IN THE SUPREME COURT OF IOWA

STATE OF IOWA Plaintiff-Appellee, v. LAWRENCE EUGENE WALKER, Defendant-Appellant.	)	Supreme Court No. 18-0457

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
THE HONORABLE JOHN D. TELLEEN (TRIAL)
AND THE HONORABLE PATRICK A. McELYEA
(SENTENCING), JUDGES

APPELLANT'S BRIEF AND ARGUMENT

MARK C. SMITH
State Appellate Defender

NAN JENNISCH
Assistant Appellate Defender
njennisch@spd.state.ia.us
appellatedefender@spd.state.ia.us

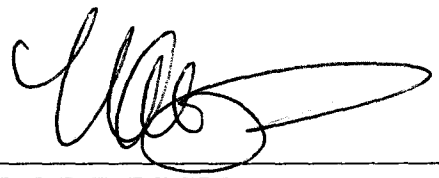
STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX

ATTORNEYS FOR DEFENDANT-APPELLANT

CERTIFICATE OF SERVICE

On the 27th day of November, 2018, the undersigned certifies that a true copy of the forgoing instrument was served upon the Defendant-Appellant by placing on copy thereof in the United States mail, proper postage attached, addressed to Lawrence Eugene Walker No. 6080443, Iowa Medical and Classification Center, 2700 Coral Ridge Avenue, Coralville, IA 52241.

APPELLATE DEFENDER'S OFFICE



NAN JENNISCH
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
njennisch@spd.state.ia.us
appellatedefender@spd.state.ia.us

NJ/sm/08/18
NJ/lr/11/18

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Authorities

State v. Mitchell, 568 N.W.2d 493, 497 (Iowa 1997)

Iowa R. Evid. 5.412(a)

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Authorities

State v. Ortiz, 789 N.W.2d 761, 764–65 (Iowa 2010)

State v. Newell, 710 N.W.2d 6, 18 (Iowa 2006)

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ROUTING STATEMENT

This case should be transferred to the Court of Appeals because the issues raised herein involve application of existing legal principles. Iowa R. App. R. 6.903(2)(d) and 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant, Lawrence Eugene Walker, from his criminal convictions for second-degree sexual abuse and lascivious acts with a child, following jury trial, judgment and sentencing in the District Court for Scott County. The Honorable John D. Telleen presided over all relevant proceedings.

Course of Proceedings: On August 10, 2016, the State filed a trial information charging the defendant with the crimes of second-degree sexual abuse, a Class "B" Felony in violation of Iowa Code Section 709.3(1)(b), in Count I and lascivious acts with a child, a Class "C" Felony of Iowa Code Sections 709.8(1)(a) and 709.8(1)(c), in Count II. (Trial Information – 8/10/16) (App. pp. 5-7). Jury trial was held on January 29-31, 2018. (Court Calendar – 1/31/18) (App. pp. 45-46). The jury found the defendant guilty as charged on both counts of

the trial information. (Court Calendar – 1/31/18) (App. pp. 45-46).

Sentencing was held on March 14, 2018. (Court Calendar – 3/14/18) (App. pp. 47-49). On the charge of second-degree sexual abuse in Count I, the district court imposed a term of imprisonment not exceeding twenty-five years with the requirement that the defendant serve seventy percent of the sentence before eligibility for parole. (Court Calendar – 3/14/18) (App. pp. 47-49). On the charge of lascivious acts with a child in Count II, the court imposed a term of imprisonment not exceeding ten years and assessed a $1,000 fine (with payment suspended). (Court Calendar – 3/14/18) (App. pp. 47-49). The prison terms were ordered to run concurrently with one another. (Court Calendar – 3/14/18) (App. pp. 47-49). The court also imposed the special sentence of lifetime parole to commence upon completion of the sentence of incarceration. (Court Calendar – 3/14/18) (App. pp. 47-49). The defendant was ordered to register as a sex offender and to provide a DNA sample. (Court Calendar – 3/14/18) (App. pp. 47-49). In addition, the defendant was

assessed a civil penalty for sex offenders, a surcharge on the fine in Count I, a sexual abuse surcharge on Counts I and II, correctional fees, court costs, and attorney fees (with payment waived). (Court Calendar – 3/14/18) (App. pp. 47-49).

Notice of appeal was timely filed on March 15, 2018; this appeal followed. (Notice of Appeal – 3/15/18) (App. pp. 50-51).

Facts: The criminal charges in this case arose from allegations that the defendant sexually abused his then-four-year-old niece while babysitting at her home. (Trial III Tr. p. 45, L. 10-12). The State presented the following facts at trial.

On the night of June 20, 2016, the defendant spent several hours babysitting at the residence of Mark Walker (the defendant's brother) in Davenport. (Trial III Tr. p. 35, L. 6-p. 36, L. 6; p. 38, L. 12-p. 39, L. 1, 17-22; p. 51, L. 13-18). The defendant was watching E.W. (the defendant's niece), J.W. (the defendant's nephew), and another boy (E.W.'s cousin) while Mark went out bowling with friends. (Trial III Tr. p. 37, L. 8-24; p. 38, L. 5-13; p. 46, L. 20-24). Kelley Roling (E.W.'s mother and Mark's fiancée) also lived there but wasn't home at

the time since she worked nights. (Trial III Tr. p. 35, L. 6-p. 37, L. 7; p. 45, L. 4-p. 46, L. 15). The defendant left when Mark came home from bowling. (Trial III Tr. p. 40, L. 1-p. 41, L. 7).

The next afternoon, on June 21, E.W. told Kelley that the defendant hurt her the previous night while she was sleeping in the master bedroom. (Trial III Tr. p. 47, L. 9-16). E.W. stated that the defendant was in her "butt crack." (Trial III Tr. p. 63, L. 23-p. 65, L. 8). She explained that he removed his pants and underwear and pulled her underwear down to her ankles. (Trial III Tr. p. 63, L. 23-p. 65, L. 8). E.W. said "he did this to me" and indicated, through gestures, that the defendant sat her on his crotch and bounced her up and down. (Trial III Tr. p. 63, L. 23-p. 65, L. 8). She also mentioned that he put his fingers in her crotch and "butt crack." (Trial III Tr. p. 63, L. 23-p. 65, L. 8).

Afterward, Kelley informed Mark that the defendant had touched E.W. sexually. (Trial III Tr. p. 41, L. 8-p. 42, L. 2; p. 47, L. 9-16). When that conversation led to an argument, Kelley took E.W. to her mother's house in DeWitt that evening

to figure out what to do. (Trial III Tr. p. 41, L. 8-p. 42, L. 2; p. 47, L. 9-p. 48, L. 5). Shortly thereafter, Kelley decided to take E.W. to the emergency department at Genesis West Hospital in DeWitt. (Trial III Tr. p. 48, L. 3-19).

