IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-0825

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BENJAMIN G. TRANE,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR LEE COUNTY (SOUTH)
THE HONORABLE MARK KRUSE, JUDGE

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

SHERYL SOICH
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
sherri.soich@ag.iowa.gov

DENISE A. TIMMINS
Assistant Attorney General

ATTORNEYS FOR PLAINTIFF-APPELLEE

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W. LaFave & A. Scott, *Handbook on Criminal Law*, § 3.5 (f), 226 (2d ed. 1986)

ROUTING STATEMENT

Trane requests retention by the Iowa Supreme Court. He asks the court to address what he characterizes as two issues of first impression and another substantial legal question. The first issue – whether a defendant is entitled to litigate his ineffective assistance of counsel claims in the context of a motion for new trial rather than in postconviction proceedings – has not been specifically decided but can be resolved through the application of existing caselaw and statutory language. The second issue – whether the State must specify which of two children is the subject of a child endangerment charge in the marshalling instruction – is unlikely to occur frequently, is unpreserved, and should be resolved through a lack of prejudice analysis under the rubric of ineffective assistance of counsel. The third issue – whether the defendant was entitled to raise an untimely rape shield claim at the start of trial due to an alleged delay in reviewing discovery material – is also unpreserved and must be analyzed as an ineffective assistance claim. Because this case does not meet the criteria for retention, the State requests transfer to the Court of Appeals. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case.

Benjamin Trane was charged with one count of third-degree sexual abuse (by force against the will alternative), one count of sexual exploitation by a counselor or therapist (pattern or practice alternative), and one count of child endangerment, in violation of Iowa Code sections 709.4(1)(a), 709.15(2)(a)(1) and 709.15(4)(a), and 726.6(1)(a) and 726.6(7) (2017). Trial Information; Amended Trial Information; App. 5-6, --. The charges stemmed from allegations that Trane – the owner of a private and unregulated "therapeutic boarding school" for troubled teenagers – engaged in inappropriate conduct with a teenage girl culminating in several sex acts, and oversaw a program of extended and isolated confinement of students as a consequence for behavior deemed unacceptable.

A jury convicted Trane of the lesser included offense of assault with intent to commit sexual abuse, as well as the charged offenses of pattern or practice of sexual exploitation by a counselor or therapist and child endangerment. Verdict Forms; App. 36. Before sentencing, Trane retained new counsel and presented several allegations of ineffective assistance of trial counsel in a motion for new trial.

Motion for New Trial; Supplemental Motion for New Trial; App. 45-53, --. The court concluded that Trane was not entitled to relief, declining to permit him to fully litigate his ineffective assistance claims in the context of a motion for new trial. May 11, 2018 Ruling; App. 75-78. The court did, however, permit new defense counsel to present extensive argument and offers of proof by way of discussion with the court. *See* Sent. 3, L2 – 198, L19. This appeal follows.

Course of Proceedings.

The State generally agrees with Trane's rendition of the case's procedural history. *See* Iowa R. App. P. 6.903(3).

Facts.

Benjamin Trane owned Midwest Academy in Keokuk, Iowa. Vol. VII 191, L9 – 193, L5. Because Midwest Academy was a large, private facility that billed itself as a "therapeutic boarding school" for troubled teenagers, it was not subject to regulation by the Iowa Board of Education or any other agency. Vol. V 287, L11 – 289, L11. Boys and girls were housed in separate wings and were prohibited from communicating or looking at each other, at least in the early stages of the program. Vol. III 12, L2 – 15, L21. By November 2015 one teenage girl would tell a staff member that "Mr. Ben" did things to

her, and two thirteen-year-old boys would be removed after spending much of their time in small solitary rooms called "Off-School Suspension" rooms, or O.S.S.

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K.S. had just turned sixteen when she came to Midwest Academy. Vol. III 160, L13-24. K.S. had lived with her biological parents, her grandparents, her aunt and uncle – who became her adoptive parents – and in foster care. Vol. III 158, L20 – 160, L12. K.S.'s aunt and uncle sent her to Midwest Academy after she ran away. Vol. III 161, L6-13. She met Trane immediately: "He just came in and said, I'm Mr. Ben. A lot of the girls were telling me, oh, this is Mr. Ben; he's the director, he's the owner; he's kind of a big deal." Vol. III 164, L16-25.

K.S. soon learned that there were many rules at Midwest Academy; new students were prohibited from looking out of windows, looking in mirrors, touching anyone, or talking to others except in certain specified circumstances. Vol. III 166, L21 – 167, L25. The academy had six levels, with increasing privileges and responsibilities. Vol. III 19, L19 – 29, L23. At Level 1, residents were not allowed to use salt and pepper or condiments at meals. Vol. III

170, L3 – 171, L6. Level 2 brought a few more privileges, and students at level 3 were partially responsible for other students:

> It's more responsibility... You're able to refer more consequences to other people. You're eligible to be a dorm leader, which would mean instead of being in charge of... one person as a Level 3 bunk leaders, you're in charge of your whole room.

Vol. III 174, L19 – 175, L5.

Midwest Academy had staff members called family representatives or "family reps", who acted as a point of contact between the residents and their families, as well as counselors on duty. Vol. III 18, L12 – p. 19, L18. K.S. had several family reps assigned to her during her stay; Trane took over as her final family rep, which was unusual. Vol. III 177, L2 – 178, L9. Most of the teenagers wanted to talk to Mr. Ben because he was so powerful at the academy; he could take them off-site for various service projects or a shopping trip. Vol. III 181, L8 – 183, L22. Trane paid more attention to K.S. than to the other girls, and they commented that he "treat[ed] [her] like a princess." Vol. III 183, L23 – 185, L24. Trane would also pull K.S. out of class to speak with her. Vol. III 185, L8 – 186, L9. Trane bought her toiletries, jewelry, cosmetics, and clothes. Vol. III 187, L19 – 188, L18.

In the summer, K.S.'s family rep left the academy; she was assigned another rep for a few days until she was told that Trane would be her family rep. Vol. III 189, L4 – 190, L13. As her representative and the owner of the school, his control of her was "total" and "complete." Vol. III 190, L4-21.

At one point, Trane appeared in the gymnasium and asked the girls which of them had not "done the body image thing." Vol. III 190, L22 – 191, L13. Trane took about eight girls to the "uniform room", which had a full-length mirror, and told them to go in the room individually, disrobe, and look at their bodies. Vol. III 192, L23 – 124, L24. Because there were no mirrors, even in the bathrooms, this was the first time K.S. had seen a mirror since arriving at Midwest Academy. Vol. III 194, L7-24. They were instructed to fully disrobe:

> He had told us that you have to completely undress… Because I was like, oh, can't we just keep our bra and underwear on? And he said, well, do women look the same when they're completely nude versus when they have bikinis on? And he said no, they look absolutely different, so you have to take it all off to see what shape you really are.

Vol. III 195, L11-24. She complied and walked out to a discussion between Trane and the girls about body shapes. Vol. III 195, L25 – 196, L14.

K.S. also participated in a sexual survey handed out by Trane, which he said was for a parenting class about teenage sexuality. Vol. III 196, L15 – 197, L16. K.S. recalled that the questions included: "When was the first time you masturbated? When was the first time you saw porn? What do you think about when you masturbate? Have you had sex, or when was the first time you had sex?" Vol. III 196, L19 – 197, L4.

On her 17th birthday, Trane took K.S. and another girl, Maudie, out for sushi. Vol. III 199, L18-22. It was not unusual for Trane to treat students to birthday dinners. Vol. III 199, L23 – 200, L2. He also took them shopping at Sam's Club and Victoria's Secret lingerie store that day; Trane may have bought Maudie underwear, but K.S. "didn't let him buy [her] anything." Vol. III 198, L19 – 201, L23.

In the late spring or early summer of 2015, K.S. left the academy briefly to participate in two different child protection center interviews stemming from events occurring before she came to Midwest Academy. Vol. III 202, L14 – 203, L15. In lieu of K.S.

returning a third time for a visual examination, Trane volunteered to inspect her body and photograph any distinctive characteristics. Vol. III 203, L12 – 204, L18. Because she did not want to return to the child protection center, K.S. agreed, and Trane photographed her neck, collarbone, ribs, and back. Vol. III 207, L4-22. "He said we should check my hips. I said I was pretty sure I didn't have any [moles or birthmarks], and he just barely pulled down my pants – I mean, barely – just enough so that my hips and the top of my underwear was exposed." Vol. III 207, L4-19. After Trane photographed her, he told the teenager that she "had nothing to be self-conscious about." Vol. III 207, L20 – 208, L14.

After the inspection incident, Trane came into K.S.'s sleeping room one night after "shutdown"; K.S. was a dorm leader and approximately ten other girls were in bunk beds up lined up against the wall. Vol. III 208, L15 – 209, L20. The girls were required to face the wall and were prohibited from looking around or facing out into the room. Vol. III 211, L5 – 212, L18. The consequence for violating that rule was a severe penalty. Vol. III 212, L10-25. Trane walked into the sleeping room, kneeled down by K.S.'s bed as she faced the wall, and slid his hand underneath her shorts and placed it into her

vagina.[1] Vol. III 214, L3-10. She felt pain when his fingernail scratched her. Vol. III 215, L19 – 216, L5. The encounter lasted about thirty seconds. Vol. III 214, L3-13. K.S. did not tell anyone what occurred, and things seemed "normal" between them afterward. Vol. III 216, L9 – 217, L1.

