IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-2059

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JORGE SANDERS-GALVEZ,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DES MOINES COUNTY
THE HONORABLE MARY ANN BROWN, CHIEF JUDGE

# APPELLEE'S BRIEF

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## ROUTING STATEMENT

In his brief, the defendant asks the Supreme Court to retain this case for two reasons: (1) to clarify a hearsay exception; and (2) to expand juvenile-sentencing case law to persons as old as twenty-one. *See* Defendant's Proof Br. at 20. Neither issue warrants retention.

First, the defendant's claim regarding the hearsay exception is undeveloped and unbriefed. While his routing statement contends that "[t]he current interpretation" of the present-sense-impression exception has strayed from the rule he prefers, he does not ask this Court to overrule, limit, or otherwise modify any cases or the state of the law in his argument Division. *Compare* Defendant's Proof Br. at 20, *with* Defendant's Proof Br. at 54–64. Moreover, this claim is raised solely through the rubric of an ineffective-assistance claim, rendering retention inappropriate. Defendant's Proof Br. at 54–64.

Second, both the Iowa Supreme Court and the Iowa Court of Appeals have repeatedly drawn a bright line at age 18 for juvenile-sentencing principles, and the defendant offers no compelling reason for overturning these cases. *See State v. Lyle*, 854 N.W.2d 378, 403 (Iowa 2014) ("[O]ur holding today has no application to sentencing laws affecting adult offenders."); *accord State v. Seats*, 865 N.W.2d

545, 556–57 (Iowa 2015), *holding modified by State v. Roby*, 897 N.W.2d 127 (Iowa 2017); *see, e.g.*, *State v. Hall*, No. 17-0570, 2018 WL 4635685, at *5 (Iowa Ct. App. Sept. 26, 2018); *Nassif v. State*, No. 17-0762, 2018 WL 3301828, at *1 (Iowa Ct. App. July 5, 2018); *State v. Wise*, No. 17-1121, 2018 WL 2246861, at *3 (Iowa Ct. App. May 16, 2018); ; *State v. Mallett*, No. 16-0565, 2017 WL 4049318, at *2 (Iowa Ct. App. Sept. 13, 2017); *State v. Makuey*, No. 16-0565, 2017 WL 4049318, at *2 (Iowa Ct. App. Sept. 13, 2017); *Smith v. State*, No. 16-1711, 2017 WL 3283311, at *3 (Iowa Ct. App. Aug. 2, 2017) (collecting cases); *Thomas v. State*, No. 16-0008, 2017 WL 2665104, at *2 (Iowa Ct. App. June 21, 2017); *Schultz v. State*, No. 16-0626, 2017 WL 1400874, at *1 (Iowa Ct. App. Apr. 19, 2017); *Kimpton v. State*, No. 15-2061, 2017 WL 108303, at *3 (Iowa Ct. App. Jan. 11, 2017); *State v. Davis*, No. 15-0015, 2015 WL 7075820, at *1-2 (Iowa Ct. App. Nov. 12, 2015) (collecting cases); *State v. Vance*, No. 15-0070, 2015 WL 4936328, at *2 (Iowa Ct. App. Aug. 19, 2015) (collecting cases); *State v. Clayton*, No. 13-1771, 2014 WL 5862075, at *6 (Iowa Ct. App. Nov. 13, 2014).

This case can be decided based on existing legal principles. Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

## STATEMENT OF THE CASE

### Nature of the Case

The defendant, Jorge Sanders-Galvez, appeals his conviction for murder in the first degree, a Class A felony in violation of Iowa Code sections 707.1 and 707.2 (2015). The defendant was convicted following trial by jury in the Des Moines County District Court (on change of venue to South Lee County), the Hon. Mary Ann Brown presiding.

### Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3). The defendant was tried separately from his co-defendant, Jason Purham. Defendant's Proof Br. at 21. The trial information charged that the defendant acted either as a principal or aider and abettor. Amended Trial Information; Conf. App. 19–20.

### Facts

Kedarie Johnson, a teenage boy who sometimes dressed as a girl, was kidnapped, tortured, and shot execution-style in the chest,

before his body was dumped in a Burlington alley. Kedarie's genitals were doused in bleach, he was shot through his bra, and it appeared he had tried to frantically claw off the black trash bag that covered his face. Ballistics linked the bullets recovered from Kedarie's heart and spine to the defendant's gun. Digital forensics established that the defendant didn't use his cell-phone during the time of the murder, but Googled the crime shortly after it happened. And surveillance footage established that the defendant, his accomplice, and Kedarie crossed paths shortly before the murder.

**Before he was kidnapped and murdered, Kedarie spent the evening hanging out with friends.**

On the night of March 2, 2016, Kedarie and his friend Tremell went to Hy-Vee around 7:00 p.m. to use the wi-fi. Trial tr. vol. II, p. 31, lines 10–13; *see also* trial tr. vol. II, p. 180, lines 19–24. Tremell had a curfew and, at 8:52 p.m., Kedarie left Hy-Vee to walk Tremell part of the way home. Trial tr. vol. II, p. 37, lines 4–16; p. 186, lines 4–11. Kedarie returned to Hy-Vee with his backpack and computer between 8:55 p.m. and 8:56 p.m. Trial tr. vol. II, p. 37, lines 4–16; p. 187, lines 5–16.

Hy-Vee surveillance then catalogued at least some of the activities undertaken by Kedarie, the defendant, and co-defendant Jason Purham, over the next hour:

- At 9:41 p.m., Purham entered Hy-Vee, while Kedarie was still inside. Trial tr. vol. II, p. 189, lines 8–22; *see also* State's Exhibit E-3: Surveillance Footage, at 9:41:30–9:41:35.

- At 9:55 p.m., the defendant entered the store, while Kedarie and Purham were both still inside. Trial tr. vol. II, p. 190, line 17 — p. 191, line 17; *see also* State's Exhibit E-3: Surveillance Footage, at 9:55:40–9:55:50.

- At 10:00 p.m., Kedarie started to leave Hy-Vee but stopped to make a phone call in the atrium. Trial tr. vol. II, p. 198, lines 3–15; p. 200, lines 1–25; *see also* State's Exhibit E-4: Surveillance Footage, at 10:00:25–10:00:30; State's Exhibit E-6: Surveillance Footage, at 10:00:40–10:00:50.

- At 10:01 p.m., the defendant checked out at a Hy-Vee cash register. Trial tr. vol. II, p. 199, lines 8–21.

- At 10:03 p.m., the defendant and Purham left Hy-Vee together. Trial tr. vol. II, p. 201, lines 4–14; *see also* State's Exhibit E-1: Surveillance Footage, at 10:03:01–10:03:15. While exiting, the defendant and Purham looked toward the entrance doors of Hy-Vee, where Kedarie was standing alone. *See* trial tr. vol. II, p. 308, lines 3–12.

- Less than a minute later, Kedarie left the store, and at 10:04 "walk[ed] across th[e] parking lot" toward his friend Amari's house. Trial tr. vol. II, p. 213, lines 10–21; *see also* State's Exhibit E-1: Surveillance Footage, at 10:03:40–10:03:55; State's Exhibit E-2: Surveillance Footage, at 10:02:35–10:04:28.

- Less than a minute after that, the red Impala (driven by Purham, with the defendant in the passenger seat) started "coming in behind" Kedarie and following him. Trial tr. vol. II, p. 213, lines 10–21; *see also* State's Exhibit E-2: Surveillance Footage, at 10:02:35–10:04:28; State's Exhibit E-5: Surveillance Footage, at 10:03:30–10:04:25.