At the hospital, Elsa Durr-Baxter, a sexual assault nurse examiner, first talked to Kelley separately from E.W. (Trial III Tr. p. 52, L. 19-p. 53, L. 1; p. 55, L. 13-21). Kelley provided the nurse with E.W.'s account of sexual abuse by the defendant. (Trial III Tr. p. 55, L. 13-21; p. 63, L. 23-p. 65, L. 8). When the nurse spoke with E.W., she reported the same abuse. (Trial III Tr. p. 55, L. 24-p. 58, L. 20). E.W. stated that the defendant broke her ankle as well. (Trial III Tr. p. 56, L. 25-p. 58, L. 20). When the nurse asked her to demonstrate how he did this, she turned her right ankle out to the side and squeezed her right thigh with her hand. (Trial III Tr. p. 56, L. 25-p. 58, L. 20). The nurse found no evidence of injuries upon physical examination. (Trial III Tr. p. 58, L. 24-p. 8). The nurse further conducted a sexual assault examination and collected forensic evidence for a sexual assault kit. (Trial III Tr. p. 60, L. 14-p. 62, L. 3).

The nurse subsequently consulted with Dr. Barbara Harre, a physician with the Child Protection Center in Davenport, about E.W.'s case due to concerns of "possible inappropriate genital contact." (Trial III Tr. p. 68, L. 21-70, L. 8). E.W. was seen by the physician on July 8. (Trial III Tr. p. 71, L. 17-22). During the physician's examination, E.W. again disclosed that the defendant had sexually abused her. (Trial III Tr. p. 74, L. 25-p. 80, L. 21).

Maureen Hammes, a detective with the Davenport Police Department, interviewed the defendant on July 14 at the police station. (Trial III Tr. p. 82, L. 21-p. 89, L. 11). She questioned him about allegations that he had touched E.W. sexually. (State's Exhibit 1 – Defendant's Interview). The defendant stated that when he was babysitting E.W. recently, he put her to bed in her parents' bedroom and slept next to her. (State's Exhibit 1 – Defendant's Interview). He thought that she may have wet the bed, so he checked her underwear. (State's Exhibit 1 – Defendant's Interview). He said that he subsequently removed her underwear and "wiped her clean." (State's Exhibit 1 – Defendant's Interview). The defendant

indicated that he was cuddling with E.W. while she had her underwear off and he was stripped down to his boxers. (State's Exhibit 1 – Defendant's Interview). He eventually acknowledged having her sit on his lap. (State's Exhibit 1 – Defendant's Interview). He admitted that he rubbed her vagina with his hand but stopped after she "shook a little." (State's Exhibit 1 – Defendant's Interview). At the end of the interview, the detective obtained a buccal swab from the defendant, and he was placed under arrest. (State's Exhibit 1 – Defendant's Interview).

E.W.'s sexual assault kit was sent to the Department of Criminal Investigation for analysis. (Trial III Tr. p. 90, L. 2-p. 92, L. 18). Tests confirmed the presence of spermatozoa on E.W.'s anal swab, however a DNA profile could not be developed from the sperm fraction. (Tr. p. 93, L. 16-p. 105, L. 21). E.W.'s vaginal swab tested negative for seminal fluid. (Tr. p. 93, L. 16-p. 105, L. 21). A mixture of DNA from E.W. and a foreign contributor was found on the swabs taken from E.W.'s back and from the inside crotch of her underwear. (Tr. p. 93, L. 16-p. 105, L. 21). The DNA sample from the foreign

contributor was too weak for interpretation, so no identification could be made. (Tr. p. 93, L. 16-p. 105, L. 21).

At trial, E.W. testified that the defendant did "a really, really bad thing" to her which she didn't like. (Trial III Tr. p. 124, L. 3-p. 129, L. 23). She recalled sleeping at home downstairs, when the defendant carried her up to her parents' bedroom. (Trial III Tr. p. 124, L. 3-p. 129, L. 23). She stated that, once there, he "lifted" her up and down, with his "private" (a reference to his penis) touching her "private" (a reference her vagina). (Trial III Tr. p. 124, L. 3-p. 129, L. 23). E.W. said that she was sleeping while all this was happening. (Trial III Tr. p. 124, L. 3-p. 129, L. 23).

The defendant took the stand at trial and testified in his own defense. He testified that he was babysitting at his brother's house one night and had his dog with him. (Trial III Tr. p. 135, L. 8-19). According to the defendant, E.W. was sleeping only in her underwear on the couch with a blanket wrapped around her. (Trial III Tr. p. 136, L. 4-12). The defendant was on the couch as well, playing video games with her brother and her cousin. (Trial III Tr. p. 136, L. 23-p. 137,

L. 3). E.W. woke up when the dog jumped onto the couch. (Trial III Tr. p. 137, L. 4-7). The defendant then carried E.W. up to her parents' bedroom. (Trial III Tr. p. 137, L. 8-17).

The defendant testified that he took off his shorts and lied down beside E.W. in her parents' bed. (Trial III Tr. p. 137, L. 23-p. 138, L. 10). He smelled urine and thought that she may have wet the bed. (Trial III Tr. p. 138, L. 11-p. 140, L. 7). He stated that he tapped her underwear and noticed that it was moist. (Trial III Tr. p. 138, L. 11-p. 140, L. 7). He removed her underwear, wiped her bottom with a towel, and then slipped her underwear back on her. (Trial III Tr. p. 138, L. 11-140, L. 7). The defendant stated that he took a short nap next to her on the bed afterward. (Trial III Tr. p. 140, L. 8-14). They both woke up when the dog started scratching at the bedroom door. (Trial III Tr. p. 140, L. 15-23). The defendant said that he subsequently took E.W. back downstairs. (Trial III Tr. p. 140, L. 24-p. 141, L. 6). All three children ended up falling asleep on the couch. (Trial III Tr. p. 141, L. 7-21).

The defendant testified that he never touched E.W. in a sexual manner while babysitting her that night. (Trial III Tr. p. 142, L. 6-16; p. 149, L. 19-20). He also denied putting her in his lap. (Trial III Tr. p. 142, L. 8-9). He additionally claimed that he was "zoned out" when he was interviewed by the detective due to the combination of pain killers, sleeping pills, and beer that he had consumed earlier. (Trial III Tr. p. 143, L. 2-p. 149, L. 20). Moreover, he suggested that his statements to the detective were made under duress. (Trial III Tr. p. 143, L. 2-p. 149, L. 20).

Other facts pertinent to the appeal will be mentioned below.

ARGUMENT

I. The district erred in excluding evidence that the child's mother feared the child's brother, a victim of sexual abuse, would act out sexually on the child. The evidence is relevant to legitimate factual issues in dispute and does not fall within the coverage of the rape shield law under Iowa Rule of Evidence 5.412.

Preservation of Error: The defense sought to present evidence that the child's mother feared the child's brother, a victim of sexual abuse, would act out sexually on the child.

(Trial III Tr. p. 5, L. 3-p. 19, L. 12). Error was preserved by the defense arguments in support of admission and the trial court's ruling excluding the evidence. (Trial III Tr. p. 5, L. 3-p. 19, L. 12).