The next time Trane had sexual contact with K.S., she was in the doorway to the sleeping room monitoring it after shutdown; Trane summoned her and walked with her down a hallway and around a corner. Vol. III 218, L16 – 220, L9. He hugged her, putting his arm around her back so she could not move away, and he grabbed her hand. Vol. III 220, L5 – 221, L3. Trane placed her hand on his groin, over his pants. Vol. III 221, L4-14. She did not say anything; she tried to pull away but was not able to extricate herself. Vol. III 221, L6-14. K.S. could feel Trane's penis becoming erect under his clothes. Vol. III 222, L6-14. After a minute or two, Trane let go of K.S. Vol. III 226, L18 – 227, L25. She began to cry, and staff member Mike Holker walked by and asked if she was having a bad day. Vol. III 222,

[1] The State again acknowledges that the jury acquitted Trane of third-degree sexual abuse. Because Trane was convicted of sexual exploitation by a counselor or therapist and assault with intent to commit sexual abuse, however, the testimony of sexual conduct by Trane remains relevant in detailing the evidence presented at trial.

L16-25. She did not reply. Vol. III 222, L16-25. As she came back into her room, a staffer named Miss Kathy saw K.S., wiped away a tear, and asked her why she was upset; K.S. did not respond. Vol. III 223, L1-10.

K.S. recalled another incident when she and another girl, Bailey, went to Trane's house to make cinnamon rolls for his children. Vol. III 224, L11 – 225, L4. Bailey was the only other girl for whom Trane served as a family rep, and it was considered a privilege to go to his home. Vol. III 224, L13 – 227, L1. As Bailey put the cinnamon rolls in the oven, K.S. went downstairs; Trane followed her, came up behind her, pressed against her, and unbuttoned her school uniform. Vol. III 228, L4 – 229, L25. He put his finger inside of her vagina. Vol. III 228, L4 – 229, L20. When asked at trial whether she told the defendant "no", she said she did not really think she could say no, "[b]ut I mean, obviously looking back… yes, you can obviously say no." Vol. III 229, L14-25.

The last sexual contact initiated by Trane occurred in the seminar building. Vol. III 231, L10 – 236, L22. K.S., Trane, and two other girls, Justine and Jillian, went into the building and Trane told K.S. to go upstairs. Vol. III 234, L3 – 235, L5. She went into a

mirrored room that students usually did not enter and saw a camera set up on the table and a few cleaning rags and spray. Vol. III 235, L11 – 236, L17. Trane unbuttoned and unzipped K.S.'s pants; she closed her eyes because she "didn't want to pay attention" and heard him unbutton and unzip his own pants. Vol. III 237, L9-24. After using his saliva as lubricant, Trane had rear-entry intercourse with K.S., which was painful. Vol. III 238, L5 – 239, L14. She believed Trane told her to look in the mirror, but she kept her eyes closed. Vol. III 239, L5-14. He ejaculated and expressed concern that K.S. should "push [h]is semen out of [her] vagina." Vol. III 239, L15 – 240, L9. Trane grabbed the camera and handed K.S. the cleaning spray, telling her to clean the floor. Vol. III 241, L2-11. A really "shaky" K.S. and Trane went back downstairs to Jillian and Justine, who were cleaning. Vol. III 241, L2-11.

K.S. testified that Trane had intercourse with her one other time, as well as an act of oral sex; she also recalled Trane lying on top of her on the floor once, clothed, moving his groin against hers. Vol. III 242, L5 – 245, L20. During this time, Trane continued to act as K.S.'s family rep, and he discussed sexual matters with her. Vol. III 247, L4-15. He told K.S. from the outset that he had "more

experience with sexual issues or trauma than any of the other counselors there." Vol. III 247, L12 – 249, L21.

K.S. eventually began to confide in some of the other girls that she was feeling "uncomfortable," without offering any details. Vol. III 250, L17 – 251, L10. Two staff members later asked her about her comment, and she denied that anything had happened. Vol. III 251, L11-24. K.S. became upset and withdrawn, and was moved from level 4 to level 2 probation for being emotional and unhappy; she was required to sleep in the hallway on a suicide or self-harm watch. Vol. III 252, L19 – 254, L25. After a night or two of sleeping in the hallway, K.S. broached the subject of Trane with Cheyenne Jerred, a night staffer. Vol. III 254, L8 – 257, L7. Although she begged Cheyenne to not repeat what she had told her, Cheyenne reported the conversation to Midwest Academy and to the Department of Human Services. Vol. III 256, L15 – 262, L24.

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Wendy and her husband sent their twelve-year-old son, A.H., to Midwest Academy in May 2014. Vol. II 279, L14 – 281, L12. A.H. had struggled with Attention Deficit Hyperactivity Disorder, anxiety, depression, self-harming behavior, suicidal thoughts, and

Oppositional Defiant Disorder. Vol. II 281, L14 – 286, L14. At a loss as to how to help their son, they decided to send him to Midwest Academy. Vol. II 283, L14 – 286, L4. Trane gave them a tour, and he explained that the O.S.S. room was a "last ditch effort for children who were not performing." Vol. II 287, L2-20. Wendy was concerned about O.S.S., but she did not believe A.H. would earn enough demerits to warrant placement there; she was also assured by Trane and another staff member that the typical time frame was twenty-four hours before release. Vol. II 288, L2-20. Soon after they dropped A.H. off, they began receiving frequent calls from A.H.'s family rep, Gary Lachapelle, who told them A.H. was losing points each day and therefore not progressing through the levels. Vol. II 292, L8 – 293, L4. The calls increased to almost daily as A.H. spent more time in O.S.S. for infractions such as cursing or causing a disturbance:

> While in O.S.S. ..., they were supposed to be in there for twenty- four hours. They were to sit in structure for nineteen hours. That's where they are--if I remember right, that's where they sit on the concrete floor with their legs straight out and their hands in their lap. They could have their mattress and a blanket that they could keep up to their chest level at night when it was bedtime. The overhead lights would stay on, the fluorescent lights.

If he sat in structure for nineteen hours, then he was able to get a chair, to sit in a chair. Then at hour twenty-three, he was to write a 1, 000-word essay reflecting on what took him to the O.S.S. room. Then on hour twenty-four, if he complied with all the rules, he would be taken out.

However, if you broke structure one time in that nineteen-hour period, your time started over.

Q. What types of things were you finding out that [A.H.] was doing while he was in O.S.S.?

A. [A.H.] would be very loud. He would sing. He would punch his nose, make it bleed all over the place. He would write on the walls with his blood. The meals that they had were—two meals was peanut butter and jelly, bananas and raisins. One meal was lunchmeat with bananas, raisins, I believe. He would chew up the food, throw it at the camera so the staff member that was monitoring the cameras couldn't see him.

One time they caught [A.H.] taking his T-shirt off and wrapping it around, tying it around his neck to try to harm himself. Staff came in, stripped him down completely naked for a few hours. [He] of course did not like that.

[A.H.] would urinate on the walls and then lay on the ground with the door shut and blow on the urine to make it go out into the hallways. And he would be restrained... for being loud or not doing what he was supposed to be doing, screaming, yelling.

Vol. II 294, L4 – 296, L12. Children in O.S.S. did receive a bathroom break every two hours. Vol. II 325, L11-23.

Wendy recalled that A.H. was spending up to a week at a time in O.S.S., and one month he was there almost 29 days. Vol. II 296, L13. She was "a wreck" hearing about her son's experiences, but trusted Lachapelle's assurances that the program was going to work for A.H. Vol. II 297, L2-25. She was told that "it was [A.H.'s] choice to stay in O.S.S. because he knew what the expectation was to get out… To sit in structure, not talk, and after twenty-four hours, after he wrote his 1,000 word essay, he could get out. So he chose by his behaviors to stay in O.S.S." Vol. II 298, L9-19. She learned that D.H.S. had become involved in March 2015, but was reassured by Trane that "it was a disgruntled employee making allegations and that D.H.S is always trying to get them for something." Vol. II 299, L9-23.

Believing they were helping A.H., Wendy allowed him to return to the academy; he was placed in a new program – the Pride family – for boys who "were not leveling up in the program." Vol. II 301, L3-18. Lachapelle informed them that the boys in the Pride family, including now thirteen-year-old A.H., were "experimenting with sexual activity" and staff were investigating but could do little about

it. Vol. II 301, L8 – 303, L19. Wendy spoke to a D.H.S. worker and concluded that information they were receiving from Midwest Academy was at odds with information from D.H.S. Vol. II 304, L1-17. Wendy asked Trane and Lachapelle how they would keep the children safe; they inquired about video surveillance but were told that surveillance would be an invasion of privacy. Vol. II 302, L8 – 305, L3. When A.H.'s parents finally decided to remove him from Midwest Academy, Trane tried to talk them out of that decision, positing "What are you going to do when he does this to his sister?" Vol. II 305, L4-13. They had paid Midwest Academy $30,000. Vol. II 305, L17-25.

A.H. weighed 120 pounds when he entered Midwest Academy and was 90 pounds when he came home eleven months later. Vol. II 306, L1-8. He had difficulty sleeping at first, waking up screaming in the middle of the night. Vol. II 306, L18 – 307, L8. With the help of counseling, A.H. improved significantly after he left, but at the time of trial had still not spoken to his parents about his experiences and steadfastly refused to recount them to a D.C.I. agent. Vol. II 307, L20 – 310, L10. According to D.H.S. social worker Jennifer Richardson, A.H. spent 163 of his 323 days – or 50% of his time at Midwest

Academy – in O.S.S. Vol. V 281, L17 – 282, L23. A.H. had to repeat 7th grade because he spent so much time confined in O.S.S. Vol. II 329, L1-23.