A review of the surveillance footage established that both the defendant and Purham would have been able to see or cross paths with Kedarie, based on their location and travel inside the store. Trial tr. vol. II, p. 284, lines 17–23; p. 286, lines 13–23; p. 291, line 11 — p. 292, line 2; p. 294, lines 2–8. The defendant in particular was in "close proximity" to Kedarie—less than 20 feet away. Trial tr. vol. II, p. 307, lines 20–24; p. 309, lines 14–17. The defendant can also be seen on the surveillance looking in Kedarie's direction. Trial tr. vol. II, p. 308, lines 3–12.

Kedarie arrived at his friend Amari's house shortly after 10:00 p.m. and stayed 15 or 20 minutes. Trial tr. vol. II, p. 66, lines 22–25; p. 67, lines 12–19.[1] Kedarie and Amari liked to hang out, watch Netflix, and do their hair and nails. Trial tr. vol. II, p. 49, lines 13–25. On this particular night, Kedarie borrowed bras from Amari. Trial tr.

[1] Though Amari did not recall the exact time Kedarie arrived or left her house, her testimony was consistent with the surveillance footage: Kedarie came over around 10:00 p.m. Trial tr. vol. II, p. 310, line 23 — p. 311, line 1.

vol. II, p. 52, lines 15–22; p. 53, lines 7–13; p. 59, lines 14–17. Following the murder, Amari identified one of the bras found on Kedarie's corpse as a bra she had loaned him. Trial tr. vol. II, p. 53, line 14 — p. 54, line 16.

While at Amari's house, Kedarie "said he was scared" and told Amari that "Lumni was following him." Trial tr. vol. II, p. 56, line 8 — p. 57, line 3. The testimony of multiple witnesses, including the defendant's testimony at trial, established that he went by the nickname or street-name of "Lumni." Trial tr. vol. II, p. 169 lines 13–21; p. 171, lines 19–24; p. 322, lines 2–18; p. 369, lines 21–22; vol. III, p. 256, lines 4–10; p. 289, lines 9–11; p. 307, lines 6–7; p. 381, lines 1–5. When Amari looked out the window, she saw a red car parked illegally on her side of the street in front of her house. Trial tr. vol. II, p. 57, line 24 — p. 58, line 23.

**The defendant, Purham, and their associates used a house at 2610 Madison for sex and drugs. Kedarie's shoes and backpack, trash bags matching the one used to suffocate Kedarie, and blue fibers matching those recovered from Kedarie's body were all found at this house.**

The defendant, Purham and some of their associates used a residence at 2610 Madison to consume or traffic drugs and to have sex with girls. *See* trial tr. vol. II, p. 368, line 23 — p. 369, line 3; p.

371, lines 1–8; vol. III, p. 10, line 25 — p. 12, line 5; p. 13, line 21 — p. 14, line 24; p. 168, line 23 — p. 169, line 21; p. 372, line 22 — p. 373, line 15; p. 388, line 19 — p. 389, line 5; State's Exhibit H-15: 2610 Madison Video; State's Exhibit H-15a: Screenshot from H-15; Exhibit App. 23. The house at 2610 Madison is approximately two miles from the Hy-Vee where the defendant, Purham, and Kedarie were all seen at approximately 10:00 p.m. Trial tr. vol. II, p. 296, lines 2–4.

Police eventually searched 2610 Madison and found a box of Dollar General trash bags that matched those found on Kedarie's body: they were black with pink drawstrings. *See* trial tr. vol. II, p. 301, line 23 — p. 302, line 12; p. 303, lines 7–9; p. 396, lines 16–22; p. 405, line 21 — p. 406, line 8.

Inside 2610 Madison, police found Kedarie's belongings, including his backpack, his school ID, his school-issued laptop, the bras borrowed from Amari, and Kedarie's black Nike shoes. Trial tr. vol. II, p. 304, line 20 — p. 305, line 24; p. 399, line 3 — p. 402, lines 19–23; p. 404, lines 12–14; p. 405, lines 15–20. The shoes and backpack were both found on the second floor, near a bedroom with blue bed-sheets that shed fibers. Trial tr. vol. II, p. 399, line 3 — p. 402, lines 19–23. A forensic analysis confirmed that these blue fibers

matched those recovered from Kedarie's t-shirt, checkered long-sleeve shirt, and pants during the autopsy. Trial tr. vol. II, p. 269, line 14 — p. 270, line 13; p. 407, line 24 — p. 408, line 2; p. 434, line 11 — p. 439, line 6.

**Gunshots ring out in the East Walnut alley at approximately 11:25 p.m.**

Multiple 911 callers reported hearing gunshots at approximately 11:25 or 11:30 p.m. in the vicinity of the East Walnut alley. Trial tr. vol. II, p. 79, lines 8–15; p. 105, line 16 — p. 106, line 1; p. 138, lines 18–22. One caller observed headlights and a "vehicle … turning the corner really fast," like it was trying to get away. Trial tr. vol. II, p. 79, lines 7–15; p. 80, lines 3–12.

Burlington police responded and eventually found Kedarie's body in the alley. From street-level view, Kedarie's body was at least partially hidden. Trial tr. vol. II, p. 153, lines 6–9. Police smelled bleach in the alley and the smell got stronger as they approached Kedarie's body. Trial tr. vol. II, p. 155, lines 17–24; p. 156, lines 4–7.

A black plastic trash bag was tied over Kedarie's head, his arms were raised "above his head," and his shirt was pushed up, exposing his chest and bra. *See* State's Exhibits: D-2, D-3, D-4, D-5, D-6, D-7: Photos; Exhibit App. 10–12; Conf. App. 54–56; trial tr. vol. II, p. 156,

lines 8–19. The trash bag over Kedarie's face had "deformities" that appeared as if "somebody was trying to grab at it and pull it and actually stretched a hole in the bag." Trial tr. vol. II, p. 162, line 13 — p. 163, line 1. The trash bag also appeared to have bullet holes or grazes. Trial tr. vol. II, p. 162, line 13 — p. 163, line 1. When police eventually removed the black trash bag from Kedarie's face, in an attempt to identify the body, they found a bloody white t-shirt wrapped around his mouth and chin. *See* trial tr. vol. II, p. 167, lines 11–23; p. 503, line 21 — p. 504, line 3; p. 505, lines 1–5.

A bottle of Dollar-General-brand bleach was between Kedarie's thighs, with the spout pointed toward his exposed genitals. State's Exhibit D-8: Photo; Conf. App. 57; trial tr. vol. II, p. 113, lines 7–23; p. 161, lines 14–20; p. 268, lines 17–21; p. 489, lines 10–13. Kedarie was wearing leggings, but his shoes were missing. Trial tr. vol. II, p. 156, lines 8–22. Apparent bleach stains were visible on Kedarie's leggings, socks, and shirt. Trial tr. vol. II, p. 157, lines 4–10.

There were two visible gunshot wounds: one bullet-hole went through Kedarie's bra and the other was closer to the center of his midsection. State's Exhibit D-10: Photo; Conf. App. 58; trial tr. vol. II, p. 157, lines 11–22.

The body was cold and pulseless. Trial tr. vol. II, p. 107, lines 1–4, p. 117, lines 21–23.

**Kedarie's manner of death was homicide and the cause of death was gunshot wounds to the chest. The autopsy also found evidence that Kedarie struggled to breathe before he died and that he was shot at close range.**

A forensic pathologist at the University of Iowa Hospital performed on autopsy on Kedarie's body. The pathologist observed that Kedarie's clothes were "not in the usual positions as worn by a person" and "there was a fair amount of blood in some garments." Trial tr. vol. II, p. 249, line 16 — p. 250, line 2. Kedarie's button-up shirt and his t-shirt were both pulled up past his head. Trial tr. vol. II, p. 251, lines 1–10.