Standard of Review: Review of trial court rulings on admissibility of evidence under rule 5.412 in criminal prosecutions for abuse of discretion. State v. Mitchell, 568 N.W.2d 493, 497 (Iowa 1997). Reversal is warranted only upon showing the "court exercise[d] its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Id.

Discussion: The district erred in excluding evidence that the child's mother feared the child's brother, a victim of sexual abuse, would act out sexually on the child. This evidence is relevant to legitimate factual issues in dispute and does not fall within the coverage of the rape shield law under Iowa Rule of Evidence 5.412.

The child's parents were subpoenaed by the defense to testify at trial. (Trial III Tr. p. 5, L. 3-9). The defense sought to

present the following evidence. The child's father reported to the detective that the child's older brother had been sexually abused at some point. (Trial III Tr. p. 6, L. 2-17). The child's mother told the physician that the child's brother would inappropriately stare at the child's body. (Trial III Tr. p. 6, L. 2-17). In addition, she felt it necessary to separate the children and wanted to make sure that they had clothes on when they were together. (Trial III Tr. p. 6, L. 2-17).

The trial court sustained the State's objection to admission of the evidence in question. (Trial III Tr. p. 16, L. 14-p. 19, L. 12). The court ruled this evidence inadmissible based upon the rape shield law in Iowa Rule of Evidence 5.412. (Trial III Tr. p. 16, L. 14-p. 19, L. 12). See Iowa R. Evid. 5.412(a). The court also indicated that the defense did not provide timely notice as required by the rule. (Trial III Tr. p. 16, L. 14-p. 19, L. 12). See Iowa R. Evid. 5.412(c)(1). The court further determined that the evidence, though marginally relevant, was more prejudicial than probative and would confuse the issues and mislead the jury. (Trial III Tr. p. 16, L. 14-p. 19, L. 12). See Iowa Rs. Evid. 5.401, 5.402, 5.403.

Relevancy: The defendant argues that the evidence in question is relevant to legitimate factual issues in dispute. The evidence is material to support the defense theory that another person, namely the child's brother, could have perpetrated the sexual abuse. See Iowa R. Evid. 5.401, 5.402. The evidence further provides an explanation for the source of the child's knowledge of sexual matters. For example, the child could have become familiar with such matters while overhearing her parents discuss her brother's abuse.

Rape Shield Law: Iowa's rape shield law, contained in Rule of Evidence 5.412, is an exception to the general rule that relevant evidence is admissible. State v. Clarke, 343 N.W.2d 158, 160-61 (Iowa 1984). Rule 5.412 provides that "[e]vidence of a victim's other sexual behavior" is generally inadmissible in criminal proceedings involving alleged sexual abuse. Iowa R. Evid. 5.412. Where the proffered evidence is not evidence of the complainant's "other sexual behavior," however, Rule 5.412 is not triggered. Additionally, even where evidence is of "other sexual behavior" the rule provides an exception to permit admission of "[e]vidence whose exclusion would violate

the defendant's constitutional rights." Iowa R. Evid. 5.412(b)(1)(c).

The defendant asserts that the rape shield law is not triggered in this case. Evidence that the child's brother was sexual abused arguably constitutes "other sexual behavior."[1] (Trial III Tr. p. 6, L. 2-17). Yet, this "other sexual behavior" does not involve the child, who is the victim and complainant in this case. Furthermore, the child's mother had observed the child's brother staring inappropriately at the child's body. (Trial III Tr. p. 6, L. 2-17). She also felt it necessary to keep the children apart and wanted them clothed if they were around each other. (Trial III Tr. p. 6, L. 2-17). The evidence from the child's mother makes no reference to actual sexual contact, thus it does not constitute sexual activity within the meaning of the rape shield law.

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[1] "[P]ast sexual behavior" means a volitional or non-volitional physical act that the victim has performed for the purpose of the sexual stimulation or gratification of either the victim or another person or an act that is sexual intercourse, deviate sexual intercourse or sexual contact, or an attempt to engage in such an act, between the victim and another person. State v. Baker, 679 N.W.2d 7, 10 (Iowa 2004) (quoting State v. Wright, 776 P.2d 1294, 1297–98 (Or. Ct. App. 1989)).

Disposition: The evidence in question is relevant to legitimate factual issues in dispute and does not fall within the purview of the rape shield law under Iowa Rule of Evidence 5.412. Consequently, the trial court erred and abused its discretion in excluding this evidence. The defendant's convictions for second-degree sexual abuse and lascivious acts with a child must therefore be vacated and the case remanded for a new trial.

II. The trial court erred in permitting the nurse and physician to testify to the child's out-of-court statements about the defendant's sexual abuse. The child's statements to the medical providers are inadmissible hearsay and do not fall under Iowa Rule of Evidence 5.803(4), the hearsay exception for statements made for purposes of medical diagnosis and treatment. In addition, the nurse should not have been allowed to testify to statements that the child made to her mother regarding the abuse, since the testimony includes inadmissible double hearsay. Defense counsel was ineffective to the extent error was not preserved on these issues.

Preservation of Error: Defense counsel objected to admission of the child's statements to the physician as inadmissible hearsay, and the trial court overruled the objection. (Defense Motion in Limine – 1/20/18, pp. 4-7; Motion Tr. p. 4, L. 2-p. 12, L. 11; Trial III Tr. p. 4, L. 2-p. 11,

L. 24) (App. pp. 12-15). Error on this claim was therefore preserved.

However, error was not preserved on the defendant's challenge to admission of the child's statements to both the nurse and her mother. The defendant thus raises these unpreserved claims under the rubric of ineffective assistance of counsel. Ineffective-assistance-of-counsel claims are not bound by traditional error-preservation rules. See State v. Ortiz, 789 N.W.2d 761, 764–65 (Iowa 2010) (noting claims of ineffective assistance are the exception to the general error preservation rule).

Standard of Review: The admissibility of hearsay evidence is reviewed for errors at law. State v. Newell, 710 N.W.2d 6, 18 (Iowa 2006). "Hearsay ... must be excluded as evidence at trial unless admitted as an exception or exclusion under the hearsay rule or some other provision." Id. (quoting State v. Dullard, 668 N.W.2d 585, 589 (Iowa 2003)). Deference is given to the factual findings of the district court. State v. Long, 628 N.W.2d 440, 445 (Iowa 2001). "If a court's factual findings with respect to application of the hearsay rule

are not 'clearly erroneous' or without substantial evidence to support them, they are binding on appeal." Id. (citation omitted). "Inadmissible hearsay is considered to be prejudicial to the nonoffering party unless otherwise established." Dullard, 668 N.W. at 589 (citing Long, 628 N.W.2d at 447).

Review of ineffective-assistance-of-counsel claims is de novo. State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012). 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. Ondayog, 722 N.W.2d at 784.

To establish his claim of ineffective assistance of counsel, the defendant must demonstrate (1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 693 (1984); State v. Gaskins, 866 N.W.2d 1, 5 (Iowa 2015). The defendant has the burden of proving both elements by a preponderance of the evidence. See State v. Halverson, 857 N.W.2d 632, 635 (Iowa 2015).

