicated Moore. (Trial Vol.2 p.110 L.25-p.111 L.18). Moore did not confess to wrongdoing; instead he maintained that, as far as he knew, E.B. was injured in an accidental fall. However, the State urged that Moore's version of events as articulated to Agent Calloway on August 31 differed from the version of events provided to Agent Calloway on September 2, and that the purported inconsistencies between the two statements indicated Moore's guilt. (Trial Vol.2 p.32 L.8-12, p.39 L.17-p.42 L.10; Vol.3 p.25 L.15-19, p.54 L.6-8, p.60 L.12-17). Moreover, the State urged that Moore's version of events was contrary to the medical evidence, in particular the opinions of Dr. Oral and Dr. Shelton on whether E.B.'s injuries could have resulted from a fall from a bathroom stool. (Trial Vol.2 p.146 L.22-p.147 L.23, p.150 L.9-18, p.173 L.5-8, p.200 L.25-p.201 L.6, p.216 L.16-19, p.218 L.13-22; Vol.3 p.37 L.10-16, p.55

L.12-17). However, the events as articulated to Agent Calloway by Moore on August 31 and September 2 were merely based on Moore's best understanding of what had happened at that time, with a limited understanding of the scope of the child's injuries and during a course of time when Moore was trying to fully recall or clarify the sequence of events which Moore had initially believed resulted in only a relatively limited injury but which subsequently proved to be much more serious to the child. Those statements (given over a period of weeks and based on an evolving understanding or recollection of what may have happened), if artificially inflated to the level of sworn testimony given at trial under oath, would be much more suspect in the eyes of a jury than the same statements understood in the context in which they were actually made. If the jury had been free to consider Moore's alleged statements in the context in which they were made, rather than being directed to consider them as if they were sworn testimony given at trial, there is a reasonable likelihood the jury would have reached a different decision. Additionally,

the State explicitly referenced and emphasized Instruction 15 and the Defendant's out-of-court statements in urging the jury during closing argument to return a guilty verdict. (Trial Vol.3 p.25 L.15-19, p.36 L.14-p.37 L.22, p.54 L.6-8, p.55 L.12-17, p.57 L.11-13, p.60 L.12-17, p.61 L.22-23). Moore's conviction should be vacated and his case remanded for a new trial.

D. Conclusion: Defendant-Appellant Justin Cole Moore respectfully requests that his conviction be reversed and remanded for a new trial.

II. Counsel rendered ineffective assistance in failing to object to the omission of and request a jury instruction defining "reasonable degree of medical certainty".

A. Preservation of Error: A claim of ineffective assistance of counsel is an exception to the general rule of error preservation. State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982).

B. Standard of Review: Ineffective assistance of counsel claims are reviewed de novo. State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987).

C. Discussion: A criminal defendant is entitled to effective assistance of counsel. U.S. Const. amend VI; Iowa Const. art. I, §10; Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2063 (1984); State v. Ambrose, 861 N.W.2d 550, 556 (Iowa 2015). When specific errors are relied upon to show the ineffective assistance of counsel, the defendant must demonstrate (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). In order to establish ineffective assistance of counsel, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Counsel has the duty to know the applicable law and to protect the defendant from conviction under a mistaken application of the law. State v. Hopkins, 576 N.W.2d 374, 379-80 (Iowa 1998). To preserve error counsel must make a

specific objection to the instructions in final form. State v. Deases, 518 N.W.2d 784, 792 (Iowa 1994). Counsel did not object to the omission of an instruction defining "reasonable degree of medical certainty". (Trial Vol.3 p.15 L.23-p.17 L.22). Counsel had a duty to inspect the instructions and make certain the instructions correctly reflected the law. State v. Goff, 342 N.W.2d 830, 837-38 (Iowa 1983). Counsel's failure to preserve error denied defendant the effective assistance of counsel as guaranteed by the state and federal Constitutions.

An expert witness only needs to "entertain a 'reasonable degree of medical certainty' for his conclusions." State v. Webb, 309 N.W.2d 404, 413 (Iowa 1981) (quoting Commonwealth v. Stoltzfus, 337 A.2d 873, 879 (1975)). The doctors' opinions herein were offered "to a reasonable degree of medical certainty." See (Trial Vol.2 141 L.16-p.142 L.18, p.145 L.3-15, p.146 L.22-p.147 L.23, p.150 L.9-18, p.152 L.10-20, p.173 L.5-8, p.200 L.19-p.201 L.6, p.202 L.19-p.203 L.16, p.205 L.19-p.206 L.3, p.218 L.13-22). The phrase "to a reasonable degree of medical certainty" is not a medical term

of art. Lewin, The Genesis and Evolution of Legal Uncertainty about "Reasonable Medical Certainty", 57 Md. L. Rev. 380, 402-403 (1998).