There was a bullet hole in the left bra cup. Trial tr. vol. II, p. 254, lines 14–23. The shirt showed signs of bleach staining. Trial tr. vol. II, p. 252, lines 3–15. And there were "scattered, small, gray to black particles" on the bra and t-shirt that "looked to be gunpowder particles" consistent with "discharge of a firearm" within "2 or 3 feet" of the skin or clothing surface, possibly from a firearm pointed downward. Trial tr. vol. II, p. 254, line 14 — p. 255, line 23; p. 278,

lines 7–11. Similar particles were found near the bullet-holes on the chest. Trial tr. vol. II, p. 256, line 14 — p 257, line 9.

The autopsy also revealed that a second black plastic trash bag had been "tightly compressed" and shoved into Kedarie's mouth. Trial tr. vol. II, p 261, lines 2–13. The pathologist found petechial hemorrhages in Kedarie's eyes, which point toward asphyxiation. Trial tr. vol. II, p. 261, line 19 — p. 262, line 23; p. 263, line 11 — p. 265, line 4. The presence of petechiae, as well as the placement of the plastic bag, showed that Kedarie struggled to breathe in the time leading up to his death. Trial tr. vol. II, p. 265, line 5 — p. 266, line 5.

The cause of death, however, was the gunshot wounds to chest—not asphyxia. Trial tr. vol. II, p. 273, lines 1–8. The bullet-hole in the bra likely corresponded to one of the fatal gunshots, each of which was around 3 inches apart. Trial tr. vol. II, p. 276, line 6 — p. 277, line 1; p. 277, lines 16–18. The bullets pierced Kedarie's aorta, heart, and liver, before coming to rest in his lung and spine. Trial tr. vol. II, p. 271, lines 1–11; p. 272, lines 14–25. These injuries were "rapidly fatal." Trial tr. vol. II, p. 273, line 13 — p. 274, line 1.

Kedarie's skin showed signs of bleach injuries, as did his genitals. Trial tr. vol. II, p. 266, line 12 — p. 267, line 11.

**Eventually, Purham was arrested while driving the red Impala, and the murder weapon was seized, following a high-speed chase in Missouri.**

About two weeks after the murder, the red Impala was spotted in Florissant Missouri, 15 minutes north of St. Louis. Trial tr. vol. II, p. 448, lines 6–12; p 449, line 25 — p. 350, line 4. Police pulled over the red Impala, driven by Purham, for failing to signal. Trial tr. vol. II, p. 450, lines 5–11. A record search showed the vehicle was wanted for a homicide. Trial tr. vol. II, p. 450, lines 5–11.

Missouri police attempted to stop the vehicle with guns drawn, but Purham drove away in excess of 100 miles per hour. Trial tr. vol. II, p. 451, lines 6–24; p 452, lines 19–21. A high-speed chase ensued:

> [Purham] ran several red lights, stop signs, nearly struck a pedestrian[,...] careened through front yards, ultimately struck [a police] vehicle, went through a front yard again, came back out of that front yard and struck [the police] vehicle again. The vehicle [then] went through a utility pole and sawed it off at the bottom and then the vehicle continued southbound ... and crashed into a guardrail doing approximately 40 miles an hour.

Trial tr. vol. II, p. 452, lines 5–14. Then Purham attempted to flee on foot, before he was ultimately apprehended. Trial tr. vol. II, p. 452, line 22 — p. 454, line 2.

When officers approached the vehicle, they found a woman in the passenger seat and a two-year-old boy "huddled on the floorboard" in the back seat. Trial tr. vol. II, p. 454, lines 6–16. Police found a silver revolver with a wooden grip on the driver's-side floorboard. Trial tr. vol. II, p. 454, line 21 — p. 455, line 3; p. 468, lines 10–13. The revolver was loaded with six live rounds. Trial tr. vol. II, p. 470, lines 12–19.

Criminalists at the State Crime Lab examined the red Impala and found fingerprints from the defendant and Purham in multiple locations in or on the red Impala. Trial tr. vol. III, p. 55, lines 9–22; p. 57, line 22 — p. 60, line 6.

**Ballistics prove that the silver revolver possessed by the defendant and Purham was used to murder Kedarie.**

DCI criminalists identified the silver gun as a Smith & Wesson .357 magnum revolver. Trial tr. vol. II, p. 593, lines 5–17. A forensic analysis confirmed that the bullets that killed Kedarie were fired by the .357. Trial tr. vol. II, p. 600, lines 6–18.

A review of the defendant's Facebook page showed him discussing and trading images of that gun or "another just like it." *See* trial tr. vol. II, p. 609, line 23 — p. 611, line 24; p. 616, lines 8–11.

DCI criminalists found Purham's DNA on the gun and his fingerprints on the outside of an ammunition box. Trial tr. vol. II, p. 549, lines 7–15; vol. III, p. 49, lines 18–23.

**The defendant—a prolific cell-phone user—did not use his phone during the time of the murder. Records show a "dead zone" that aligns precisely with the kidnapping and murder of Kedarie Johnson.**

In the seven days leading up the murder, the defendant sent or received approximately 1,000 total calls and text messages—not including Facebook, Snapchat, or other social media. Trial tr. vol. III, p. 183, lines 2–20. Yet on the night of the murder, there was no activity on the defendant's phone from 10:33 p.m. to 11:46 p.m. Trial tr. vol. III, p. 184, lines 4–10. The defendant's 11:46 p.m. call was 10 minutes after shots were fired in the Walnut Street alley. Trial tr. vol. III, p. 217, lines 3–7. Also, in the hours following the murder, the defendant consistently used his phone and sent multiple messages indicating that he was planning to leave Burlington. Trial tr. vol. III, p. 187, line 13 — p. 192, line 3,

According to police, this "dead zone" is when the defendant and Purham kidnapped and murdered Kedarie. Trial tr. vol. III, p. 184, lines 4–16.

**The defendant repeatedly searches for information about Kedarie's murder, starting at 4:00 a.m. the night of the murder and for the next few weeks.**

Before the murder, the defendant's internet search history was typical for many twenty-somethings: he looked up things like weather and music, but did not seek out information on current events or news. Trial tr. vol. III, p. 217, line 16 — p. 218, line 9. At 4:00 a.m. the night of the murder, the defendant's search history changed, and he repeatedly searched for news related to "Burlington, Iowa" or "Burlington, Iowa shooting" and opened multiple pages that specifically referenced the murder of Kedarie Johnson and the subsequent police investigation. Trial tr. vol. III, p. 218, line 19 — p. 229, line 1; Exhibit L-11: Extraction Report; Conf. App. 62–78. In the weeks following, the defendant similarly searched the internet for "Burlington, Iowa, crime," "Burlington, Iowa, shooting," and for information specifically about the Kedarie Johnson murder. Trial tr. vol. III, p. 230, lines 9–25.

**The defendant's social media links him to Kedarie's female persona, 2610 Madison, and the murder weapon.**

Police executed a search warrant for the Facebook page of "Lumni Hoe"—a page the defendant admitted was his, which

displayed his image as the profile photograph. Trial tr. vol. II, p. 168, line 12 — p. 170, line 16.

Facebook records showed that the defendant was "friends" with Kedarie's female Facebook persona, "Kandicee Johnson" and had been since December of 2015. Trial tr. vol. III, p. 149, line 14 — p. 150, line 17; p. 151, line 6 — p. 152, line 3. Although Facebook records did not document any direct interactions between Kedarie and the defendant, they were both members of the same small "group chat" with 2–4 other people. *See* trial tr. vol. III, p. 152, lines 4–23; p. 233, lines 1–8 (4–6 people total in group chat).

Other Facebook messages, photos, and videos extracted from the defendant's phone established he was at 2610 Madison in the days before the murder. Trial tr. vol. III, p. 155, line 21 — p. 171, line 20.