Discussion: The trial court erred in permitting the nurse and physician to testify to the child's out-of-court statements about the defendant's sexual abuse. The child's statements to the medical providers are inadmissible hearsay and do not fall under Iowa Rule of Evidence 5.803(4), the hearsay exception for statements made for purposes of medical diagnosis and treatment.[2] In addition, the nurse should not have been

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[2] Defense counsel also objected to the child's statements to the physician as a violation of the Confrontation Clause under the state and federal constitutions. (Defense Motion in Limine – 1/20/18, pp. 4-7; Motion Tr. p. 4, L. 2-12; p. 8, L. 21-p. 10, L. 13) (App. pp. 12-15).

Both the Sixth Amendment of the United States Constitution and article I, section 10 of the Iowa Constitution preserve an accused's right "to be confronted with the witnesses against him." U.S. Const. amend. VI; Iowa Const. art I, sec. 10. This constitutional provision reflects the "preference for face-to-face confrontation at trial and the right of cross-examination." State v. Castaneda, 621 N.W.2d 435, 444 (Iowa 2001). It is not to be equated with the hearsay rule. See State v. Brown, 656 N.W.2d 355, 361 (Iowa 2003). That is because "[t]he Confrontation Clause bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule." Castaneda, 621 N.W.2d at 444.

The child testified at trial and was available for cross-examination, therefore the defendant does not raise a confrontation clause violation on appeal. See State v. Reyos, 402 P.3d 113, 119 (Utah Ct. App. 2017) (holding concept of witness's unavailability under the Confrontation Clause is

allowed to testify to statements that the child made to her mother regarding the abuse, since the testimony includes inadmissible double hearsay. Defense counsel was ineffective to the extent error was not preserved on these issues.

The Hearsay Exception for Statements Made For Medical Diagnosis or Treatment: Iowa Rule of Evidence 5.803(4) provides that the following are not excluded by the hearsay rule, regardless of the availability of the witness:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Iowa R. Evid. 5.803(4) (2018).

In State v. Smith, 876 N.W.2d 180, 185 (Iowa 2016), the Iowa Supreme Court discussed the circumstantial guarantees of reliability that justify this hearsay exception—a patient has a selfish incentive to be accurate because "a false statement in a diagnostic context could result in misdiagnosis." See also

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narrow and literal while the concept of unavailability under state and federal rules of evidence is much broader).

State v. Hildreth, 582 N.W.2d 167, 169 (Iowa 1998) (discussing rationale for exception); State v. Mann, 512 N.W.2d 528 (Iowa 1994) (noting that exception rests upon assumption that "patient will not fabricate statements made to the physician if the patient's future treatment and well-being are at stake," and that the "declarant knows a false statement may cause misdiagnosis or mistreatment").

The Iowa Supreme Court has adopted the Eighth Circuit's two-part test in United States v. Renville, 779 F.2d 430 (8th Cir.1985), for establishing the admissibility of hearsay statements under rule 803(4):

> [F]irst the declarant's motive in making the statement must be consistent with the purposes of promoting treatment; and second, the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis.

State v. Tracy, 482 N.W.2d 675, 681 (Iowa 1992). The State bears the burden of establishing that both prongs of this two-part test have been satisfied. State v. Long, 628 N.W.2d 440, 443 (Iowa 2001).

The Child's Statements to Sexual Assault Nurse Examiner: The defendant asserts that there was an insufficient foundation under the first prong of the Renville test (the declarant's motive to promote treatment or diagnosis) for the testimony from the sexual assault nurse examiner, Elsa Durr-Baxter. In the absence of a proper objection, the nurse was allowed to testify that the child disclosed the defendant's sexual abuse to her.

As to the first requirement, the Renville court noted that the physician had emphasized the importance of truthful responses on the part of the victim in providing her with treatment for any physical or emotional problems that she might have as a result of the abuse suffered. Renville, 779 F.2d at 438–39. Moreover, the Renville court noted that nothing in the record indicated that the child's motive in making the statements to her physician was other than as a patient responding to a doctor's questioning for prospective treatment. Id. at 439. Thus, when the record reveals that the examining doctor emphasized to the alleged victim the importance of truthful responses in providing treatment and

the record further indicates that the child's motive in making the statements was consistent with a normal patient/doctor dialogue, the first element of the two-part test will typically be satisfied. Tracy, 482 N.W.2d at 681.

"[T]he declarant must subjectively believe that [s]he was making the statement for the purpose of receiving medical diagnosis or treatment." McClain v. State, 675 N.E.2d 329, 331 (Ind. 1996). With most declarants, this is generally a simple matter: "[o]ften, for example where a patient consults with a physician, the declarant's desire to seek and receive treatment may be inferred from the circumstances." Id.

But in cases like the one here, where the declarant is a young child brought to the medical provider by a parent, such an inference may be less than obvious. See id. Such young children may not understand the nature of the examination, the function of the examiner, and may not necessarily make the necessary link between truthful responses and accurate medical treatment. In that circumstance, "there must be evidence that the declarant understood the professional's role in order to trigger the motivation to provide truthful

information." Id. (citing U.S. v. Barrett, 8 F.3d 1296, 1300 (8th Cir. 1993)). This evidence does not necessarily require testimony from the child-declarant; it may be received in the form of foundational testimony from the medical professional detailing the interaction between him or her and the declarant, how he or she explained his role to the declarant, and an affirmation that the declarant understood that role. Barrett, 8 F.3d at 1300. But whatever its source, this foundation must be present and sufficient. Van Patten v. State, 986 N.E.2d 255, 261 (Ind. 2013).

In the present case, the nurse discussed the process for interviewing a child as opposed to an adult.

> Q. I want to talk to you about a specific examination that you did in June of 2016 of [E.W.] Walker. Do you recall that?
>
> A. Yes.
>
> Q. Tell the jury how [E.W.] came into the ER?
>
> A. Her mother brought her into the emergency room.
>
> Q. What is the process? You mentioned a process with a child is slightly different than with an adult. Can you explain that please?

A. With the children you have to be very careful not to ask any leading questions or put any words in their mouth. So with children you can't really ask specific questions, you have to just let them tell you the story. So with an adult, I would say things like did he – did he or she hit you, did he or she kick you and tell me but with a child you can just say, tell me what happened. Do you know why you are here and say things like, tell me more about that. With a child you cannot lead them at all.

(Trial III Tr. p. 54, L. 15-p. 55, L. 7).

The nurse testified about her interactions with both the child and her mother at the hospital. The child's statements regarding the sexual abuse were also introduced through the nurse's testimony.

Q. You take [E.W.] and do you ask her questions first or do a physical examination first?

A. First I talked to mom separate from [E.W.] and mom told me what [E.W.] had told her, I document that and then I have the patient, the child, just her and I – I talk to her first and then when I examined [E.W.] in particular I had mom in the room because I have to take her clothes off and it's very uncomfortable for the child to be there without a parent.

Q. And she was four at the time, right?

A. Yes.

Q. Let's start with your conversation with [E.W.]. Tell the jury about that.

A. I believe I said something like, do you know—what brings you here today or can you tell me what happened last night and she had said that Uncle Larry – and I would have to— I would like to refer to my document to be specific.