The Restatement of Torts (Third) addressed the application of "reasonable medical certainty" in the context of a civil case. "Experts must hold their opinions with some degree of certainty for them to be admissible. To an expert witness, virtually any proposition may be 'possible,' but the law demands proof by a preponderance of the evidence in civil cases." Restatement (Third) of Torts: Phys. & Emot. Harm § 28, subsection (a) comment (e) (2010). "Requiring an expert to state that an opinion is held to a medical or scientific certainty is problematic because the medical and scientific communities have no such 'reasonable certainty' standard." Id. "Moreover, the reasonable-certainty standard provides no assurance of the quality of the expert's qualifications, expertise, investigation, methodology, or reasoning. Thus, this Section adopts the same preponderance standard that is universally applied in civil cases." Id.

The Restatement (Third) is consistent with the Black's Law Dictionary definition. "Reasonable medical probability" or "reasonable medical certainty" means "[i]n proving the cause of an injury, a standard requiring a showing that the injury is more likely than not caused by a particular stimulus, based on the general consensus of recognized medical thought." Black's Law Dictionary (10th ed. 2014).

The jury should have had a definition for "reasonable degree of medical certainty." This is a legal definition. The medical witnesses' opinions are meaningless without an understanding of the level of certainty to which each was held. It was also important for the jury to have an understanding of the difference between the level of proof for the doctors' opinions compared to the level of proof required for a guilty verdict. Counsel had a duty to request an instruction consistent with the Black's Law Dictionary definition. Such an instruction would have provided the significant information that the doctors' opinions were based on a "more likely than not" – greater than fifty percent.

Moore was prejudiced by the lack of an instruction defining "to a reasonable degree of medical certainty." There were no witnesses who observed the cause of E.B.'s injuries. E.B. and S.B. were both interviewed, but neither ever implicated Moore. (Trial Vol.2 p.110 L.25-p.111 L.18). Moore did not confess to wrongdoing; instead he maintained that, as far as he knew, E.B. was injured in an accidental fall. The State's case was based solely on the medical opinions that E.B.'s injuries were intentionally inflicted, that they were inflicted during the time period Moore was the only adult present with E.B., and that they could not have resulted from an accidental fall in the bathroom. See (Trial Vol.2 141 L.16-p.142 L.18, p.145 L.3-15, p.146 L.22-p.147 L.23, p.150 L.9-18, p.152 L.10-20, p.173 L.5-8, p.200 L.19-p.201 L.6, p.202 L.19-p.203 L.16, p.205 L.19-p.206 L.3, p.218 L.13-22).

The instructions as a whole do not convey the definition of "reasonable degree of medical certainty." The jury was instructed that it needed to find evidence beyond a reasonable doubt and the definition of reasonable doubt. (Instructions 3,

4, 13, 14) (App. pp. 17-18, 20-21). Additionally, the jury was instructed it should consider expert testimony just like any other evidence and determine what weight to give it. (Instruction 12) (App. p. 19). What the jury did not know was what the expert testimony (the doctors' opinions "to a reasonable degree of medical certainty") actually meant. Without a definition of "reasonable degree of medical certainty" the jury did not know whether the opinions rose to a level above speculation and suspicion.

In order to establish ineffective assistance of counsel, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. Defendant is not required to prove that without the error, he would have been acquitted. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. The lack of an instruction on such an integral issue in the case undermines the confidence

in the outcome of this trial. Moore must be granted a new trial.

D. Conclusion: Defendant-Appellant Justin Cole Moore respectfully requests that his conviction be reversed and remanded for a new trial.

III. The portion of the sentencing order directing Defendant to pay jail fees must be removed by way of a nunc pro tunc order, as it fails to conform to the oral pronouncement of sentence. Additionally, the district court erred in ordering Defendant to pay court costs and jail fees without making any ability to pay determination.

A. Preservation of Error: The district court's sentence may be reviewed on appeal even where there was no objection in the district court. State v. Cooley, 587 N.W.2d 752, 754 (Iowa 1999). Because the challenged language ordering Moore to pay court costs and jail fees is contained within the district court's sentencing order, it is considered part of the sentence and may be addressed on direct appeal. State v. Janz, 358 N.W.2d 547, 549 (Iowa 1984); State v. Campbell, No. 15-1181, 2016 WL 4543763, at *2 (Iowa Ct. App. Aug. 31, 2016); State

v. Pace, No. 16-1785, 2018 WL 1629894, at *3 (Iowa Ct. App. April 2, 2018).

B. Standard of Review: Appeals of restitution orders are reviewed for an abuse of discretion. State v. Van Hoff, 415 N.W.2d 647, 648 (Iowa 1987). Constitutional issues are reviewed de novo. State v. Dudley, 766 N.W.2d 606, 626 (Iowa 2009).