Still other Facebook messages and videos sent and received by the defendant depicted a .357 magnum revolver that appeared similar or identical to the murder weapon. *See* trial tr. vol. III, p. 171, line 21 — p. 179, line 5.

**The defendant's friends corroborate significant portions of the State's case, including the State's timeline, the red Impala, and the defendant's possession of the murder weapon.**

According to the defendant's friend Deangelo Haley, the defendant, Purham, and friends spent the afternoon preceding the murder smoking marijuana and playing video games at a residence on Spruce Street. *See* trial tr. vol. II, p. 346, line 25 — p. 347, line 12. At some point in the evening, the defendant and Purham left to get food at Hy-Vee in the red Impala: Haley expected them to be gone for 15 or 20 minutes, but they were instead gone for "a couple hours." Trial tr. vol. II, p. 328, lines 11–23; p. 322, lines 19–24; p. 326, lines 2–3; p. 327, lines 13–14. When the defendant returned, hours later, and a friend asked where he had been, he replied: "We had to make a quick stop." Trial tr. vol. II, p. 330, lines 8–21. According to Haley, the defendant and Purham both appeared nervous when they got back to the house. Trial tr. vol. II, p. 331, lines 14–20.

After returning to Spruce Street hours later, the defendant asked Haley to hold onto his gun—a revolver with a long chrome barrel that "looked like a cowboy gun." Trial tr. vol. II, p. 324, lines 9–22; p. 331, line 21 — p. 332, line 13. Haley wrapped the gun in a shirt to avoid adding his fingerprints ("because ain't no telling what

[the defendant and Purham] had did") and stashed it in his bedroom. Trial tr. vol. II, p. 332, lines 11–22. The next morning, the defendant came back to the Spruce Street house, collected the gun from Haley, and left. Trial tr. vol. II, p. 333, lines 3–21. The defendant skipped town shortly thereafter. Trial tr. vol. II, p. 334, line 24 — p. 335, line 6.

The defendant's on-and-off girlfriend, Peyton Stinemall-Noll, similarly confirmed that she had seen the defendant with the "cowboy gun" before Kedarie was murdered. Trial tr. vol. III, p. 13, lines 1–23; p. 14, line 25 — p. 15, line 8.

Another of the defendant's paramours, Andrea Bedford, testified that the defendant unexpectedly called at 11:52 p.m. on the night of the murder and asked to stay with her. Trial tr. vol. III, p. 291, lines 1–16. They had sex around 2:00 a.m.—less than three hours after Kedarie was murdered—and then the defendant unexpectedly left the next day. Trial tr. vol. III, p. 286, line 13 — p. 287, line 4; p. 291, lines 1–16; p. 294, line 23 — p. 295, line 2; p. 295, lines 6–12.

One or two days after the murder, the defendant asked Jocalynn Martinez, a friend or acquaintance, if he could stay at her place,

apparently because he was unable to continue staying at 2610 Madison. *See* trial tr. vol. III, p. 308, lines 3–8; p. 310, line 5 — p. 311, line 1.

**The defendant's trial testimony confirms key details of the State's case, though he denies the murder and kidnapping.**

At trial, the defendant denied knowing Kedarie. Trial tr. vol. III, p 371, lines 6–17. But he admitted that his story changed multiple times between his interview with police and trial, and he admitted that he had never given the version of events relayed at trial before that day. *See* trial tr. vol. III, p. 380, lines 13–20; p. 413, lines 6–8.

The defendant's explanation of the "dead zone" in his cell-phone records was that he was busy packaging marijuana. Trial tr. vol. III, p. 373, lines 8–25. Even under his version of events, the defendant agreed with prosecutors that, during the time Kedarie was alleged to have been kidnapped and tortured, the defendant was the only person present at 2610 Madison. Trial tr. vol. III, p. 418, lines 13–22. He also admitted to purchasing the "cowboy gun" depicted in his Facebook messages. Trial tr. vol. III, p. 387, lines 20–24.

The defendant confirmed that Purham was driving the red Impala on the night of the murder, and that Purham had the murder

weapon: he claims Purham drove past him, brandished the gun at him in public, and told him "to get the fuck out the street." Trial tr. vol. III, p. 374, lines 13–23. Then, according to the defendant, Purham asked him to hold onto the gun because it was "hot out here," referring to police interest. Trial tr. vol. III, p. 375, lines 5–24. The defendant admitted to retrieving the gun from Haley the next day, claiming he returned the gun to Purham. Trial tr. vol. III, p. 375, lines 7–19.

The defendant said at trial that he spent the hours following the murder Googling information about the crime and having sex. Trial tr. vol. III, p. 400, line 2 — p. 403, line 14.

## ARGUMENT

### I. There Was Strong Circumstantial Proof that the Defendant, Either as a Principal or Aider and Abettor, Kidnapped Kedarie Johnson.

#### Preservation of Error

The State does not contest error preservation. *See* trial tr. vol. III, p. 239, line 21 — p. 240, line 13.

#### Standard of Review

When evaluating a sufficiency challenge, evidence is viewed in the light most favorable to the State and all reasonable inferences are drawn to uphold the verdict. *State v. Leckington*, 713 N.W.2d 208,

212–13 (Iowa 2006). "A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive." *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996).

**Merits**

In his brief, the defendant does not challenge—and seems to concede—that there was sufficient evidence the defendant committed premeditated first-degree murder. Defendant's Proof Br. at 48. Instead, he challenges the sufficiency of evidence for the underlying felony that supports felony murder: that the defendant, as a principal or aider and abettor, kidnapped Kedarie Johnson. Defendant's Proof Br. at 48. Contrary to the defendant's assertion, the State's evidence presented a compelling circumstantial case that the defendant, with Purham, kidnapped Kedarie, took him to 2610 Madison (for sex or another purpose), tortured him, transported him to the East Walnut alley, and murdered him there. The State established opportunity and linked the defendant to the crimes with physical, forensic, and digital evidence, all of which convinced the jury of the defendant's guilt. This Court should not disturb the verdict.

The timeline constructed from eyewitnesses and surveillance footage establishes opportunity:

- **Between 9:41 p.m. and 10:00 p.m.,** the defendant, Kedarie, and Purham were all in close proximity to each other at Hy-Vee. Trial tr. vol. II, p. 189, lines 8–22; p. 190, line 17 — p. 191, line 17; p. 198, lines 3–15; p. 200, lines 1–25.

- **At 10:03**, the defendant and Purham left the store. Trial tr. vol. II, p. 201, lines 4–14. Around this time, surveillance shows the defendant looking in Kedarie's direction. Trial tr. vol. II, p. 308, lines 3–12.

- **Between 10:03 and 10:04,** Kedarie left the store and started walking across the parking lot toward Amari's house. Trial tr. vol. II, p. 213, lines 10–21; *see also* State's Exhibit E-2: Surveillance Footage, at 10:02:35–10:94:25.

- **Between 10:04 and 10:05,** the red Impala used by Purham and the defendant started "coming in behind" Kedarie and following him. Trial tr. vol. II, p. 213, lines 10–21; *see also* State's Exhibit E-2: Surveillance Footage, at 10:02:35–10:04:28.

- **A few minutes after that,** Kedarie arrived at Amari's house and borrowed bras. Trial tr. vol. II, p. 52, lines 15–22; p. 53, lines 7–13; p. 59, lines 14–17; p. 66, lines 22–25; p. 67, lines 12–19.

- **At some point between 10:05 and approximately 10:25 p.m.,** Amari saw a red car parked illegally on her side of the street in front of her house. Trial tr. vol. II, p. 57, line 24 — p. 58, line 23; p. 66, lines 22–25; p. 67, lines 12–19.