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Although A.H. did not testify at trial, then-sixteen-year-old B.V. did. He, like A.H., was sent to Midwest Academy when he was twelve. Vol. III 74, L8 – 75, L14. He had anger issues and was "getting in trouble a lot" when his mother and juvenile services sent him to the academy. Vol. III 74, L25 – 75, L22. He met Mr. Ben on the first day. Vol. III 76, L16-25. B.V. rarely emerged from level 1 during his entire stay, and he spent a substantial amount of time in the O.S.S. for aggressive behavior and failing to follow directions. Vol. III 84, L11 – 85, L4. He explained that the typical stay was twenty-four hours, but if a student broke a rule while in O.S.S., the clock began again. Vol. III 85, L5-25. He also explained sitting in structure:

> Q. What were the rules in O.S.S.?
>
> A. That I have to be sitting with the back against the wall, feet on the ground, and sit there. When I sit there for about two hours without doing anything to start the time over, then basically the door is open. Nineteen hours would then result that you have a chair to be able to sit in the room. Either twenty-one or twenty-three hours is where you get a 1,000-

> word essay. Each time you're in O.S.S., 1,000 words is added each time, and it starts all over after 10,000 words.
>
> * * *
>
> Q. When could you go to the bathroom when you were in O.S.S.?
>
> A. When I raised my hand and asked from the staff that is in the O.S.S. room monitoring the cameras.
>
> Q. If you were sitting as you had said with your back against the wall and your legs out and you wanted to move your legs, what did you have to do?
>
> A. I have to wait to be called on to be able to ask to switch positions.

Vol. III 86, L1 – 87, L10.

Students would be given homework during in-school suspension, or I.S.S., but not in O.S.S. Vol. III 89, L17 – 90, L25. The lights were always on in O.S.S. and tapes of "a person talking" were occasionally piped in through speakers. Vol. III 91, L1-11. B.V. would sometimes refuse to eat and bang his head against the wall. Vol. III 89, L6 – 91, L18. D.H.S. became involved and B.V.'s mother later removed him from Midwest Academy; a few days later, as his mother was taking him out to dinner, he asked to go to the hospital instead.

Vol. III 95, L2-16. He was hospitalized and given intravenous fluids and nutrition. Vol. III 95, L17 – 96, L6.

B.V.'s mother, Christina, also testified at trial. She was aware of the O.S.S. rooms but was never informed that the children had to sit in structure for extended periods and could not move without permission. Vol. III 127, L16 – 128, L9. Christina began to get calls and emails from the academy about B.V. being in O.S.S. Vol. III 128, L10 – 130, L17. When she visited him three months into his stay, she did not recognize him immediately because he had lost so much weight; Mr. Ben assured her that his weight loss was not a concern. Vol. III 131, L10 – 132, L12. B.V. weighed 115 pounds in September of 2014 and by March, he weighed 89 pounds. Vol. V 277, L11-18. He spent 210 days at Midwest Academy and at least 133 of those days – or 63% – were spent in O.S.S. confinement.[2] Vol. V 280, L21 – 281, L16.

When D.H.S. child protection worker Jennifer Richardson arrived at Midwest Academy in March 2015, Trane seemed to be expecting her and told her only two of the seven children she was

[2] Jennifer Richardson testified that some of the O.S.S. logs were missing for each boy, but her calculations were based on the logs she had in her possession. Vol. V 280, L13 –281, L25.

going to interview were still at the academy – A.H. and B.V. Vol. V 252, L11 – 257, L21. A.H. was very talkative and explained all the rules and consequences at Midwest Academy. Vol. V 262, L8 – 263, L25. The social worker was concerned about A.H.'s extended experience in confinement. Vol. V 263, L12-24. As for B.V., he was in O.S.S. when they arrived, and he was very thin, withdrawn, pale, hungry, and bruised. Vol. V 258, L5 – 259, L25. B.V. did not realize he was bruised until he looked in the mirror; he also asked for food repeatedly. Vol. V 258, L5 – 259, L25.

When Jennifer Richardson came back in May, she spoke to Trane; he said that he developed the policies and rules at the academy and maintained that no child spent months in O.S.S. Vol. V 269, L14-9. He contended that both boys were helped "100%" by O.S.S. Vol. V 271, L22 – 272, L22.

The State called two expert witnesses at trial. Dr. Anna Salter, a forensic psychologist, testified about sexual abuse dynamics but offered no direct or indirect opinion regarding K.S.; she explained general concepts such as delayed disclosure, desensitization, and grooming. Vol. IV 190, L7 –242, L23. Dr. Stuart Grassian, a psychiatrist and authority on the effects of solitary confinement,

testified that isolation should never be used as punishment, that children are particularly sensitive to its effects, and that many organizations and jurisdictions have condemned solitary confinement, especially involving juveniles. Vol. VI 16, L7 –77, L10. Dr. Grassian opined that troubled teenagers are even less capable of controlling their behavior, and that a person who can respond to the concept of cause and effect will probably not find himself in solitary confinement in the first place. Vol. VI 27, L20 –33, L25; 56, L22 – 57, L19. He characterized a requirement of holding a certain physical position at length as sadistic. Vol. VI 53, L2-20. Dr. Grassian also discussed the ways in which prolonged isolation exacerbates rather than defuses the situation for a person who is out of control, only increasing the intensity by humiliating, enraging, and frightening the person. Vol. VI 38, L13 –40, L24.

Other witnesses testified about the rules, the levels, and the consequences of Midwest Academy. *See*, *e.g.*, Vol. VII 98, L21 – 99, L23 (family rep Lachapelle testifies that the 24-hour rule in O.S.S. was "just another rule in place" and talked about purposely feeding children in O.S.S. food that they hated, adding that "Midwest Academy was not Club Med"); Vol. III 4, L7 – 68, L7 (Stephan

Jansing, a student at the academy from 2004 through 2006 and a staffer there from 2014 through 2015 describes the levels, consequences, and O.S.S. in detail).

For his defense, Trane's wife Layani testified, noting that B.V. and A.H. were in O.S.S. by choice because they could have simply changed their behavior and been released. Vol. VI 215, L10 – 217, L21. Trane testified in his own defense, explaining that he "fell in love with working with troubled teens" while he was still in college. Vol. III 169, L10 –173, L10. After opening Midwest Academy on the site of an old county home in Keokuk, he served as the program director from 2007 through 2012, when he then handed off some responsibilities after an intervention; Trane acknowledged that the fact that he was a micromanager and a "control freak" necessitated the restructuring. Vol. VII 171, L1 –173, L13; 206, L9 – 211, L25. A litany of directors followed, but Trane remained the owner. Vol. VII 204, L6 –211, L25.

Trane testified that he took over as family rep for K.S. and Bailey because none of the staffers wanted to work with them. Vol. VII 300, L12 –303, L16. He admitted that he distributed the sexual surveys, conceded that he took K.S. and a few others to Victoria's

Secret, and acknowledged that he conducted the body image exercises. Vol. VII 266, L9 –294, L12. Trane denied performing K.S.'s body scan or engaging in any sexual impropriety with her. Vol. VII 298, L16 –299, L14; 309, L21 –321, L7.

As noted, the jury acquitted Trane of third-degree sexual abuse but convicted him of assault with intent to commit sexual abuse, sexual exploitation by a counselor or therapist, and child endangerment. Additional facts will be discussed as relevant to the arguments below.

ARGUMENT

I. The Trial Court Properly Rejected Trane's Ineffective Assistance of Counsel Claims as a Basis For His Motion For New Trial.

Standard of Review.

This court reviews a trial court's ruling on a motion for new trial for an abuse of the court's broad discretion. *See State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003); *see also* Iowa R. App. P. 6.904(3) (noting that the trial court has "broad but not unlimited" discretion to "effectuate[] substantial justice between the parties.").

Preservation of Error.

Trane preserved error by alleging various ineffective assistance of counsel claims in his motion for new trial and arguing that the court should consider the claims under Iowa Rule of Criminal Procedure 2.24(2)(b). Motion for New Trial; Supplemental Motion for New Trial; App. 45-53, --.

Merits.

Trane's first assignment of error involves his attempt to litigate ineffective assistance of counsel claims in the context of a motion for new trial, with newly retained counsel. This court should conclude that the trial court rightly curtailed that effort.

Iowa Rule of Criminal Procedure 2.24(2)(b)(9) provides:

> The court may grant a new trial for any or all of the following causes:
>
> (1) When the trial has been held in the absence of the defendant, in cases where such presence is required by law, except as provided in rule 2.27.
>
> (2) When the jury has received any evidence, paper or document out of court not authorized by the court.
>
> (3) When the jury have separated without leave of court, after retiring to deliberate upon their verdict, or have been guilty of any misconduct tending to prevent a fair and just consideration of the case.

> (4) When the verdict has been decided by lot, or by means other than a fair expression of opinion on the part of all jurors.
>
> (5) When the court has misdirected the jury in a material matter of law, or has erred in the decision of any question of law during the course of the trial, or when the [prosecutor] has been guilty of prejudicial misconduct during the trial thereof before a jury.
>
> (6) When the verdict is contrary to law or evidence.
>
> (7) When the court has refused properly to instruct the jury.
>
> (8) When the defendant has discovered important and material evidence in the defendant's favor since the verdict, which [he] could not with reasonable diligence have discovered and produced at the trial…
>
> (9) When from any other cause the defendant has not received a fair and impartial trial.