C. Discussion:

1). Nunc Pro Tunc (Jail Fees):

The court's written sentencing order directs Moore to pay jail fees. (10/30/17 Order of Disposition, p.2) (App. p. 24) (Paragraph titled "JAIL FEE."). However, the court's oral pronouncement of sentence made no reference to jail fees. See (Sent. Tr. p.4 L.9-p.7 L.6).

The portion of the written sentencing order ordering payment of jail fees is thus in conflict with the court's oral pronouncement of sentence. Where there is a discrepancy between the oral pronouncement of sentence and the written judgement, the oral pronouncement governs. State v. Hess,

533 N.W.2d 525, 527-529 (Iowa 1995). The proper remedy is to remand for entry of a nunc pro tunc order. Id. at 529.

A nunc pro tunc should accordingly be entered removing from the written sentencing order Moore's obligation to pay jail fees. See (10/30/17 Order of Disposition, p.2) (App. p. 24) (paragraph titled "JAIL FEE.").

Alternatively, to the extent this Court determines the portion of the written sentencing order directing Moore to pay jail fees is not appropriately removable by way of a nunc pro tunc order, this Court should hold that the assessment of jail fees without any ability to pay determination amounted to an abuse of discretion and an illegal sentence, as discussed next in subsection 2 of this division.

2). Illegal Sentence and Abuse of Discretion (Jail Fees and Court Costs):

A sentencing court must order restitution to the victims of a crime and to the clerk of court for fines, penalties, and surcharges, regardless of a defendant's ability to pay. Iowa

Code section 910.2(1) (2015); State v. Wagner, 484 N.W.2d 212, 215–16 (Iowa Ct. App. 1992).

However, restitution for crime victim assistance reimbursement, for public agencies, for *court costs including correctional fees under section 356.7*, and for court-appointed attorney fees may only be assessed "to the extent the defendant is reasonably able to pay". Iowa Code § 910.2(1) (2015). See also Campbell, 2016 WL 4543763, at *3. "A defendant's reasonable ability to pay is a constitutional prerequisite for a criminal restitution order such as that provided by Iowa Code chapter 910." State v. Van Hoff, 415 N.W.2d 647, 648 (Iowa 1987). See also Goodrich v. State, 608 N.W.2d 774, 776 (Iowa 2000). Thus, before ordering payment for correctional fees or court costs, the court must consider the defendant's ability to pay.

In the present case, the sentencing court ordered that Moore pay court costs and correctional fees. See (Sent. Tr. p.5 L.12-14) (ordering payment of court costs); (10/30/17 Order of Disposition, pp.1-2) (App. pp. 23-24) (ordering payment of

"COURT COSTS" and "JAIL FEE"). However, no determination of Moore's ability to pay such costs and fees was made by the sentencing court. Indeed, with regard to court costs, the court appeared to have believed ability to pay determination was necessary or permissible as it stated "I am required to order you to pay court costs....". (Sent. Tr. p.5 L.12-14).

The portions of the district court's sentencing order directing Moore to pay court costs and jail fees without any ability-to-pay determination is statutorily and constitutionally unauthorized and illegal. See State v. Bruegger, 773 N.W.2d 862, 871 (Iowa 2009) (an illegal sentence is one that "is outside the statutory bounds" or "itself...unconstitutional"); Tindell v. State, 629 N.W.2d 357, 359 (Iowa 2001) (an illegal sentence is "one not authorized by statute"). Such aspects of the sentence also amount to a "failure of the court to exercise discretion or an abuse of that discretion." Van Hoff, 415 N.W.2d at 648. Statutorily and constitutionally, the court must consider the defendant's ability to pay before ordering payment for court costs and jail fees. Id. See also State v.

Coleman, 907 N.W.2d 124, 149 (Iowa 2018). It was error for the court to order Moore to pay court costs and jail fees without affirmatively making any ability to pay determination. See Dudley, 766 N.W.2d at 615 (reimbursement obligation "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.") (emphasis added); Goodrich, 608 N.W.2d at 776 ("Constitutionally, 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.") (emphasis added). The portion of the sentencing order assessing court costs and correctional fees should be vacated and remanded to the district court for entry of a corrected sentencing order omitting that language.

D. Conclusion: Defendant-Appellant Justin Cole Moore respectfully requests that the portion of the sentencing order assessing court costs and correctional fees should be vacated and remanded to the district court for entry of a

corrected sentencing order omitting that language. See (10/30/17 Order of Disposition, p.1 & 2) (App. pp. 23-24) (paragraphs titled "COURT COSTS." and "JAIL FEE.").

NONORAL SUBMISSION

Oral submission is not requested unless this Court believes it may be of assistance to the Court.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $5.38, and that amount has been paid in full by the Office of the Appellate Defender.

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

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