- **Between 10:33 p.m. and 11:46 p.m.,** the defendant (an otherwise prolific cell-phone user) did not use his phone a single time. Trial tr. vol. III, p. 184, lines 4–10.

- **At approximately 11:30 p.m.,** gunshots rang out near the East Walnut alley and a car fled the scene rapidly. Trial tr. vol. II, p. 79, lines 7–15; p. 80, lines 3–12; p. 105, line 16 — p. 106, line 1; p. 138, lines 18–22.

- **At 4:00 a.m.,** the defendant started searching the internet for information about the murder and police investigation. Exhibit L-11: Extraction Report; Conf. App. 62–78.

Numerous witnesses tied the defendant to 2610 Madison, a house used by him and his associates for sex and drugs. *See* trial tr. vol. II, p. 368, line 23 — p. 369, line 3; p. 371, lines 1–8; vol. III, p. 10, line 25 — p. 12, line 5; p. 13, line 21 — p. 14, line 24; p. 155, line 21 — p. 171, line 20; p. 168, line 23 — p. 169, line 21; p. 372, line 22 — p. 373, line 15; p. 388, line 19 — p. 389, line 5; State's Exhibit H-15: 2610 Madison Video; State's Exhibit H-15a: Screenshot from H-15; Exhibit App. 23. At 2610 Madison, police found the following:

- **Dollar General trash bags that matched those found on Kedarie's body**. *See* trial tr. vol. II, p. 301, line 23 — p. 302, line 12; p. 303, lines 7–9; p. 396, lines 16–22; p. 405, line 21 — p. 406, line 8.

- **Kedarie's backpack and missing shoes.** Trial tr. vol. II, p. 304, line 20 — p. 305, line 24; p. 399, line 3 — p. 402, lines 19–23; p. 404, lines 12–14; p. 405, lines 15–20.

- **A blue bedsheet with fibers that forensically matched those found on Kedarie's body.** Trial tr. vol. II, p. 269, line 14 — p. 270, line 13; p. 399, line 3 — p. 402, lines 19–23; p. 407, line 24 — p. 408, line 2; p. 434, line 11 — p. 439, line 6.

Forensics also proved the .357 magnum—which the defendant possessed on multiple occasions—was the murder weapon. Trial tr. vol. II, p. 600, lines 6–18; p. 609, line 23 — p. 611, line 24; p. 616, lines 8–11; vol. III, p. 155, line 21 — p. 179, line 5. Social media showed at least some links between the defendant and Kedarie's female persona. Trial tr. vol. III, p. 149, line 14 — p. 150, line 17; p. 151, line 6 — p. 152, line 3; p. 152, lines 4–23; p. 233, lines 1–8. And the defendant's fingerprints were found in the red Impala. Trial tr. vol. III, p. 55, lines 9–22; p. 57, line 22 — p. 60, line 6.

Digital evidence established that the defendant was Facebook friends with Kedarie's female persona and had been in a group chat with him. Trial tr. vol. III, p. 149, line 14 — p. 150, line 17; p. 151, line 6 — p. 152, line 3; trial tr. vol. III, p. 152, lines 4–23; p. 233, lines 1–8. Social-media and cell-phone evidence established that the defendant had been at 2610 Madison and possessed the murder weapon. Trial tr. vol. III, p. 155, line 21 — p. 179, line 5. Search-history data showed that, beginning at 4:00 a.m. after Kedarie was tortured and killed, the defendant began searching for information about the murder and the police investigation. Trial tr. vol. III, p. 218, line 19 — p. 229, line 1; p. 230, lines 9–25; Exhibit L-11: Extraction Rep.; Conf. App. 62–78.

This all provided compelling circumstantial evidence that, during the "dead zone" for the defendant's cell-phone usage, Kedarie was taken against his will to 2610 Madison, likely for sex, before he was then tortured, suffocated, transported, mutilated with bleach, and murdered in the East Walnut alley.

Much of the defendant's argument appears to challenge whether the removal or confinement had significance apart from Kedarie's murder. Defendant's Proof Br. at 52. The defendant's argument overlooks significant circumstantial evidence and runs counter to common sense. The defendant did not need to take Kedarie to a remote alley in order to murder him. Nor did he need to transport Kedarie without shoes, force his hands above his head, put a black trash bag over his head while he was still breathing, or shove a bloody t-shirt into his mouth. These acts—as well as the removal and transportation of Kedarie from 2610 Madison to the alley—all had significance apart and separate from the act of homicide, which was accomplished with close-range gunshot wounds to the chest.

In one portion of his brief, the defendant appears to suggest that Kedarie was murdered elsewhere and then his body was left in the alley. *See* Defendant's Proof Br. at 53 (arguing that "[the] idea of

removal and confinement presume that the person is alive…" and that "[k]illing someone and leaving the body in the alley is not removal and confinement"). Yet we know for near certainty that Kedarie was killed at the East Walnut alley (rather than 2610 Madison or elsewhere) because the mechanism of death was gunshot wounds to the chest and 911 callers heard gunshots in the alley. Trial tr. vol. II, p. 79, lines 8–15; p. 105, line 16 — p. 106, line 1; p. 138, lines 18–22; p. 273, lines 1–8. This means that the defendant and his accomplice selected the alley as the location for the murder because of its comparatively secret location, to substantially reduce the risk of detection, to substantially increase the risk of harm to Kedarie, and to make their escape substantially easier. *See* Jury Instr. No. 19: Definitions, p. 4; App. 39 (defining kidnapping).

The defendant also appears to challenge in his brief whether there was an intent to conceal or hide Kedarie's body to prevent discovery. Defendant's Proof Br. at 50. Kedarie was murdered and dumped in an alley with a trashbag on his head precisely because that location would conceal or hide the body and prevent discovery. Even after police arrived on-scene, Kedarie's body was at least partially obscured from street-level view, in a mound of tall grass. Trial tr. vol.

II, p. 153, lines 6–9; Exhibit D-8: Photo; Conf. App. 57. The most probable intent associated with transporting Kedarie to the alley is to commit the murder and/or additional torture (such as bleaching Kedarie's genitals) in secret.

In the end, this was a strong circumstantial case for both traditional premeditated murder and felony murder. The State's timeline, as well as the physical, forensic, and digital evidence, proved the defendant's guilt beyond a reasonable doubt. This Court should affirm the jury's verdict.

## II. Counsel Was Not Ineffective. The Statements at Issue On Appeal Are Not Hearsay or Were Admissible Pursuant to an Exception. They Were Also Cumulative to Other Evidence.

### Preservation of Error

The defendant frames this issue as ineffective assistance, which permits him to bypass the rules of err preservation. *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005).

### Standard of Review

Constitutional claims, including allegations of ineffective assistance, are reviewed de novo. *Wills*, 696 N.W.2d at 22.

**Merits**

In the second Division of his brief, the defendant alleges that trial counsel was ineffective for not objecting to Kedarie's statement to Amari that "Lumni was following him." Defendant's Proof Br. at 55. Counsel was not ineffective. This evidence was admissible, so counsel had no duty to object. And there is no reasonable probability that objecting to this statement would have resulted in the testimony being stricken or that exclusion of the testimony would have changed the verdict.

At trial, the district court appears to have admitted this evidence on the theory that it was a present sense impression:

> **[THE STATE]:** Now, when Kedarie first got to your house, did he say anything to you?
>
> **[AMARI]:** He said --
>
> **[THE DEFENSE]:** I'm going to object. This is going into hearsay at this time.
>
> **[THE STATE]:** Your Honor --
>
> **THE COURT:** Your response?
>
> **[THE STATE]:** -- this is an exception to the hearsay rule, much like the Court ruled in State v. Richards that it is an exception under 5.803, present sense impression under subsection 1, or it applies under subsection 3 that these are statements made by the victim. Because identity is also an issue in this case, motive is

going to be a critical element in proving premeditation under the aiding and abetting theory.