Iowa R. Crim. P. 2.24(2)(b)(1-9).

Trane contends that Rule 2.24(2)(b)(9) permits him to litigate ineffective assistance of counsel claims in a motion for new trial. The rule's so-called catch-all provision admittedly contains broad language. That subsection, however, must be read in conjunction with the subsections preceding it, the caselaw explaining the limited scope of a motion for new trial, and other statutory language. First, the specific enumerated grounds in the new trial rule implicate

circumstances involving the structure of the trial itself. The final subsection should be read in the same manner – that the defendant's right to a fair and impartial trial may have been abridged by an irregularity or impermissible bias by the court or jury or an analogous circumstance. *See, e.g.*, *State v. Silva*, No. 17-0802, 2018 WL 1858294, at *1 (Iowa Ct. App. April 18, 2018); *State v. Christensen*, No. 17-0005, 2018 WL 1865353, at *2 (Iowa Ct. App. April 18, 2018).

Second, even if this court is inclined to read subsection 2.24(2)(b)(9) as unlimited in scope, it must nonetheless apply long-standing caselaw to the analysis. With the exception of weight of the evidence claims[3], a motion for new trial preserves nothing that has not been previously raised. *See State v. Johnson*, 476 N.W.2d 330, 333-34 (Iowa 1991) ("A post-verdict motion challenging the jury panel simply comes too late to comply with the policies behind the preservation requirement."); *State v. Steltzer*, 288 N.W.2d 557, 559 (Iowa 1980) ("[A] motion for new trial ordinarily is not sufficient to

[3] A claim that the evidence was "contrary to law or evidence" is a weight of the evidence challenge, drawing the court into questions of witness credibility. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). An *Ellis* claim, unlike the other listed grounds for a new trial, would not become apparent until the verdict was rendered, and no earlier opportunity to object would present itself.

preserve error where proper objections were not made at trial."); *see also State v. Hilliard*, No. 17-1336, 2018 WL 4923000, at *2 (Iowa Ct. App. Oct. 10, 2018) ("Hillard first raised his jury-composition claim in his post-trial motion, which is too late to preserve error."); *State v. Bolden*, No. 14-0445, 2016 WL 3784887, at *1 (Iowa Ct. App. June 15, 2016) ("Because Bolden failed to object to the composition of the jury panel until the motion for new trial, the objection is waived."); *State v. Bucklin,* 304 N.W.2d 452, 454 (Iowa 1981) (an evidentiary objection "was not raised until the motion for new trial was made. In order to preserve error, objections must be timely and be raised at the earliest time the error becomes apparent… Defendant did not preserve error on this issue."); *State v. Droste*, 232 N.W.2d 483, 488 (Iowa 1975) (a new trial motion must stand or fall on exceptions taken at trial and a party cannot amplify or add new grounds in a post-trial motion). A motion for new trial is one last opportunity for the court to revisit alleged deficiencies that occurred during trial and take corrective measures before pronouncing judgment. It is not an opportunity to raise new claims that have not been raised during trial.

Third, and perhaps most important, the statutory scheme for litigating ineffective assistance claims is clear. Allegations of

counsel's ineffectiveness are properly and regularly reviewed through a vehicle designed for that very purpose – Chapter 822. Iowa Code section 814.7(1) provides:

> An ineffective assistance of counsel claim in a criminal case shall be determined by filing an application for postconviction relief pursuant to Chapter 822, except as otherwise provided in this section. The claim need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for postconviction relief purposes.

Iowa Code § 814.7 (2017). To the extent that Rule 2.24(2)(b)(9) conflicts with Iowa Code section 814.7(1), section 814.7(1) should prevail. Rule 2.24(2)(b)(9) is a general provision governing new trial grounds, whereas 814.7(1) specifically provides that ineffective assistance of counsel claims should be litigated under Chapter 822. If a specific statutory provision cannot be harmonized with a conflicting general provision, the specific provision controls. *See Christiansen v. Iowa Bd. of Educational Examiners*, 831 N.W.2d 179, 189 (Iowa 2013); *Doe v. Ray*, 251 N.W.2d 496, 501 (Iowa 1977).

Most postconviction relief proceedings involve allegations of ineffective assistance of counsel, and numerous rules and procedures are in place to facilitate the orderly progression of those claims. *See, e.g.*, Iowa Code § 822.2 (listing grounds for relief, including claim

that the conviction was obtained in violation of the state or federal constitution); Iowa Code § 822.3 (detailing method of filing application and setting forth the three-year statute of limitations and exception for grounds of law or fact that could not have been raised earlier); Iowa Code § 822.4 (explaining contents of applications); Iowa Code § 822.5 (discussing payment of costs); Iowa Code § 822.6 (providing for a dismissal or summary disposition on the pleadings under certain circumstances); Iowa Code § 822.7 (noting "[a]ll rules and statutes applicable in civil proceedings including pretrial and discovery procedures are available to the parties" and providing that the postconviction court "may receive proof of affidavits, depositions, oral testimony, or other evidence, and may order the applicant brought before it for the hearing); Iowa Code § 822.8 (discussing waiver and *res judicata* principles).

The provisions of Chapter 822 are critical to a fair resolution of ineffective assistance claims for all involved, including the applicant and the lawyer alleged to be ineffective; thus, the appellate courts usually decline to decide ineffective assistance claims on direct appeal. Resolution of these claims is generally reserved for postconviction review because of the seriousness of the claim to

counsel, as well as the fairness to the proceedings in which the ineffective assistance is alleged to have occurred. *See State v. Atley,* 564 N.W.2d 817, 833 (Iowa 1997); *Kellogg v. State*, 288 N.W.2d 561, 563 (Iowa 1980). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Stewart,* 691 N.W.2d 747, 750 (Iowa Ct. App. 2004) (citing *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978)).[4]

Moreover, the applicant is better served by proceeding under Chapter 822 because of discovery tools and other rights made available to him. In contrast, attempting to morph a motion or sentencing hearing into a full-blown trial to litigate hotly contested issues without any structural overlay benefits no one. *See Humphrey*

[4] True, Iowa appellate courts have considered ineffective assistance claims raised in motions for new trial. *See*, *e.g.*, *State v. Tjernagel*, No. 15-1519, 2017 WL 108291, at *1, 6-8 (Iowa Ct. App. Jan. 11, 2017). However, the State is unaware of a case in which an Iowa appellate court has ruled, over the State's argument to the contrary, that a new trial motion is an appropriate procedural vehicle to raise an ineffective assistance of counsel claim. *C.f. State v. Jacobs*, No. 01-0826, 2002 WL 1428785, at *1 (Iowa Ct. App. July 3, 2002) (preserving for postconviction claims of ineffective assistance raised in a motion for new trial that the trial court refused to hear after it determined that "allegations of ineffective assistance of counsel would more properly be dealt with on appeal or... in postconviction proceedings").

v. Commonwealth, 962 S.W.2d 870, 872 (Ky. 1998) (noting that while defendants are in Kentucky permitted to raise ineffective assistance of counsel claims in a motion for new trial, the claims "are best suited to collateral attack proceedings, after the direct appeal is over, and in the trial court where a proper record can be made" because of abbreviated post-trial time frames and ethical concerns arising from a lawyer asserting his own ineffectiveness). And contrary to Trane's suggestion, a defendant need not wait years to file a postconviction application; he can file it immediately.

As the prosecutor noted, a motion for new trial hearing is simply not the proper vehicle to litigate complex ineffective assistance claims:

> What has happened today is exactly why ineffective assistance of counsel is dealt with at a trial, at a PCR trial, because so much has been thrown out there, and persons were not able to respond to it. The State wasn't aware of what was going to be presented. Everything that has been put out there in regards to the ineffective assistance should be left for that and not addressed here.

See Sent. p. 199, L10-19.

This court should conclude that the trial court properly restricted Trane's efforts to bypass the orderly presentation of his ineffective

assistance claims under Chapter 822. His claim to the contrary should be rejected.

II. Counsel Was Effective Despite Declining to Move to Sever the Sexual Abuse and Sexual Exploitation By a Counselor or Therapist Counts From a Count of Child Endangerment.

Scope of Review.

Ineffective assistance of counsel claims are reviewed *de novo*. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010).

Preservation of Error.

Claims of ineffective assistance are not subject to ordinary concepts of error preservation. *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011).

Merits.

Trane next contends that counsel was constitutionally deficient in failing to move to sever the counts involving sexual conduct from the child endangerment count. To prevail on an ineffective assistance claim involving complaints of specific acts or omissions, the defendant must show that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *State v. Fountain*, 786 N.W.2d 260, 266-67 (Iowa 2010). Ultimately, the test of ineffective assistance of counsel rests on whether counsel's performance was

reasonably effective; the defendant must show that the performance fell below an objective standard of reasonableness such that his lawyer was not functioning as "counsel" as guaranteed by the Sixth Amendment. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984).

Judicial scrutiny of counsel's performance is highly deferential, and this court indulges in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *See Strickland*, 466 U.S. at 689. A defendant is not entitled to perfect representation, but rather only that which is within the range of normal competency. *See State v. Artzer,* 609 N.W.2d 526, 531 (Iowa 2000). "Improvident trial strategy, miscalculated tactics, [or] mistakes in judgment do not necessarily amount to ineffective assistance of counsel." *Osborn v. State,* 573 N.W.2d 917, 922 (Iowa 2008). Counsel here was effective despite not moving to sever the charges.