MS. SHEPHERD [THE PROSECUTOR]: May I approach, your Honor?

THE COURT: You may. Any objection?

MR. JONES [DEFENSE COUNSEL]: No, your Honor.

Q. So to be clear for the jury tell them what you are using to refresh your recollection?

A. These are my progress notes when the patient is talking I type as fast as I can to get what they are saying word for word and document what the patient says word for word. I may miss some things, I go as fast as I can.

Q. What was it that [E.W.] told you?

A. [E.W.] said Larry did this to me and she bounced up and down like this (demonstrating).

Q. For the record what kind of motion did you do?

A. It was like bouncing her bottom up and down on the bed with her arms like this (demonstrating).

Q. And for the record because it can't reflect what you are doing, you have your arms in fists in front of you, is that right?

A. Yes.

Q. Okay.

A. He made me sit on his crotch and he did this and then she did the bouncing up and down again and then he carried me downstairs and got me juice

and this is from [E.W.]. He touched my butt crack really deep and he had my—I had my underwear on so he took it off. He broke my ankle and I asked her how did he do that, can you show me and she twisted her right ankle, she twisted it to the side.

Q. Let's talk about that for a moment. Did you check her ankles to see if they were broken?

A. Yes.

Q. Were they?

A. No.

Q. She was four, is that correct?

A. Yes.

Q. Is it common for four year olds to use maybe a different kind of wording than what we would ordinarily use as adults to refer to things?

A. Yes.

Q. When she said to you, he broke my ankles, you said that she also did an action with it?

A. Yes.

Q. Can you describe that?

A. She just like pushed her ankle out to the side, like a twisting kind of motion.

Q. And so you interpreted her saying he broke my ankles, you looked at that and what she did, you interpreted it as twisting?

A. Yes, twisting and went on to say that he broke my other ankle and when I asked her to tell me about that, she pointed to her right thigh and said that he did this and then squeezed her thigh.

Q. So she showed you with her hand?

A. Yes.

Q. And did a squeezing motion on her thigh?

A. Yes. It says that the patient states that Larry did not have his pants or underwear on, patient states that she was sleeping and Larry did like this to me and she did the bouncing up and down motion again.

Q. Did she tell you where this happened?

A. Her mother had said that it had happened in her mom's bedroom.

Q Okay. Did you have any further conversation with [E.W.] about what happened?

A. That was all of the information I could get from [E.W.] without leading her, that was—

Q. You did a physical examination also, is that correct?

A. Yes.

Q. What's the purpose of a physical examination?

A. I need to make sure her ankles weren't broke, I need to see if there was any redness, discharge, infection in the vaginal area and see if she had any bruises or anything like that.

Q. Did you notice anything like that?

A. I don't recall. Can I look at the documentation?

Q. To refresh your recollection, yes.

A. I did not find any bruising or anything out of the ordinary.

Q. When you were talking with [E.W.], what was her demeanor?

A. She was happy and sweet and silly.

Q. Was she pretty chatty?

A. Huh-uh.

Q. Is that yes?

A. Yes.

Q. You said you didn't really have to ask her questions and you specifically said you didn't ask her any leading questions?

A. Yes.

Q. You just asked her what happened?

A. Correct.

Q. What was it that you initially asked her, do you recall, to prompt her to tell her what had happened?

A. Typically what I say, do you know why you are here or what brought you into see me today but I did not document my exact words, that is what I typically say.

(Trial III Tr. p. 55, L. 13-p. 60, L. 1).

There was no circumstantial evidence showing that the child understood the medical purpose for the examination and questions. The nurse had no specific memory of what she said to the child, rather she only recalled what she typically says. It does not appear that the child was provided with a medical explanation for the examination. Further, the record does not reflect that the child adequately understood the nurse's role

and the purpose of the visit in order to infer that the child was motivated to speak truthfully. Moreover, there was no testimony establishing the child knew what telling the truth meant, much less the importance of telling the truth in this situation. Nor is there testimony from the child, or her parents, concerning past experience with medical facilities or medical providers from which one could reasonably infer that the child knew why she was being examined by a sexual assault nurse examiner. Under circumstances similar to that in the present case, the Supreme Court of Indiana in Van Patten v. State, 986 N.E.2d 255, 265-67 (Ind. 2013), found the statements to a forensic nurse examiner by two girls were inadmissible under the hearsay rule for statements made for the purpose of medical diagnosis or treatment.

If the child had been older, the appearance of the emergency room at the hospital and the knowledge of the nurse's job title would probably be sufficient circumstances from which to infer that the child desired to seek medical treatment and was thus motivated to speak truthfully. With young victims, "that inference is not obvious," and there must

be evidence that the declarant understood the professional's role in order to trigger the motivation to provide truthful information." McClain, 675 N.E.2d at 331. Courts cannot simply assume that what is obvious to a competent adult – that they are in a medical facility seeking medical treatment from a medical professional – is obvious to a child. Id.

The present case is distinguishable from State v. Neitzel, 801 N.W.2d 612, 622 (Iowa Ct. App. 2011), in which a victim's statements to an interviewer and nurse were found admissible under medical diagnosis exception to hearsay rule. Neitzel argued the first Renville prong was not satisfied insofar as the victim was not told of the medical purpose of the interviews. Id. The Court of Appeals there noted that both the interviewer and nurse were qualified to provide diagnosis and treatment options. Id. The nurse explained to the victim that her "job was to check over her body and to make sure she was healthy and we were going to check private parts." Id. When asked why she was there, the victim responded that it was for her "ouchie." Id. The nurse also discussed with the victim the difference between the truth and a lie and the importance of

telling the truth. Id. The interviewer explained to the victim that her job was to "talk to kids" about "things that might have bothered, or hurt, or scared them." Id. The interviewer also discussed the importance of being truthful. Id. The record in the present case, however, does not show that the nurse covered the topics in Neitzel during her interview with the child.

The Child's Statements to the Physician: The defendant argues that the physician's testimony should not have been admitted as substantive evidence because there was an insufficient foundation under both prongs of the Renville test. Over defense objections, the physician was allowed to testify to statements that the child made regarding defendant's sexual abuse. (Defense Motion in Limine – 1/20/18, pp. 4-7; Motion Tr. p. 7, L. 13-p. 11, L. 24; Trial III Tr. p. 4, L. 2-p. 11, L. 24) (App. pp. 12-15).

Dr. Barbara Harre, a physician at the Child Protection Center in Davenport, explained the procedure she generally follows in interviewing children.

Q. When you see a child, tell the jury just about your process. What do you do?

A. When a child comes to our center, they will be, of course, welcomed and background information that would be needed for any medical type of appointment is sought. They fill out paperwork about insurance, where they live, how to contact them, who is allowed to bring the child if there are follow-ups, all of that information is gathered and when that is completed, then I introduce myself to the family and explain just briefly the process that we do and I will then speak with the adult caretaker alone, separately from the child and get the background of the child's health history, their development, social history relationships, any concerns that the parent may have. Try to clarify details, possibly try to, you know, explain and relieve any concerns a parent may have about the process.