**THE COURT:** I believe that this could be an exception to the hearsay rule, being a present sense impression, but I think you may want to ask a question or two before this question to lay the foundation for the present sense impression.

**[THE STATE]:** All right. Thank you, your Honor.

**Q.** When Kedarie came in your house, how was he acting?

**A.** His normal self, he was smiling and talking.

**Q.** Did he give you any indication that he was having some concerns?

**A.** No, he just said he was scared.

**[THE DEFENSE]:** This is going into hearsay then, the answer is.

**THE COURT:** Overruled.

**Q.** Yeah, and can you speak up? Did he indicate to you he had any concerns?

**A.** No.

**Q.** Okay. But you started to say he was what?

**A.** He just said he was scared. He didn't act scared or anything.

**Q.** But he said he was scared?

**A.** Yes.

> **Q.** And did he say why he was scared?
>
> **A.** He just said Lumni was following him.
>
> [...]
>
> **Q.** Did you know who Lummi was?
>
> **A.** No.
>
> **Q.** So in response to that statement, what did you do, if anything?
>
> **A.** I asked if he wanted a ride home or if he wanted to stay a little longer or if he wanted to go out the back door. He said no.

Trial tr. vol. II p. 55, line 12 — p. 57, line 12.

The statement at issue is not hearsay because it was offered to establish Amari's subsequent course of conduct, rather than the truth of the matter asserted. "When an out-of-court statement is not offered for its truth, but to explain the responsive conduct of a third party, it is not hearsay." Laurie Kratky Doré, *Statements Not Offered to Prove the Truth of the Matter Asserted*, 7 Ia. Prac., Evidence § 5.801:4 (Westlaw 2018); *accord State v. Plain*, 898 N.W.2d 801, 812

(Iowa 2017). Kedarie's statement was offered to explain Amari's conduct.[2] It was not hearsay.

If this Court disagrees, and finds the statement was hearsay, it was admissible pursuant to one or two exceptions: present sense impression or statement of then-existing mental, emotional or physical condition.

***Present sense impression.*** The district court relied on the present-sense-impression exception, which permits admission of "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." Iowa R. Evid. 5.803(1). There are essentially two elements to the exception: (1) the statement must describe an event or condition; and (2) the statement must be made "immediately after" the event or condition. Laurie Kratky Doré, *Present Sense Impression*, 7 Ia. Prac., Evidence § 5.803:1 (Westlaw 2018).

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[2] As discussed below, cumulative evidence was also admitted. That evidence is also not hearsay because it was offered to show the officers' subsequent course of conduct—why they went to question "Lumni," later identified as the defendant. *See United States v. DeMarce*, 564 F.3d 989, 996 (8th Cir. 2009) ("Where testimony is offered for res gestae purposes to explain the origin of an investigation, this court has admitted the statements as not hearsay.").

The case law provides some guidance on the first element. In *State v. Fleshner*, the Supreme Court unanimously approved the admission of a woman's hearsay statement when her phonecall with the testifying witness was cut short. *State v. Flesher*, 286 N.W.2d 215, 216 (Iowa 1979). The context of the conversation, relayed by the caller at trial, was as follows:

> The first thing she said to me was, "It's a man." She went to the door and I could hear some conversation in the background, and she came back to the phone and she said, "It's Joan," and I said, "Did you let her in?" And she said, "Yes, I did." I said, "Well, just be careful." She said, "I will," and I said, "I'll talk to you later." And she hung up.

*Id.* at 216. The facts here are comparable. Kedarie's statement describes the event or condition: he says that he is afraid and, when asked why, says that Lumni is following him. Trial tr. vol. II p. 55, line 12 — p. 57, line 12.

The second element requires that the statement be made while perceiving the event or condition or "immediately after." Iowa R. Evid. 5.803(1). The condition at issue is Kedarie being afraid, and the statement was made contemporaneous with that feeling. If this Court disagrees and analyzes the "event" related to Kedarie's statement, it was made "immediately after" he was followed by Lumni. In a

published case, the Court of Appeals has found 15–20 minutes after an event qualifies as immediately after. *Fratzke v. Meyer*, 398 N.W.2d 200, 205 (Iowa Ct. App. 1986). The total time Kedarie spent at Amari's house was 15 or 20 minutes. Trial tr. vol. II, p. 66, lines 22–25; p. 67, lines 12–19. The statement was made "immediately after" for purposes of Rule 5.803(1).

***Statement of then-existing mental, emotional, or physical condition.*** Rule 5.803(3) provides for the admission of "[a] statement of the declarant's then existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will." Iowa R. Evid. 5.803(3). Again, the case law provides some guidance. In *DeMarce*, the Eighth Circuit Court of Appeals affirmed the admission of hearsay under the then-existing-state-of-mind exception when a victim told her mother "she was bleeding because Joseph DeMarce hit and tried to rape her." *United States v. DeMarce*, 564 F.3d 989, 996 (8th Cir. 2009). In *State v. Ingram*, a victim's diary indicated that she feared her stepfather because he had

raped her, and the diary was found admissible under the same exception. *State v. Ingram*, No. 15-1984, 2017 WL 514403, at *3–4 (Iowa Ct. App. Feb. 8, 2017). Both cases are comparable to the facts here: Kedarie said he was afraid because Lumni was following him, much like the victims' statements in *DeMarce* and *Ingram* concerning the nature of their fear.

Even if this Court finds the evidence was hearsay, not subject to an exception, the defendant still is not entitled to relief because he cannot satisfy the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In his brief, the defendant complains solely about an exchange on pages 55–57 of volume II of the trial transcript. Defendant's Proof Br. at 58. But this evidence was cumulative to other statements, made by other witnesses, which established Kedarie mentioned "Lumni" to Amari that night. *See* trial tr. vol. II, p. 168, line 12 — p. 170, line 16; p. 178, line 24 — p. 179, line 5 ("[W]e had talked to Amari [W.] at the time and she said that … Kedarie said that Lummi was following him[.]"). It was also cumulative to the surveillance footage that showed the defendant and Purham following Kedarie in the red Impala in the Hy-Vee parking lot, as well as Amari's eyewitness testimony that the red Impala was illegally parked

in front of her house. Trial tr. vol. II, p. 57, line 24 — p. 58, line 23; p. 213, lines 10–21; *see also* State's Exhibit E-2: Surveillance Footage, at 10:02:35–10:04:28. Excising the lines the defendant complains about cannot establish the reasonable probability of a different outcome, because that evidence is cumulative. The jury would have heard substantially the same evidence regardless.

In his brief, the defendant asserts that "[t]he statement that Lumni was following him was the only evidence placing [the defendant] with [Kedarie] that night." Defendant's Proof Br. at 63. But this is not true. Hy-Vee surveillance footage placed the defendant "in close proximity" to Kedarie inside the store—within 20 feet. Trial tr. vol. II, p. 284, lines 17–23; p. 286, lines 13–23; p. 291, line 11 — p. 292, line 2; p. 294, lines 2–8; p. 307, lines 20–24; p. 309, lines 14–17. He can also be seen on the surveillance footage looking in Kedarie's direction. Trial tr. vol. II, p. 308, lines 3–12. Once they leave the store, the red Impala started "coming in behind" Kedarie and following him. Trial tr. vol. II, p. 213, lines 10–21; *see also* State's Exhibit E-2: Surveillance Footage, at 10:02:35–10:04:28. The car was then seen illegally parked outside Amari's house. Trial tr. vol. II, p. 57, line 24 — p. 58, line 23. In addition, Kedarie's belongings were

found at 2610 Madison—where the defendant admitted to being on the night of the murder. Trial tr. vol. II, p. 304, line 20 — p. 305, line 24; p. 399, line 3 — p. 402, lines 19–23; p. 404, lines 12–14; p. 405, lines 15–20; vol. III, p. 418, lines 13–22. Because the defendant's assertion that no other evidence linked the defendant to Kedarie on the night of the murder is objectively untrue, and it is the sole basis of his prejudice argument, this Court can reject it wholesale. Counsel was not ineffective.