Iowa has a liberal rule allowing joinder of charges for trial. Iowa Rule of Criminal Procedure 2.6(1) provides:

> Two or more indictable public offenses which arise from the same transaction or occurrence or from two or more transactions or occurrences constituting parts of a common

> scheme or plan, when alleged and prosecuted contemporaneously, shall be alleged and prosecuted as separate counts in a single complaint, information or indictment, unless, for good cause shown, the trial court in its discretion determines otherwise.

Iowa R. Crim. P. 2.6(1). Because the rule promotes judicial economy, the accused bears the burden to prove prejudice from joinder of charges for trial. *State v. Delaney*, 526 N.W.2d 170, 174 (Iowa 1994). Here, Trane cannot establish that severance would have been appropriate or that he was prejudiced by his lawyer's decision regarding joinder.

The lynchpin of the joinder issue is whether the two charges are part of a "common scheme or plan." *State v. Elston*, 735 N.W.2d 196, 198-99 (Iowa 2007); *State v. Oetken*, 613 N.W.2d 679, 689 (Iowa 2000). The "common scheme" must be more than the commission of two similar crimes by the same person. *Oetken*, 613 N.W.2d at 679. The two offenses must have a "common link," which can be "a single or continuing motive." Relevant factors in deciphering the single or continuing motive include "intent, modus operandi, and the temporal and geographic proximity of the crimes." *Id.*

Iowa appellate courts have found a common scheme or plan in a variety of circumstances. *See Oekten*, 613 N.W.2d at 689 ("Oetken

committed two burglaries, on two consecutive days, using similar methods of operation – *i.e.*, he traveled through the rural countryside in search of homes that were unoccupied during traditional work hours, he knocked to ascertain the abodes were indeed vacant, broke and entered the premises through the rear doors, and proceeded to steal small portable objects such as TVs, VCRs, and guns. This constitutes sufficient evidence of a common scheme or plan with a single continuing motive."); *State v. Lam*, 391 N.W.2d 245, 250 (Iowa 1986) ("The State's evidence is sufficient to support a finding that the two offenses charged in the amended information were parts of a common scheme or plan to burglarize apartments during normal working hours. It is readily inferable that both offenses were products of a single and continuing motive for obtaining small portable objects from apartments for money."); *Delaney*, 526 N.W.2d at 175 (the eight fraudulent loan transactions charged in the trial information covered an eleven month period; the money was obtained "by similar bewitching methods," accompanied by "a continuing self-indulgent motive," and the victims all lived in the same community).

While the crimes of sexual abuse and sexual exploitation are distinct from child endangerment, they occurred in close temporal and geographic proximity. A.H. and K.S. attended Midwest Academy at the same time. Vol. II 281, L6-12; Vol. III 160, L18-20. A.H.'s time in O.S.S. spanned his entire tenure at the academy while K.S. was groomed or subjected to sexual conduct much of the time she was there, rendering the events close in time. *See Elston*, 735 N.W.2d at 197, 199 (20-month scheme did not defeat propriety of joinder). The crimes all occurred at Midwest Academy.

Trane counters that good cause existed to sever the charges. Defendant's Brief, 43. Good cause arises when prejudice from joinder outweighs the State's interest in judicial economy. *Elston,* 735 N.W.2d at 199 (citing *Oetken,* 613 N.W.2d at 689). Here, the State had a strong interest in judicial economy. Trane's trial lasted eight days and spanned almost 2,500 transcript pages. Many witnesses testified to background matters that applied to all charges or had pertinent information proving multiple counts. K.S., Rachel Pate, Cheyenne Jerred, Elizabeth Webster, D.C.I. Agent Joe Lestina, Jennifer Richardson, and F.B.I Special Agent Thomas Pearson all fit that description. *See*, *e.g.*, Vol. III 170, L3-21, 179, L10-23, 285, L6 –

288, L24; Vol. V 8, L19 – 9, L17, 18, L13 – 19, L4. In addition, almost every witness explained the structure of Midwest Academy, its myriad rules and its culture, and Trane's position of authority – all circumstances enabling his crimes.

These same facts go to Trane's intent and *modus operandi*. *See Elston*, 735 N.W.2d at 199 (reasoning defendant's intent to victimize children to satisfy his sexual desires showed similar intent supporting joinder of two sex-related charges). For instance, former student Lauren Synder testified that Trane was "extremely God-like" at Midwest Academy. Vol. III 288, L8 – 289, L16. She explained how he could give and take away points and privileges at will. Vol. III 288, L8 – 289, L16. She also explained how traumatic O.S.S. was, noting that once she was released from "the box" she was ready to comply with any demand to avoid being sent back. Vol. III 285, L16 – 287, L12. The evidence pertaining to the child endangerment charge – demonstrating the draconian measures Midwest Academy used to control its students – was also critical to understanding K.S.'s testimony, including the reason she seemingly did not resist Ben Trane, and her inability to give any meaningful consent under the circumstances of this extreme power differential. *See generally State*

v. Meyers, N.W.2d 132, 140-47 (Iowa 2011) (concluding that the teenage victim's seemingly voluntary sexual and "romantic" relationship with her stepfather was against her will, given her vulnerable psychological state).

Finally, in any event, Trane cannot establish prejudice. The court instructed the jury: "You must determine whether the defendant is guilty or not guilty separately on each count." Instruction 13; App. --. This instruction ensured that the jury would consider each charge independently. *State v. Owens,* 635 N.W.2d 478, 483 (Iowa 2001) ("[W]e presume the jury follows the instruction[s]… "). And all the charges involved harming children, so juror sympathy on one child-victim charge would not taint resolution of the other charges. *Cf. Elston,* 735 N.W.2d at 197 (eighteen counts of sexual exploitation of a minor and one count of indecent contact with a child tried together). Trane argues that it was impossible for the jury to hear evidence of one charge without that same evidence being used to find him guilty of other charges. Defendant's Brief, 47. While Trane may not believe jurors can compartmentalize, his jury did just that. Trane was acquitted of third-degree sexual abuse and convicted only of assault with intent to commit sexual abuse. Under

those circumstances, he cannot demonstrate that the jury failed to individually consider his guilt or innocence on each count. His ineffective assistance claim regarding severance should be rejected.

III. The Trial Court Properly Concluded That Trane's Request to Present Alleged Prior False Claims of Sexual Abuse was Untimely and Without Merit When Urged on the First Day of Trial.

Standard of Review.

This court reviews rulings on the admissibility of evidence offered pursuant to Rule 5.412 for an abuse of the trial court's discretion. *State v. Alberts*, 722 N.W.2d 402, 407-08 (Iowa 2006).

Preservation of Error.

Trane preserved error to the extent that he presented a prior false claim argument below. *See* Rule 5.412 Motion; App. 23-24. As discussed below, however, Trane's motion was untimely and not accompanied by a written offer of proof.

Merits.

Trane's third claim involves Iowa's rape shield law, Iowa Rule of Evidence 5.412. Because he failed to comply with the procedural requirements of the rule, the court properly refused to allow Trane to present evidence of allegedly false prior claims made by the victim,

K.S. The State does not dispute that, upon a proper showing – including notice and proof of falsity by a preponderance of the evidence – a false prior allegation of sexual abuse is admissible to attack the credibility of a victim. Trane did not make a proper showing here because his motion was untimely and was not accompanied by a written offer of proof. He also failed to prove, by a preponderance of the evidence, that the prior allegation was false.

A. Timeliness.

Rule 5.412 explicitly sets forth the mechanism by which a defendant may seek to introduce evidence of arguably false prior allegations of sexual abuse. Iowa R. Evid. 5.412(c)(1); *see Alberts*, 722 N.W.2d at 410 (noting these requirements also "apply to allegedly false claims of sexual conduct because they are covered by the rape-shield law unless proven to be false"). Here, Trane failed to comply with the requirements of Rule 5.412(c).

First, Rule 5.412 requires that a motion to introduce arguably false prior allegations must be made in writing "not later than 15 days before the date on which the trial in which such evidence is to be offered is scheduled to begin," with an exception for newly discovered evidence. Iowa R. Evid. 5.412(c)(1). Before jury selection on the first

day of trial, Trane raised the issue of prior allegations against K.S.'s adoptive parents. The untimeliness of the request therefore provided a valid basis for the trial court to exclude the evidence.

The notice requirement serves important policy interests. *Michigan v. Lucas,* 500 U.S. 145, 153–54 (1991) ("The notice-and-hearing requirement serves legitimate state interests in protecting against surprise, harassment, and undue delay."); *see also State v. Lajoie*, 849 P.2d 479, 484 (Or. 1993). The notice requirement "protects against harassment," as a sex abuse prosecution "requires the alleged victim to discuss painfully intimate matters in front of strangers and to allow others to discuss these matters." *Lajoie*, 849 P.2d at 484. "A notice requirement such as the one contained in [Iowa R. Evid. 5.412(c)] protects the alleged victim against surprise and needless anxiety by ensuring adequate warning of the extent of the ordeal that he or she will face at trial." *Id.* at 484.