Then when I have completed my history taking with the parent, we kind of switch places. The parent goes out to the waiting area and the child, if they are verbal and able to, will come back with me to the history taking area and I will go through a history taking process with them to try to understand their experience. When that is completed, I give the child the choice of whether they want – I explain what the physical examine is going to entail, a child is given a choice who they want in that room and then we complete a head-to-toe physical exam with focusing on the areas of concern that the child reports.

At the end of that time, I am able to identify whether they need any additional labs or X-rays or other referrals or support, what type of follow-up we are looking at and those things are discussed.

(Trial III Tr. p. 71, L. 23-p. 73, L. 3). The physician then provided specific details of her interview with the child.

Q. You met with [E.W.], is that correct?

A. Correct.

Q. Did you speak with her individually?

A. Yes.

Q. And what's your process – what's your reason for doing that?

A. The reason for doing that is to allow the child to explain their experience in a way that is comfortable for the child. Sometimes when adults are involved, they might interrupt or maybe they react in a way that is upsetting to the child. It's upsetting to the adult that is there, that can upset the child, the child may be impacted as to how comfortable they are to relate information. So the history taking is done with the child separately to allow them as much as possible to feel comfortable in this process.

Q. When you talked to [E.W.], what did you talk to her about?

A. We started out talking about how old she was, what kind of colors she likes, she was a young four at the time I met her. We have a big easel and the kids have markers and they can draw on that and I can identify where she is developmentally, get an idea of what kind of skills she has. As we interact I can identify whether we have any speech or language difficulties that I have to be attuned to. I use this period to get to know the child, for them to

get to know me, before we start getting into more questions and exploring the child's experience.

Q. Then tell the jury about that process. How do you explore the child's experience?

A. What I do is introduce myself as a physician, so that the child knows who I am. I explain that I take care of kids from little babies to big children to high school kids, where there's been concerns about things that might have happened to them that were hurtful to their bodies on the outside, be the physical things, it can be that their bodies are hurt in the inside and that can be also physical but their feelings or that they feel bad about how someone may have interacted with them or what somebody has done with them. So I explain that to the child. I usually ask them if they have ever been hurt by a physician because I want to know if they've had some procedure done that might make them uncomfortable and [E.W.] was able to say she was comfortable with doctors, she understood my role, she indicated that the only thing she doesn't like about doctors was shots and I clarified that we don't do shots at our center and that's how we got started.

(Trial III Tr. p. 73, L. 4-p. 74, L. 24). The child's out-of-court statements implicating the defendant in the sexual abuse were offered through the physician's testimony.

Q. You then did talk to her about some things that had happened to her, is that correct?

A. Correct.

Q. How do you lead into that conversation?

A. I usually start with what we call a review of symptoms approach because what I'm looking for, is the child stressed as well as did something happen or if something did happen, what happened. But I'm also interested in how the child is doing overall. It's a very common thing that you probably have experienced when you see your doctor but are you having trouble with your head, does your head hurt, do you have headaches, are your eyes bothering you, are your ears okay today and go through that process and then specific questions will be interjected in that process to look for oral things. Do you have any pain with chewing or swallowing, has anybody put anything in your mouth that you don't like and we will talk about foods, talk about soap, hot pepper stuff, body parts and so I wrap this into this approach and it's a very comfortable thing for the children to engage in that[.]

[Q. [A]nd] [E.W.] did indicate to you that something happened to her that she didn't like, is that correct?

A. Yeah, not right away but as we talked about other things, yes.

Q. And what led into that conversation?

A. I also – if a child comes into be seen for maybe genital or sexual concerns, is there concerns about physical issues within the family that need to be addressed. Are there chemical issues to be addressed because they can be very important in having this child in a vulnerable environment, I'm looking for those other concerns as well. As we are talking she mentioned other people in the family and I asked her if Larry was a part of that and she indicated no –

Q. Meaning what? Was Larry a part of what?

A. She made a comment about other people, Chris smoking – I asked about substance issues and that, she made a comment that someone named Chris smoked and there was a gal who was involved – and I was trying to figure out who these people were and so I had just asked if they had anything to do with Larry and she indicated no and I asked if there was anything about Larry that wasn't comfortable for her and she didn't respond and then I asked if there was anything that Larry had ever done that was weird or made her feel weird. When I had done the review of symptoms process, she was quick and responded right away until I got to, did anything come into contact with your back, bottom, did something hurt you or come into contact there. She didn't respond. She was quick in responding up until that point and I repeated again and she ignored me and I went on and any trouble with burning or pain with urination. She denied that promptly and I asked if anything had touched her with the front bottom that was uncomfortable and she wouldn't respond with that. I was concerned that there was something there but I wasn't – I didn't know what it was until it came forward and as I asked and opened up the question about – I asked if there had been anything about Larry that was uncomfortable for her and that's when she informed me that, yes.

Q. What was it that she told you?

A. She had informed me that Larry had – can I see my report real quick, just to get this right on how that started out.

MS. SHEPHERD [PROSECUTOR]: May I provide this to the doctor?

THE COURT: Any objection?

MR. JONES [DEFENSE COUNSEL]: No, your Honor.

THE COURT: You may.

A Okay.

Q This is a report that was authored by you that you are using to refresh your recollection, is that correct?

A Correct. And I asked her if anything made her uncomfortable and she said Larry doing this and she was going like this on her chair (demonstrating). Then I asked her –

Q. For the record what kind of motion did you just do on the chair?

A. Various people can describe it as gyrating, humping, moving back and forth, bouncing. I've heard it described in different ways like that.

Q. Thank you and then did she do that motion for you?

A. Yes.

Q. Then what did she do?

A. I asked what his clothing situation was when he was doing that and she indicated at that point that his underwear was off and he took her underwear off at that point and I asked where she was at that time and she said on his crotch and I asked where that happened and she said in her parents' bedroom. I asked if any other parts of her body had been touched or if she was just sitting there and she indicated touching with fingers and

something else. So I asked what the something else was that she was referring to and she pointed to between her legs. And I clarified by saying do you mean his crotch and she shook her head yes.

Then I asked if there had been any discomfort with that and she indicated that that had hurt. I asked if she had seen anything that would make her think anything was injured or any blood and she indicated no blood. I asked if this had happened to her one time or more than one time and she indicated one time. I asked if she appreciated if anything was wet or sticky or anything like that around her bottom during this or after the experience and she did not indicate appreciating that.

At that point, I asked her if he had done anything nice or mean or something else to her, if there had been anything else that – no, I also asked her if he had done anything with his hands because she had mentioned touching with fingers before and she indicated that he was using – he was using his finger to touch her with. I asked if she was touching him and she indicated that she was rubbing his arm. I asked if that was something that he had wanted her to do or she wanted to do, if that was for some other reason and she indicated that – because she wanted to do that and then I asked if there was anything else that had happened and whether, you know, it was nice or mean or something else that she wanted to talk about. She indicated that he would get – he got her juice and a bag of chips at that point....