## III. The District Court Did Not Abuse Its Discretion When It Permitted the State to Play Exhibit H-15, a Tape that Linked the Defendant to 2610 Madison.

### Preservation of Error

The State does not contest error preservation. *See* trial tr. vol. III, p. 98, line 16 — p. 103, line 18.

### Standard of Review

Review is for an abuse of discretion. *State v. Putman*, 848 N.W.2d 1, 7 (Iowa 2014). An abuse of discretion occurs when the court's "discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.* (internal citation and quotation marks omitted). "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *Id.* (same).

**Merits**

The defendant next challenges the admission of Exhibit H-15, a video of Purham having consensual sex with a woman at 2610 Madison, which briefly shows the defendant (who is not seen engaging in any sex acts). *See* Defendant's Proof Br. at 65–81. This Court should affirm because the district court did not abuse its discretion. The evidence is not subject to Rule 5.404, as it does not depict a prior bad act. But even if it did, the State offered the evidence for a legitimate non-character purpose.

As a threshold matter, Exhibit H-15 does not depict a "bad act"—it briefly depicts the defendant observing Purham as Purham engages in a consensual sex act with an unidentified woman. *See* Exhibit H-15: 2610 Madison Video. The video does not depict a crime, evidence of bad character, or misconduct. The defendant's presence at the site of consensual sex acts is not the kind of evidence that tends to impugn one's character or demonstrate criminality. *See State v. Reynolds*, 765 N.W.2d 283, 289 (Iowa 2009) (collecting various definitions of "prior bad act"), *overruled on other grounds by Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699 (Iowa 2016). Nor was the evidence offered to prove conduct in conformity therewith.

*See* trial tr. III, p. 101, lines 3–11 (the State's reasons for admitting the evidence). This evidence is not governed by at all by Rule 5.404, and the analysis should end here.

But, if this Court disagrees, and does engage in a Rule-5.404 analysis, the district court did not abuse its discretion. According to the Iowa Supreme Court, the admission of 5.404(b) evidence involves a three-step analysis:

1. Is the evidence "relevant to a legitimate, disputed factual issue?"
2. Is there "clear proof the individual against whom the evidence is offered committed the bad act or crime?" and
3. Is "the evidence's probative value … substantially outweighed by the danger of unfair prejudice to the defendant?"

*State v. Putman*, 848 N.W.2d 1, 9 (Iowa 2014) (internal citations and quotation marks omitted). The defendant does not challenge clear proof on appeal, leaving only the first and third inquiries. *See* Defendant's Proof Br. at 64–81. For the reasons that follow, the evidence was relevant and the risk of unfair prejudice did not substantially outweigh the evidence's probative value. The evidence was properly admitted.

### A. The evidence was relevant because it proved a connection between the co-defendants, established they were comfortable having sex in front of each other, and linked the defendant to the bedroom where Kedarie's belongings were found.

The general bar for relevance is low—"whether a reasonable [person] might believe the probability of the truth of the consequential fact to be different if [the person] knew of the proffered evidence." *Putman*, 848 N.W.2d at 9 (citing and quoting *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988)). Here, the State identified three reasons Exhibit H-15 was relevant to establishing the defendant murdered Kedarie:

1. **The video establishes a connection between the co-defendants.** Trial tr. vol. III, p. 101, lines 3–11. The closeness and familiarity of the co-defendants is a fact of consequence because the State alleged they, acting as principals or aiding and abetting the other, kidnapped and murdered Kedarie. *See* Amended Trial Information; Conf. App. 19–20.

2. **The video establishes that the co-defendants were comfortable having sex in front of each other at 2610 Madison, despite being cousins.** Trial tr. vol. III, p. 101, lines 3–11. This is a fact of consequence because the State's theory was that the defendant and/or co-defendant kidnapped Kedarie (who was dressed as a teenage girl), took him to 2610 Madison, then tortured, transported, and murdered him when they discovered his anatomically male features. Some jurors may have reasonably questioned whether cousins would be comfortable having sex in front of each other and the

video demonstrates these two cousins were willing to do so.

3. **The video establishes that the defendant has previously been in the bedroom where Kedarie's belongings were found.** Trial tr. vol. III, p. 101, lines 3–11. This is a fact of consequence because the defendant's familiarity with and presence at the scene of the kidnapping increases the likelihood he kidnapped and murdered Kedarie.

The district court's verbal analysis generally tracked these reasons, explaining:

> In this case the State's theory is that there was, in essence, a plan between Mr. Sanders-Galvez and Mr. Purham to take Kedarie Johnson back to this house at 2610 Madison Avenue and have sex with him. This video would be evidence that would show that act was consistent with other plans or knowledge or also disprove any absence -- or any mistake or accident. So I conclude that it could be relevant under this Rule of Evidence and would be admissible.

Trial tr. vol. III, p. 103 lines 3–10. The defendant cannot prove any abuse of discretion in the district court's ruling.

The defendant's relevancy challenge on appeal is not entirely clear, but he seems to allege that the video was not relevant because it was not directly probative on whether he and Purham "*randomly* [emphasis original] picked up Johnson and took him back to 2610 Madison to have sex." Defendant's Proof Br. at 74. It is true that the video does not contain a recording of the defendant and Purham

previously kidnapping a stranger, having sex with the stranger, and then murdering the stranger. If the video did depict that, there would be an arguable conduct-in-conformity argument in favor of excluding the evidence. The evidence here, however, was not offered to prove conduct in conformity, but rather as 5.404(b) evidence: the connection between the co-defendants, that they would have sex in front of each other at 2610 Madison, and that the defendant had been in that bedroom before. In addition, the defendant and co-defendant's past use of 2610 Madison as a location for sex furthered the State's theory of motive for the kidnapping and murder: to take Kedarie to 2610 Madison for sex before, upon discovering male anatomy, the defendant and co-defendant murdered him. Evidence of motive is always relevant in a murder prosecution because it bears on the element of malice aforethought. *See State v. Newell*, 710 N.W.2d 6, 21 (Iowa 2006); *State v. Gordon*, 354 N.W.2d 783, 784 (Iowa 1984). These are all permissible non-character reasons for admitting the evidence and they are facts of consequence, thus satisfying the low bar for relevance.

### B. The evidence was not substantially more unfairly prejudicial than probative. The video was brief and recording a consensual sex act pales in comparison to the kidnapping, torture, depraved mutilation, and murder for which the jury convicted the defendant.

The Supreme Court has identified four non-exclusive factors to consider in this portion of the balancing test:

1. The need for the evidence in light of the issues and the other evidence available to the prosecution;
2. Whether there is clear proof the defendant committed the prior bad acts;
3. The strength or weakness of the evidence on the relevant issue; and
4. The degree to which the fact finder will be prompted to decide the case on an improper basis.

*Putman*, 848 N.W.2d at 9 (citing *State v. Taylor*, 689 N.W.2d 116, 124 (Iowa 2004)). These factors support admitting the 24-second video.