Appellate courts interpreting identical or similar language have concluded that failure to provide adequate notice provides a valid basis for excluding the evidence. *See, e.g.*, *Mayo v. Com.*, 322 S.W.3d 41, 49 (Ky. 2010) (noting a "trial court ha[s] the discretion to rely upon the lack of notice alone to exclude testimony about the victim's

sexual history [under the rape shield law.]"); *Roberson v. State*, 61 So. 3d 204, 221 (Miss. Ct. App. 2010) (affirming exclusion of arguably false prior allegations based on untimely motion that was not served on victim); *State v. Poitra*, 785 N.W.2d 225, 234 (N.D. 2010) (affirming exclusion of evidence because defendant did not file timely motion and did not provide notice to victim); *United States v. Seymour*, 468 F.3d 378, 387 (6th Cir. 2006) (finding failure to provide notice under Rule 412(c)(1) rendered evidence inadmissible); *United States v. Ramone*, 218 F.3d 1229, 1235 (10th Cir. 2000) (affirming trial court's rejection of Rule 412 evidence based on untimely notice, and also finding no Sixth Amendment violation); *United States v. Eagle Thunder,* 893 F.2d 950, 954 (8th Cir. 1990) (failure to timely serve notice was sufficient to allow trial court to exclude proffered Rule 412 evidence). This court should come to the same conclusion. Trane's failure to provide the required notice under Rule 5.412(c)(1) provides an adequate basis to affirm the trial court's exclusion of the evidence here.

While Trane blames his untimeliness on the State, there is no evidence that the prosecutor withheld any discovery materials or controlled defense counsel's discovery timeline. The academy's

records in this case were voluminous and often confidential. *See* Oct. 27, 2017 Discovery Agreement; App. 13-14. It was Trane's insistence on invoking his speedy trial right despite his lawyer's pleas for more time that created the rape shield timeliness issue. *See* Sent. 81, L21 – 83, L25. While a defendant does not automatically forfeit a speedy trial for the sake of discovery, that right may have to give way when the case involves an extraordinary volume of information – in this case, a large U-Haul truck full of files compiled onto computer discs. *See* Sent. 18, L12 – 88, L18 (detailing the discovery process between the parties). Trane's injury in this instance is self-inflicted.

B. Proof of Falsity.

"In keeping with the policy behind our rape shield law, it is imperative that a claim of sexual conduct (or misconduct) by the complaining witness be shown to be false before it is admissible at trial." *Alberts*, 722 N.W.2d at 409. "[A] criminal defendant wishing to admit such evidence must first make a threshold showing to the trial judge outside the presence of the jury that (1) the complaining witness made the statements and (2) the statements are false, based on a preponderance of the evidence." *Id.*

Here, neither party offered sworn testimony concerning the allegedly false prior claims, and the State was under no obligation to do so, given Trane's untimely request. The burden rests on the defendant. *See* Iowa R. Evid. 5.412(c). The prosecutor did tell the court that K.S. had never recanted her prior allegations. Vol. II 238, L20 –241, L16. The only indication of falsity was the second-hand and self-serving statements of the adoptive parents against whom the allegations were made. Thus, Trane failed to carry his burden to prove by a preponderance of the evidence that K.S.'s allegations were false.

A tie in this analysis breaks in favor of the State. *See Swift, Inc. v. Sheffey*, 2010 WL 4792321, at *3 (Iowa Ct. App. 2010) ("Where evidence is in equipoise, the party who bears the burden of proof cannot prevail."); *Greenberg v. Alter Co.*, 124 N.W.2d 438, 442 (Iowa 1963) (concluding that when "the best that can be said is the evidence is in equipoise," the plaintiff has not carried the burden of proof by a preponderance of the evidence); *see also State v. West,* 24 P.3d 648, 656 (Hawaii 2001) ("[W]here the trial court is unable to determine by a preponderance of the evidence that the statement is false, the defendant has failed to meet his or her burden, and the evidence may

be properly excluded."). Unless it is more likely than not that a statement was a false allegation of sexual assault, the defendant has not made the threshold showing necessary to offer the evidence. The adoptive parents' claim of falsity here does not outweigh K.S.'s consistent allegation of abuse. The trial court did not abuse its discretion in excluding this evidence on the first day of trial.

IV. Counsel Was Effective and Under No Obligation to Object to the Testimony of Dr. Anna Salter and A.H.'s Mother, Wendy, as Improper Vouching.

Scope of Review and Preservation of Error.

Ineffective assistance claims are reviewed *de novo* and are not subject to the ordinary constraints of error preservation. *See Everett*, 789 N.W.2d at 155.

Merits.

Next, Trane complains about defense counsel's decision not to object to testimony from Dr. Anna Salter and A.H.'s mother, Wendy. Defendant's Brief, 56-65. He contends counsel was ineffective in failing to lodge "improper vouching" objections to the witnesses' testimony.

A. Testimony from Dr. Anna Salter.

Dr. Anna Salter, a forensic psychologist and expert on both sexual abuse victims and offenders, testified at trial. Her testimony fell under Iowa Rule of Evidence 5.702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Iowa R. Evid. 5.702. Since the adoption of the rule, the trend "has been toward broadening the scope of admissibility of expert testimony." *Id.* The Iowa Supreme Court has consistently described its approach to the admission of expert testimony as "liberal." *Leaf v. Goodyear Tire & Rubber Co.,* 590 N.W.2d 525, 531 (Iowa 1999).

Trane contends that the expert testimony in his case amounted to an indirect comment on the credibility of a witness, in violation of the rule originating in *State v. Myers*, 382 N.W.2d 91, 94-98 (Iowa 1986) and culminating in *State v. Dudley*, 856 N.W.2d 668, 675-78 (Iowa 2014). In *Myers*, the trial court admitted expert testimony maintaining that children rarely lie about sexual abuse; the Iowa Supreme Court found that the testimony crossed that "fine but

essential" line between an opinion that would be helpful to the jury and one that merely conveys a conclusion about the defendant's guilt. *Myers*, 382 N.W.2d at 98.

Experts are permitted to testify to matters that "explain relevant mental and psychological symptoms present in sexually abused children," but will generally not be permitted to opine on matters "that either directly or indirectly render an opinion on the credibility or truthfulness of a witness." *Myers,* 382 N.W.2d. at 97; *see also State v. McEndree*, No. 12-0983, 2013 WL 3458217 (Iowa Ct. App. July 10, 2013); *State v. Noe,* No. 11-1807, 2012 WL 6193963, *5 (Iowa Ct. App. Dec. 12, 2012) (sanctioning testimony about the reactions of sexual abuse victims generally, including delayed reporting)*; State v. Payton,* 481 N.W.2d 325, 327 (Iowa Ct. App. 1992) (finding evidence concerning delayed reporting admissible); *State v. Seevanhsa*, 495 N.W.2d 354, 356-58 (Iowa Ct. App. 1992) (finding child sexual abuse accommodation syndrome evidence properly admitted, noting "We hold [the expert's] testimony assisted the trier of fact in both understanding the evidence and determining the facts in issue.").

In *State v. Dudley*, the court held that an expert testifying in a child sexual abuse case crosses the "very thin line" of admissibility when the testimony is connected to specific characteristics of the victim. *Dudley*, 856 N.W.2d at 675-78. An expert cannot offer an opinion that the victim's physical manifestations, behaviors, or demeanor is "consistent with" children who have suffered sexual abuse trauma. *Dudley*, 856 N.W.2d at 677-78; *see also State v. Jaquez*, 856 N.W.2d 663, 664-66 (Iowa 2014) (forensic interviewer's testimony that victim's demeanor was "completely consistent with a child who has been traumatized, particularly multiple times" impermissible vouching under *Dudley*); *State v. Brown*, 856 N.W.2d 685, 689 (Iowa 2014) (doctor's report that the child victim's "disclosure [of sexual abuse] is significant and that an investigation is clearly warranted" was impermissible because it conveyed that the child was telling the truth).

In *Dudley*, the treating child psychologist testified that the victim suffered from post-traumatic stress disorder and exhibited tell-tale signs of sexual abuse, such as cutting her hair and dressing in layers. *Dudley*, 856 N.W.2d at 677-78. The *Dudley* forensic interviewer testified that the victim should receive therapy and avoid

contact with the defendant. *Id.* The court concluded that both experts crossed the line of admissibility because their testimony suggested that this victim must be telling the truth. *Id.* The *Dudley* court reaffirmed its *Myers* holding but described general expert testimony in child sexual abuse cases as "very beneficial to assist the jury in understanding some of the seemingly unusual behavior child victims tend to display." *Dudley*, 856 N.W.2d at 675.

In this case, Dr. Salter testified in the manner contemplated and sanctioned in *Dudley*. She explained general concepts that would be counterintuitive to the average juror; she never directly or indirectly commented on K.S. She discussed the phenomena of delayed reporting and incomplete disclosure in general terms, explaining various reasons that a victim would fail to immediately and fully disclose abuse. Vol. IV 200, L9 – 209, L23. She cautioned that there is "no one response to sexual assault, for children or adults. There are a variety of… responses to sexual assault." Vol. IV 18-21. Dr. Salter also explained the concepts of grooming and desensitization. Vol. IV 209, L24 – 227, L19.

Trane takes issue with several of Dr. Salter's examples of counterintuitive victim behavior. For instance, the psychologist

spoke of the tendency to attempt to return to normal life despite a traumatic event, discussing the fact that even the victims of the Boston Marathon tried to "[go] on with their lives" and "act normal." Vol. IV 206, L19 – 207, L17. Trane contends that Dr. Salter was vouching for the credibility of the victims in this case by comparing them to the "Boston Strong" survivors. Defendant's Brief, 59-60. Read in context, however, Dr. Salter was merely using an example in the realm of common experience to demonstrate that victims do not always act as if they have been victimized, and that one cannot necessarily reach a conclusion from the lack of a dramatic and visible reaction. She did not draw any unfair comparisons to this case and did not compare Trane to the Boston Marathon bomber. Counsel was under no duty to lodge a meritless objection.