(Trial III Tr. p. 74, L. 25-p. 79, L. 16).

The defendant contends that there was an inadequate foundation under the first Renville prong (the declarant's motive to promote treatment or diagnosis) for the physician's testimony. There was no testimony from the physician establishing that the child knew the difference between the truth and a lie. There was also no indication that the physician explained the importance of telling the truth for purposes of medical treatment. Although the physician explained her role, there was an insufficient showing that the child comprehended the medical purpose for the physician's examination. The physician even noted that the child was a "young" four-year-old. (Trial III Tr. p. 73, L. 21-p. 74, L. 5).

In addition, the second Renville prong (the medical provider reasonably relied upon the declarant's statement for treatment or diagnosis) was not satisfied because the child's statements were not made while seeking medical treatment. The child was referred to the physician due to suspected sexual abuse, not because of active medical concerns. (Trial III Tr. p. 71, L. 1-8). The physician's interview was conducted eighteen days after the child had been medically evaluated and

cleared at the hospital. (Trial III Tr. p. 71, L. 17-22). The child had no physical manifestations of illness or injury by the time the physician examined her. (Trial III Tr. p. 80, L. 12-21). See Coates v. State, 930 A.2d 1140, 1163 (Md. Ct. Spec. App. 2007) (finding child's statements to a pediatric nurse practitioner were not admissible under the hearsay exception for statements made for medical diagnosis or treatment given the fourteen-month delay between the last incident of abuse and examination, the child was not exhibiting any symptoms of illness, and there was no indication that she understood that there was a medical purpose for the examination). Therefore, the physician's examination was not undertaken for purposes of medical diagnosis or treatment at that point but rather for forensic purposes to document sexual abuse.

The Child's Statements to Her Mother: Prior to trial, the State filed a notice seeking to introduce the child's statements to her mother under the residual exception to the hearsay rule under Iowa Rule of Evidence 5.807. (State's Notice to Introduce Evidence of the Child's Statements 8/10/16; State's Resistance to Defense Motion in Limine 1/24/18; Brief in

Support of State's Resistance to Defense Motion in Limine 1/25/18) (App. pp. 8, 26-33). Defense counsel filed a motion in limine, arguing that admission of those statements would violate the Confrontation Clause under the Federal and State Constitutions. (Defense Motion in Limine 1/20/18, pp. 10-11) (App. pp. 18-19). The defense further argued that the statements would not fall under the residual hearsay exception. (Defense Motion in Limine 1/20/18, pp. 10-11) (App. pp. 18-19). The parties reiterated their respective positions at the motion in limine hearing. (Motion 1/26/28 Tr. p. 13, L. 3-p. 16, L. 3). The trial court ruled that the child's statements to her mother were inadmissible hearsay. (Motion Tr. p. 16, Tr. p. 4-p. 17, L. 25).

The nurse testified at trial that the child's mother provided her with the child's account of the sexual abuse, and that testimony includes inadmissible double hearsay. "'Hearsay' is a statement, other than one made by a declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801; State v. Hildreth, 582 N.W.2d 167, 169 (Iowa 1998). Double

hearsay or hearsay within hearsay refers to a hearsay statement which includes a further hearsay statement. In such a situation, both statements must conform to a hearsay exception for the statement to be admissible. Iowa R. Evid. 5.805; see State v. Williams, 427 N.W.2d 469 (Iowa 1988).

In the absence of an objection by defense counsel, the nurse testified on direct examination that the child disclosed to her mother that she had been sexually abused by the defendant. (Trial III Tr. p. 60, L. 2-10). Defense counsel then delved further into the child's statements when cross examining the nurse.

> Q. On direct you mentioned talking with [E.W.'s] mother and you said the mother told you Larry had done this to her?
>
> A. Yes.
>
> Q. Done what? What specifically did the mother tell you was reported to her?
>
> A. Refresh my memory – so –
>
> MS. SHEPHERD [PROSECTOR]: Objection, this is hearsay that was ruled on in a motion in limine.
>
> MR. JONES [DEFENSE COUNSEL]: They opened the door when they elicited the fact that he did this to her.

THE COURT: The door has been opened, I'll overrule the objection.

Q. What did the mother tell you was reported to her by [E.W.]?

A. Kelley states at 2:30 in the afternoon, [E.W.] had said Larry did this to me and made that bouncing motion with her arms and her bottom and he pulled my underwear down to my ankles and sat me on his crotch. Mom states then she had walked away.

Q. She being who?

A. Mom.

Q Did she provide further information about what [E.W.] told her?

A. The patient told mom that he was in her butt crack and states that Larry took off his clothes and did the bouncing motion in her butt crack.

Q. Refer to the last sentence in the paragraph. Did mom report anything else that [E.W.] told her before what Larry did?

A. Patient told the mother that Larry touched her with his fingers in her – his fingers in her crotch – I'm sorry, patient told mother that Larry touched her with his fingers in her crotch and her butt crack and mother or patient told mother that Larry hurt her.

(Trial III Tr. p. 63, L. 23-p. 65, L. 8).

Harmless Error (The Child's Statements to the Physician): "[A]dmission of hearsay evidence over a proper objection is presumed to be prejudicial error unless the contrary is affirmatively established." State v. Nims, 357 N.W.2d 608, 609 (Iowa 1984). The contrary is affirmatively established if the record shows the hearsay evidence did not affect the jury's finding of guilt. Id. One way to show the tainted evidence did not have an impact on the jury's verdict is to show the tainted evidence was merely cumulative. State v. Hildreth, 582 N.W.2d 167, 170 (Iowa 1998). If the record contains cumulative evidence in the form of testimony, the hearsay testimony's trustworthiness must overcome the presumption of prejudice. State v. Horn, 282 N.W.2d 717, 724 (Iowa 1979). We measure the trustworthiness of the hearsay testimony based on the trustworthiness of the corroborating testimony. See id.; State v. Johnson, 272 N.W.2d 480, 482–83 (Iowa 1978).

Although courts frequently find the erroneous admission of hearsay evidence constitutes harmless error because it is merely cumulative, that does not mean that all erroneously

admitted hearsay evidence is harmless merely because it is cumulative. See United States v. Bercier, 506 F.3d 625, 633 (8th Cir. 2007). "'There could be circumstances ... where that extra helping of evidence can be so prejudicial as to warrant a new trial.' " Id. (quoting United States v. Ramos-Caraballo, 375 F.3d 797, 802–03 (8th Cir. 2004)). One such circumstance occurs when a witness's credibility is central to the case and the only real purpose for admitting the hearsay evidence is to bolster that witness's credibility. Id.; see also Coates, 930 A.2d at 1163–64 (Md. Ct. Spec. App. 2007) (holding that where a seven-year-old girl's credibility was central to the case, a nurse practitioner's testimony regarding statements the girl made during a medical examination fourteen months after an alleged rape were inadmissible because it corroborated important portions of the girl's testimony).