First, the evidence was necessary, especially to establish that the defendant and Purham were comfortable performing sex acts in the other's presence. This was a key piece of the State's theory of the case: it is the motive for transporting Kedarie to 2610 Madison, and provides an explanation for the mutilation of Kedarie's genitals after the defendant and Purham discovered he was not biologically female.

No other evidence established that the defendant and Purham were comfortable having sex in front of each other. The evidence was also needed to link the defendant to 2610 Madison, and specifically to the bedroom where Kedarie's belongings and the blue fibers were found. In his brief, the defendant asserts that the State had no need for this evidence, given overwhelming proof the defendant was at 2610 Madison. Defendant's Proof Br. at 76–77. Yet the defendant spends the first division of his brief challenging the sufficiency of the State's evidence for the underlying felony kidnapping, which took place at that very location. *See* Defendant's Proof Br. at 47–54. The evidence was necessary in light of what was available to the State in this prosecution.

Second, the defendant did not contest clear proof below, nor does he on appeal. The acts at issue are literally on video.

Third, the video is strong proof of the defendant and co-defendant's willingness to perform sex acts in front of each other, despite being cousins, as Purham is seen having sex in front of and with the encouragement of the defendant.

Fourth, there is no chance that the jury in this case chose to convict the defendant of first-degree murder because he happened to

record his friend having consensual sex with a woman. The video is very brief: it is 24 seconds in total, only around ten seconds depict sex acts, and the defendant's face is visible for less than one second. *See* Exhibit H-15: 2610 Madison Video. The allegations in this case were substantially more heinous than the video: the defendant and co-defendant kidnapped a teenage boy; took him to a house for sex believing he was female; tortured him, suffocated him, and mutilated his genitals upon discovering male anatomy; transported him to another location; and shot him twice in the chest at close range before dumping his body in an alley. A brief video depicting consensual sex did not prompt jurors to convict.

Also, while the defendant's brief complains about the lack of a limiting instruction, none was requested. That speaks more to the fact that this was not actually character evidence than it does to the issue of prejudice. Limiting instructions in this area generally admonish the jury to the effect of "You have heard evidence the defendant committed [prior bad act]. He is not on trial for that [prior bad act]. You should consider the evidence only for purposes of [motive, intent, opportunity, etc.]" *Cf. State v. Richards*, 879 N.W.2d 140, 144 (Iowa 2016); *Putman*, 848 N.W.2d at 15; *Plaster*, 424

N.W.2d at 232. Such an instruction would make little sense here: the defendant cannot be seen committing anything that would even arguably be criminal in Exhibit H-15, so it would only confuse the jury to say he was "not on trial" for not committing a crime. A limiting instruction was unnecessary and likely would have accomplished little beyond drawing additional attention to evidence the defense (apparently) wished to minimize.

But in the end, if this Court finds the prejudicial-versus-probative weighing a close call, that favors the State. Review is for an abuse of discretion. And the district court conducted the necessary balancing test:

> Then I must do the balancing test. It's not a long video and, as counsel also points out, it is not a crime. It's a consensual sex act, from all that can be told in the video, but it really does not appear to be highly prejudicial against the defendant and I will allow the evidence in.

Trial tr. vol. III, p. 103, lines 11–18. There was no abuse of discretion, as the district court did not act for any clearly untenable or unreasonable rationale. The defendant is not entitled to relief.

### C. Admitting the 24-second video, in which the defendant can be seen for one second, was harmless error.

Even if this Court finds that the district court abused its discretion, the Court should affirm because any error from admitting Exhibit H-15 is harmless non-constitutional error. There is no reason to think the jury based its decision in this case on a 24-second video in which the defendant can be seen for less than one second. *See* Exhibit H-15: 2610 Madison Video. The State did not levy any improper arguments based on the video, nor was it used for any sensational purpose. This evidence did not tip the scales and, for the reasons discussed in Division I, the strong circumstantial evidence in this case proves any error in admitting Exhibit H-15 was harmless.

## IV. The Defendant Is Not a Juvenile and Should Not Be Sentenced as if He Is One.

### Preservation of Error

Because the defendant's claim is framed as an illegal-sentence challenge, the State is unable to contest error preservation.

### Standard of Review

Constitutional challenges are reviewed de novo. *State v. Lyle*, 854 N.W.2d 378, 382 (Iowa 2014).

**Merits**

In his final argument, the defendant raises a claim that has been repeatedly turned back by Iowa's appellate courts: he asks for the benefit of juvenile-sentencing principles, even though he is not a juvenile. Defendant's Proof Br. at 81–100. This Court should, once again, reject the defendant's request.

Iowa case law uniformly rejects identical and nearly-identical attempts to expand juvenile-sentencing principles to adult offenders. *See State v. Lyle*, 854 N.W.2d 378, 403 (Iowa 2014) ("[O]ur holding today has no application to sentencing laws affecting adult offenders."); *accord State v. Seats*, 865 N.W.2d 545, 556–57 (Iowa 2015), *holding modified by State v. Roby*, 897 N.W.2d 127 (Iowa 2017); *see, e.g.*, *State v. Hall*, No. 17-0570, 2018 WL 4635685, at *5 (Iowa Ct. App. Sept. 26, 2018); *Nassif v. State*, No. 17-0762, 2018 WL 3301828, at *1 (Iowa Ct. App. July 5, 2018); *State v. Wise*, No. 17-1121, 2018 WL 2246861, at *3 (Iowa Ct. App. May 16, 2018); *State v. Mallett*, No. 16-0565, 2017 WL 4049318, at *2 (Iowa Ct. App. Sept. 13, 2017); *State v. Makuey*, No. 16-0565, 2017 WL 4049318, at *2 (Iowa Ct. App. Sept. 13, 2017); *Smith v. State*, No. 16-1711, 2017 WL 3283311, at *3 (Iowa Ct. App. Aug. 2, 2017) (collecting cases);

*Thomas v. State*, No. 16-0008, 2017 WL 2665104, at *2 (Iowa Ct. App. June 21, 2017); *Schultz v. State*, No. 16-0626, 2017 WL 1400874, at *1 (Iowa Ct. App. Apr. 19, 2017); *Kimpton v. State*, No. 15-2061, 2017 WL 108303, at *3 (Iowa Ct. App. Jan. 11, 2017); *State v. Davis*, No. 15-0015, 2015 WL 7075820, at *1-2 (Iowa Ct. App. Nov. 12, 2015) (collecting cases); *State v. Vance*, No. 15-0070, 2015 WL 4936328, at *2 (Iowa Ct. App. Aug. 19, 2015) (collecting cases); *State v. Clayton*, No. 13-1771, 2014 WL 5862075, at *6 (Iowa Ct. App. Nov. 13, 2014). The defendant's juvenile-sentencing argument is without merit. The relief he requests—re-sentencing under the *Miller*/*Graham* factors—is simply unavailable.

The gist of the defendant's argument is that, even though he cannot cite a single case from another jurisdiction affording 21-year-olds a juvenile-sentencing hearing, this Court should find a reason to grant him such a boon. Defendant's Proof Br. at 81–100. It should not.

While the defendant laments that he "was only twenty-one years old" when he murdered Kedarie and that he was in a "transitional phase of adolescence," the record tells a different story. Defendant's Proof Br. at 96. This was a heinous, depraved, hateful

crime. There is no evidence that the defendant was coerced or peer-pressured into kidnapping, torturing, mutilating, or murdering Kedarie. The punishment is not, as the defendant contends, "too harsh." It is entirely appropriate.

The defendant's appellate complaints, at bottom, are little more than a highly culpable offender attempting to shirk responsibility for his evil acts. This Court should not grant him relief.

## CONCLUSION

This Court should affirm the defendant's conviction and sentence.

## REQUEST FOR NONORAL SUBMISSION

This case can be decided on the briefs. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

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

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **10,931** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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