Dr. Salter's reference to high status offenders was similarly not objectionable. In discussing grooming by sex offenders who "are not jumping out from the bushes," different dynamics are at play, she explained. Dr. Salter referred to Boy Scout leaders, teachers, doctors, and Olympics coaches: "So the most successful sex offenders are those who have considerable social skills or high status, such as an Olympic level coach. If I think you could send my child to the

Olympics, then you've got very high status with me. I'm not going to question the amount of time you spend alone with my child." Vol. IV 212, L24 – 213, L6. She explained that if a child's parents are not also groomed, they will not allow the person to have access to the child. Vol. IV 212, L18-23.

Grooming is a subset of sexual abuse dynamics with which the jurors would likely be unfamiliar, and neither *Dudley* nor other Iowa appellate opinions have prohibited testimony on the subject. For example, in *State v. Towney*, No. 14-1673, 2016 WL 530262, *2-3 (Iowa Ct. App. Feb. 10, 2016), the court characterized expert testimony at issue this way: "Dr. Harre testified as to what C.B. had told her concerning Towney's sexual contact with her… Dr. Harre also testified about her experience with reporting of sex abuse and the process of grooming sex abuse victims." *Id.* at 2. The *Towney* court concluded that a *Dudley* vouching claim had not been presented nor adequately briefed, but ultimately concluded that "Dr. Harre's statements, when considered individually, do not cross the fine line set forth in *Dudley*." *Id.* The few earlier cases that mention grooming foreshadow no admissibility issues. *See State v. Carver*, No. 11-0848, 2012 WL 1439029, *4 (Iowa Ct. App. April 25, 2012) (noting the

expert's discussion of delayed reporting because a child may love and trust the abuser, and observing that the victims "presented credibly with detailed accounts of Carver's grooming behaviors and details regarding their abuse"); *State v. Allison*, No. 11-0774, 2012 WL 2819324, *4 (Iowa Ct. App. July 11, 2012) (noting that the State's expert testified "Because of grooming, the child may really feel very special to that individual, and they may have no other equivalent experience with any other person in their life that is that special to them"). As in *Towney*, the discussion of ways in which sex offenders groom was couched in general terms and did not veer into inadmissible territory. Counsel rightly declined to object because this testimony remained on the proper side of the *Dudley* line.

Trane argues that the Olympic coach comment was a reference to infamous convicted pedophile Dr. Larry Nassar, the U.S.A. gymnastics team doctor who sexually abused scores girls under the guise of medical treatment. Defendant's Brief, 60-62. While the State does not quarrel with the proposition that a reference to the Olympics could bring Dr. Nassar to mind, even a direct reference would not have been improper. In the same vein, Trane assails Dr. Salter's reference to sex offenders with whom she was acquainted.

Defendant's Brief, 61. Dr. Salter did not equate Trane with Dr. Nassar or the pedophiles she had treated and studied. She was educating the jurors on a subject with which they were likely unfamiliar – as *Dudley* allows – by discussing behaviors prevalent in sexual abuse cases and using real world examples to elucidate her testimony. There was no basis for defense counsel to object at the mention of sex offenders by an expert called to explain the dynamics between sex offenders and their victims. *See State v. Lewis*, No. 17-1193, at *3-4 (Iowa Ct. App. Sept. 26, 2018) (finding nurse's expert testimony regarding sex abuse victims' tendency to "shut down" and not resist – including a specific example of the rationale given by a sexual assault victim the nurse had interviewed – to be appropriate expert testimony; "What happened here was not impermissible vouching. Nurse Grier did not testify regarding any statement made by E.B.... In fact, the record does not indicate Grier was ever present for E.B.'s testimony. Rather, Grier explained the impact fear commonly has on a victim's reaction to be being sexually assaulted... Such opinion evidence is admissible as long as it avoids any direct comment on the experience of the witness at issue and only generally addresses victims of sexual

abuse."). Dr. Salter's testimony, like the testimony in *Lewis*, avoided any direct comment on K.S. and was couched in generalities.

This case is unlike *State v. Wilkins*, 693 N.W.2d 348, 352 (Iowa 2005), cited by Trane. There, the court condemned the prosecutor's repeated references to the defendant as "O.J.", his nickname. *Wilkins*, 693 N.W.2d at 351-52. The court found that the prosecutor's use of the moniker O.J. more than a dozen times throughout the defendant's first-degree murder trial "clearly suggest[s] that he was using this form of reference to disparage the defendant in front of the jury" by calling to mind notorious convicted murderer O.J. Simpson. *Id.* The court ultimately concluded, however, that Wilkins could not establish prejudice. *Id.* at 352. The prosecutor's references in *Wilkins* were pervasive and unrelated to any legitimate issue in the case. In contrast, Dr. Salter's examples were brief and illustrative of the testimony regarding the dynamics of sexual abuse. Because she did not disparage Trane or even mention him in her testimony, counsel had no cause to object.

B. Testimony from Wendy.

Trane also contends that defense counsel was ineffective in failing to object to the testimony of A.H.'s mother, Wendy.

Defendant's Brief, 62-64. Trane likens her testimony to improper vouching and contends it was incumbent upon counsel to object. Wendy testified that A.H. was placed in O.S.S. with increasing frequency, and spent 29 days in O.S.S. in one particular month. Vol. II 293, L8 – 297, L25. When asked if Wendy had spoken to A.H. about his experience at Midwest Academy, she testified that "he won't talk to anyone," including his doctors; "Dr. Stiles eventually said, we should not push him to try to talk about it. When he's ready he will talk." Vol. IV 307, L20 – 308, L7.

Contrary to Trane's contention, this testimony does not vouch for A.H.'s credibility. There are no statements by A.H. for which to vouch. Testimony that A.H. was silent about his Midwest Academy experience was based on Wendy's personal observations and was proper testimony. *See* Iowa R. Evid. 5.701. Moreover, the doctor's statement that Wendy should honor A.H.'s silence was not hearsay because it was not offered for the truth of the matter asserted – that Wendy should not push her son to speak – but rather to demonstrate A.H.'s silence, a fact already in the record through Wendy's own testimony.

Regardless, Trane cannot establish resulting prejudice in the context of ineffective assistance, as he must. Had counsel successfully objected, she would have only succeeded in keeping out evidence of A.H.'s non-statements. Given the compelling and detailed testimony from Wendy and other witnesses about A.H.'s experiences in O.S.S. under the ultimate direction of Trane, testimony that A.H. had not discussed his experience would have hardly tipped the balance. There is no reasonable likelihood of a different outcome had counsel objected and succeeded in excluding this testimony. Trane's suggestion to the contrary should be rejected.

V. Trane Is Not Entitled to Relief on the Basis of the Child Endangerment Marshalling Instruction, Which Included Two Victims in One Count.

Scope of Review.

A preserved jury instruction claim is reviewed for errors at law. *State v. Spates*, 779 N.W.2d 770, 775 (Iowa 2010).

Preservation of Error.

Trane argues that error has been preserved by his new trial motion. Defendant's Brief, 65. As noted, a motion for new trial does not preserve a claim that was not raised at the first opportunity. *See Steltzer*, *id.*; *Bucklin*, *id.* This issue therefore can only be reached

through an allegation of ineffective assistance, as counsel had the opportunity to object to the instruction at trial and declined to object. *See* Vol. VIII 288, L1-8. Because on appeal Trane does not present an ineffective assistance claim regarding counsel's failure to object (Defendant's Brief, 65-72), that claim should be deemed waived. Iowa R. App. 6.14(1)(c) ("Failure in the brief to state, to argue, or to cite authority in support of an issue may be deemed a waiver."). Assuming the court may disagree, the State addresses it below.

Merits.

Trane next challenges the child endangerment marshalling instruction, which provided:

> 1. On or between September 14, 2014, and January 31, 2016 the defendant was the person having custody or control of B.V. and/or A.H.
>
> 2. B.V. and/or A.H. were under the age of fourteen years.
>
> 3. The defendant knowingly acted in a manner that he was creating a substantial risk to B.V. and/or A.H.'s physical or mental or emotional health or safety.

Instruction 31; App. 38. The jury was also instructed:

> Where two or more facts would produce the same result, the law does not require each juror to agree as to which fact leads to his or her verdict. It is the verdict itself which must be

> unanimous, not the theory or facts upon which it is based.

See Instruction 14; *see also State v. Bratthauer*, 354 N.W.2d 774 (Iowa 1984); *State v. Williams*, 285 N.W.2d 248 (Iowa 1979) (jurors need not agree on a certain theory of the crime if substantial evidence supports both and the alternative modes are not repugnant to each other).

Here, Trane complains that the instruction including both children in one count was erroneous because the unit of prosecution for child endangerment is a single child. Defendant's Brief, 67. Although Trane challenges the instruction as preserved error, as indicated, counsel did not object at trial and error was not preserved. The standards applicable to a preserved instruction complaint on direct appeal and an ineffective assistance claim for failure to object to an instruction are different and can be outcome-determinative. *See State v. Thorndike*, 860 N.W.2d 316, 620-22 (Iowa 2015) ("At the outset, it is important to note that this case comes before us in the context of an ineffective-assistance-of-counsel claim, as opposed to a direct appeal objecting to the legality of an instruction… Thus, given the nature of Thorndike's claim, he must affirmatively demonstrate"

resulting *Strickland* prejudice, "regardless of whether his claim would require reversal if it were before us on direct appeal").