The admission of the child's out-of-court statements through the testimony of the physician was not harmless. It is true that the nurse provided similar testimony regarding the child's allegations. (Trial III Tr. p. 56, L. 15-p. 58, L. 16).

However, the nurse consulted with the physician, a child abuse expert, who later conducted a far more comprehensive examination than the one the nurse did. (Trial III Tr. p.70, L. 20-p. 81, L. 12). Because of this, the jury likely gave the physician's testimony greater weight. The child likewise testified about the sexual abuse at trial. (Trial III Tr. p. 124, L. 3-p. 129, L. 23). However, her credibility was undermined when she also stated that she had trouble remembering what happened. (Trial III Tr. p. 127, L. 8-15; p. 128, L. 8-12). The admissions that the defendant made to the detective were rather limited. (State's Exhibit 1 – Defendant's Interview). He subsequently disavowed those admissions at trial, claiming that they were made under duress. (Trial III p. 143, L. 2-p. 149, L. 20). He denied touching the child in a sexual manner. (Trial III Tr. p. 142, L. 6-16; p. 149, L. 19-20). Thus, the only real purpose for the physician's testimony was to bolster the child's credibility, which was crucial to the State's case. Furthermore, there was no forensic evidence directly linking the defendant to the sexual abuse of the child. (Trial III Tr. p. 93, L. 16-p. 105, L. 21). Defendant's DNA was not found on

the child or her clothing. (Trial III Tr. p. 93, L. 16-p. 105, L. 21).

Ineffective-Assistance-of-Counsel Claims (The Child's Statements to the Nurse and Her Mother): The defendant asserts that his trial attorney was ineffective in three respects. First, defense counsel failed to properly object to admission of the child's statements to the nurse. Defense counsel only contested the portion of the statements alleging that defendant broke her ankles.[3] (Motion Tr. p. 5, L. 6-p. 7, L. 12). Defense counsel suggested that she must have made up that part because she suffered no actual injury to her ankles. (Motion Tr. p. 5, L. 6-p. 7, L. 12). In this regard, defense counsel noted:

> I think that goes a long way to demonstrating at age 4 [E.W.]has no real conception of [the] importance of giving accurate information to a medical care provider. Not that she's a bad person, she's 4. She's making things up during her statements to the medical care providers.

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[3] The defense motion in limine does not argue that the the child's out-of-court statements to the nurse should be excluded. (Defense Motion in Limine 1/20/18) (App. pp. 9-25).

(Motion Tr. p. 6, L. 5-9). However, defense counsel did not challenge the rest of the child's statements to the nurse relating to the sexual acts and contact itself. They were hearsay and not admissible under the hearsay exception for statements made for purposes of medical diagnosis and treatment. Second, the defendant contends that defense counsel erred in failing to object when the nurse testified on direct examination that the child had previously disclosed the abuse to her mother. (Trial III Tr. p. 60, L. 2-10). Third, defense counsel erred in delving further while cross-examining the nurse. (Trial III Tr. p. 63, L. 63, L. 23-p. 65, L. 8). The nurse's testimony on this point includes inadmissible double hearsay. Each of these errors by defense counsel constitutes a breach of an essential duty.

Defense counsel's errors prejudiced defendant. Prejudice exists where the claimant proves "'a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different.'" Bowman v. State, 710 N.W.2d 200, 203 (Iowa 2006)(quoting State v. Hopkins, 576 N.W.2d 374, 378 (Iowa 1998)). The evidence against

defendant cannot be considered overwhelming. Although the child testified at trial about the sexual abuse, her testimony was not clear cut. (Trial III Tr. p. 124, L. 3-p. 129, L. 23). She testified that she also had problems remembering since the incident happened a long time ago. (Trial III Tr. p. 127, L. 11-15; p. 128, L. 8-12). A recording of the defendant's police interview was admitted into evidence. (State's Exhibit 1 – Defendant's Interview). The defendant's admissions regarding sexual contact were rather limited. (State's Exhibit 1 – Defendant's Interview). At trial, the defendant disavowed any admissions that he made, claiming that any physical contact that he had with the child was not sexually motivated. (Trial III Tr. p. 142, L. 14-16; p. 149, L. 19-20). Moreover, the forensic evidence was inconclusive and did not directly implicate the defendant, since his DNA was not found on the child or her underwear. (Trial III Tr. p. 93, L. 16-p. 105, L. 21). The child's statements to the physician, which the defense properly challenged as inadmissible hearsay, should not be considered in the prejudice analysis. Thus, the nurse's testimony provided the remaining substantive evidence of

defendant's guilt. Without this erroneously admitted evidence, the outcome of the trial would have been different.

Defendant contends that he has met his burden in establishing his claims of ineffective assistance of counsel. His convictions for second-degree sexual abuse and lascivious acts with a child must therefore be vacated and the case remanded for a new trial.

Should this Court determine that the record is insufficient to address these claims on direct appeal, he asks that they be preserved for postconviction relief proceedings. State v. Straw, 709 N.W.2d 128, 133 (Iowa 2006) (stating claims of ineffective assistance of counsel raised on direct appeal are ordinarily reserved for postconviction proceedings to allow full development of the facts surrounding counsel's conduct).

Disposition: The child's statements to the nurse and physician regarding the defendant's sexual abuse were not admissible under Iowa Rule of Evidence 5.803(4), the hearsay exception for statements made for purposes of medical diagnosis and treatment. The trial court erred and abused its

discretion in admitting this evidence. In addition, the nurse should not have been allowed to testify to the child's account of the abuse to her mother, since this testimony includes inadmissible double hearsay. The defendant has also established that his trial attorney was ineffective to the extent error was not preserved on these issues. Accordingly, the defendant's convictions for second-degree sexual abuse and lascivious acts with a child must therefore be vacated and the case remanded for a new trial. Should this court find the record insufficient to address his ineffective-assistance-of-counsel claims on direct appeal, he requests that his claims be preserved for possible postconviction relief proceedings.

CONCLUSION

For the above reasons, Defendant-Appellant, Lawrence Eugene Walker, respectfully requests that convictions for second-degree sexual abuse and lascivious acts with a child be vacated and the case remanded for a new trial.

Should this Court find the record insufficient to address Walker's claims of ineffective assistance of counsel on direct

appeal, he requests that the claims be preserved for postconviction relief proceedings.

NONORAL SUBMISSION

Counsel requests not to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true costs of producing the necessary copies of the foregoing Page Proof Brief and Argument was $5.07, and that amount has been paid in full by the Office of the Appellate Defender.

Respectfully submitted,

MARK C. SMITH
State Appellate Defender

NAN JENNISCH
Assistant Appellate Defender

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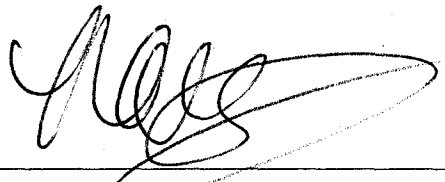

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NAN JENNISCH
Assistant Appellate Defender
State Appellate Defender's Office
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841
(515) 281-7281 (Fax)
njennisch@spd.state.ia.us
appellatedefender@spd.state.ia.us