Here, the State presented evidence that both boys were in O.S.S. for at least 50% of their stays and suffered serious adverse effects from their confinement. The identity of the victim is a fact on which the jurors need not have agreed, much like a sexual abuse case with various acts charged in one count. *See State v. Bowers*, 661 N.W.2d 536, 543-44 (Iowa 2003) ("The State… offered all available evidence of sexual abuse during a specified period of time, which largely consisted of estimates of the number of occurrences per week for a certain number of months… [T]his method of proof was permissible, and the comment on the multiple acts of sexual abuse revealed by the evidence was not improper."). Counsel was under no duty to complain about this instruction.

Even assuming that the marshalling instruction was erroneous, Trane cannot establish resulting prejudice. If counsel had successfully objected, the prosecutor would have narrowed the instruction to include only one of the victims. The result of the trial would have been the same: a conviction on one count of child endangerment. *See Thorndike*, *id.* at 322 ("If trial counsel had

objected to the jury instruction, the district court simply would have removed the offending language and otherwise provided the same instructions to the jury. We are confident the jury would have returned the same verdict of guilty…"). In the end, any error inured to Trane's benefit because he was charged with and convicted of one count of child endangerment although he endangered two children. Assuming the court does not find that Trane waived any ineffective assistance complaint, it should conclude that he cannot prevail on the merits of the claim.

VI. The State Presented Substantial Evidence Establishing that Trane Committed Assault with Intent to Commit Sexual Abuse, Sexual Exploitation by a Counselor or Therapist, and Child Endangerment.

Standard of Review.

This court reviews sufficiency of the evidence claims for the correction of errors at law. *State v. Hennings*, 791 N.W.2d 828, 832 (Iowa 2010).

Preservation of Error.

Error was preserved by motions for judgment of acquittal as to each count.

Merits.

Trane's final complaint concerns the sufficiency of the evidence against him. He contends that the State presented insufficient evidence establishing each crime. Because the jurors were presented with substantial evidence from which they could conclude Trane's guilt as to all three counts, his claims should be rejected.

In evaluating a sufficiency of the evidence claim, the appellate court reviews the record in a light most favorable to the State. *State v. Shanahan*, 712 N.W.2d 121, 134 (Iowa 2006). The court makes any legitimate inferences and presumptions that may fairly and reasonably be deduced from the evidence in the record. *State v. Wheeler*, 403 N.W.2d 58 (Iowa Ct. App. 1987); *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984). The test for whether the evidence is sufficient to withstand appellate scrutiny involves an inquiry as to whether the evidence is "substantial." *State v. Musser*, 721 N.W.2d 758, 760 (Iowa 2006). "Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury [is] free to reject certain evidence, and credit other evidence." *State v. Sanford,* 814 N.W.2d 611 (Iowa 2012) (quoting *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006)).

A. Assault with Intent to Commit Sexual Abuse.

A person commits assault with intent to commit sexual abuse when he assaults a person with the intent to commit a sex act by force or against the person's will. Iowa Code § 709.11 (2017). An assault is defined as an act intended to place another person in fear of immediate of physical contact that will be insulting or offensive, when the act is coupled with the apparent ability to execute the act. Iowa Code § 708.1(2) (2017). A sex act is defined, among other ways, as "sexual contact" by penetration of the penis into the vagina or anus, contact between the mouth of one person and the genitals of the other person, contact between the genitals of one person and the genitals or anus of the other person, or contact between the finger or hand of one person and the genitals of another. Iowa Code § 702.17 (2017).

"Intent is 'seldom capable of direct proof,' . . . and 'a trier of fact may infer intent from the normal consequences of one's actions.'" *State v. Evans*, 671 N.W.2d 720, 724-25 (Iowa 2003). As the court has noted, "[A defendant] will generally not admit later to having the intention which the crime requires ... His thoughts must be gathered from his words (if any) and actions in light of surrounding circumstances." *State v. Radeke*, 444 N.W.2d 476, 478-79 (Iowa

1989), quoting W. LaFave & A. Scott, *Handbook on Criminal Law*, § 3.5 (f), at 226 (2d ed. 1986).

> In other cases before Iowa appellate courts, the sufficiency of the evidence to support a finding of guilt beyond a reasonable doubt of assault with intent to commit sexual abuse has been examined. We pointed to a sexual comment made by the defendant to the victim, touching in a sexual way, the removal or request to remove clothing, or some other act during the commission of the crime that showed a desire to engage in sexual activity, to affirm the conviction.

State v. Casady, 491 N.W.2d 782, 787 (Iowa 1992).

Here, the jury heard testimony from K.S. that Trane inserted his finger into her vagina twice, engaged in an act of oral sex with her, made her touch his genitals, lay on top of her while clothed, and had sexual intercourse with her twice. Vol. III 213, L7 –243, L11. While the jurors may not have been entirely convinced that the acts rose to the level of sexual contact against her will – and thus sexual abuse – that K.S. described, they were presented with evidence of several incidents of, at the least, assault by Trane with a sexual purpose. Ample evidence supports Trane's conviction for assault with intent to commit sexual abuse.

B. Sexual Exploitation by a Counselor or Therapist.

To convict Trane of sexual exploitation by a counselor or therapist, the State was required to prove:

> 1. The defendant on or between September 18, 2014 and January 31, 2016, did engage in sexual conduct with K.S.
>
> 2. The defendant engaged in this conduct as part of a pattern, practice, or scheme of conduct.
>
> 3. The defendant did so with the specific intent to arouse or satisfy the sexual desires of the defendant or K.S.
>
> 4. The defendant was then a counselor or therapist.
>
> 5. K.S. was then a client, or a patient, or an emotionally dependent patient or client.

Instruction 27; App. --. Under the sexual exploitation statute, "sexual conduct" is more broadly defined than a "sex act" for purposes of the sexual *abuse* statute: it "includes but is not limited to… kissing, touching of the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubes, or genital; or a sex act as defined in section 702.17." Iowa Code § 709.15(2)(b) (2019).

As noted, the State presented substantial evidence establishing various types of sexual behavior between Trane and K.S. Despite Trane's suggestion otherwise, the victim's account alone can be

sufficient evidence and need not be corroborated. Iowa Code § 709.6 (2017).

The State also presented evidence that Trane took some of his teenage charges, including K.S., to a Victoria's Secret store, instructed them to fill out sexual behavior surveys, discussed inappropriate personal sexual matters with several of the girls while out on a service project, took photographs of K.S.'s distinctive body markings under the guise of saving her a trip to the child protection center, and instructed the girls to disrobe in a separate room, look at themselves in a mirror, and walk out to discuss their body types with "Mr. Ben." Vol. III 190, L22 – 207, L22; 248, L21 – 249, L21; 295, L19 – 300, L6. The jury was free to disbelieve Trane's innocent explanations of those behaviors. The State presented compelling evidence that Trane engaged in a pattern, practice, or scheme designed to satisfy his own or the sexual desires of another person. The jury's verdict was supported by substantial evidence.

C. Child Endangerment.

As discussed above, child endangerment is defined as knowingly acting in a manner creating a substantial risk to the physical, mental, or emotional health or safety of a child in one's

custody or control. Instruction 31; Iowa Code § 726.6(1)(a) (2017). A person who has "accepted, undertaken, or assumed supervision of a child… from the parent of a parent or guardian" has custody or control of the child. Iowa Code § 726.6(3)(a) (2017). Here, the State presented substantial evidence establishing that Trane knowingly allowed A.H. and B.V. to languish in O.S.S. rooms for 50% and 63% of their time at Midwest Academy, respectively. A.H. was told to remain in a still, seated position for nineteen hours – so long that he would rebel, urinate in O.S.S., and attempt to hang himself. Vol. II 291, L12 –298, L19. B.V. was also forced to endure long periods in the O.S.S. and would bang his head against the wall and urinate and defecate in the room; he once spent more than a week in the confinement of O.S.S. Vol. III 84, L17 –134, L24. Both boys lost a significant amount of weight given the restrictive diets they were served. Vol. III 131, L10 –132, L16. Given this testimony, the State presented substantial evidence that Trane, as the owner of Midwest Academy and the architect of its O.S.S. procedures, created a substantial risk to the boys' physical, mental, or emotional health or safety.

Trane attempts to distance himself from any personal responsibility on appeal. He testified at trial, however, that they "kept records on everything" and he reviewed each day's O.S.S. shift notes; he also testified that he stopped by O.S.S. "every single day" for 1 ½ to 2 hours. Vol. VII 250, L2 – 260, L5. He spoke to B.V.'s mother repeatedly about B.V.'s difficulties. Vol. VII 256, L15 – 259, L11. His claim that he should not be held responsible for the well-being of A.H. and B.V. should be rejected. Trane's convictions should be affirmed.

CONCLUSION

For the reasons discussed above, the State respectfully requests that the court affirm Ben Trane's convictions for assault with intent to commit sexual abuse, sexual exploitation by a counselor or therapist, and child endangerment.

REQUEST FOR NONORAL SUBMISSION

The defendant has requested oral argument. The State believes the case can be decided by reference to the briefs without further elaboration. In the event the defendant is granted oral argument, the State asks to be heard.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

SHERYL SOICH
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
sherri.soich@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

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

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SHERYL SOICH
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
sherri.soich@ag.iowa.gov