IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 18–0825

STATE OF IOWA,
Plaintiff–Appellee,

vs.

BENJAMIN G. TRANE,
Defendant–Appellant.

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

DEFENDANT–APPELLANT'S FINAL BRIEF

Alfredo Parrish
Adam Witosky
Parrish Kruidenier Dunn
Boles Gribble Gentry
Brown & Bergmann L.L.P.
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: aparrish@parrishlaw.com
awitosky@parrishlaw.com
ATTORNEYS FOR APPELLANT

Sheryl Soich
ASSISTANT ATTORNEY GENERAL
Hoover State Office Building,
2nd Floor
Des Moines, Iowa 50319
Telephone: (515) 281-3648
Facsimile: (515) 281-8894
Email: sherri.soich@ag.iowa.gov
ATTORNEY FOR APPELLEE

Table of Contents

Table of Authorities

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

Statement of Issues

I. The trial court violated Rule 2.24 when it refused to consider Trane's ineffective-assistance-of-counsel claims in the posttrial proceeding of this case.

Brakke v. Iowa Dep't of Nat. Res., 897 N.W.2d 522 (Iowa 2017)
Dolphin Res. Coop., Inc. v. Iowa City Bd. of Review, 863 N.W.2d 644 (Iowa 2015)
Mall Real Estate, L.L.C. v. City of Hamburg, 818 N.W.2d 190 (Iowa 2012)
Roth v. Evangelical Lutheran Good Samaritan Soc., 886 N.W.2d 601 (Iowa 2016)
Simmons v. State Pub. Def., 791 N.W.2d 69 (Iowa 2010)
State v. Brodene, 493 N.W.2d 793 (Iowa 1992)
State v. Dahl, 874 N.W.2d 348 (Iowa 2016)
State v. Hoyman, 863 N.W.2d 1 (Iowa 2015)
State v. Kendall, 167 N.W.2d 909 (Iowa 1969)
State v. Pickett, 671 N.W.2d 866 (Iowa 2003)
State v. Reeves, 670 N.W.2d 199 (Iowa 2003)
State v. Wesson, 149 N.W.2d 190 (Iowa 1967)
State v. Williams, 207 N.W.2d 98 (Iowa 1973)
White v. Walstrom, 118 N.W.2d 578 (Iowa 1962)
U.S. Const. amend. VI
Iowa Const. art. I, § 6
Iowa Code § 4.6(1), (5)
Iowa Code § 822.3
Iowa R. Crim. P. 2.24(2)(b)
Any, *Merriam-Webster's Online Dictionary*, https://www.merriam-webster.com/dictionary/any (last available July 13, 2018)

II. Trane was denied a fair trial because of trial counsel's failure to sever Counts I & II from Count III.

Faretta v. California, 422 U.S. 806 (1975)
Rock v. Arkansas, 483 U.S. 44 (1987)
State v. Bair, 362 N.W.2d 509 (Iowa 1985)
State v. Belieu, 288 N.W.2d 895 (Iowa 1980)
State v. Boyd, 533 P.2d 795 (Or. 1975)

State v. Brown, No. 02–0086, 2003 WL 1967828 (Iowa Ct. App. April 30, 2003)
State v. Castaneda, 621 N.W.2d 435 (Iowa 2001)
State v. Clark, 814 N.W.2d 551 (Iowa 2012)
State v. Cox, 781 N.W.2d 757 (Iowa 2010)
State v. Delaney, 526 N.W.2d 170 (Iowa 1994)
State v. Dicks, 473 N.W.2d 210 (Iowa Ct. App. 1991)
State v. Elston, 735 N.W.2d 196 (Iowa 2007)
State v. Geier, 484 N.W.2d 167 (Iowa 1992)
State v. Lopez, 633 N.W.2d 774 (Iowa 2001)
State v. Marvin, 197 Iowa 443, 197 N.W. 315 (1924)
State v. Nicoletto, 845 N.W.2d 421 (Iowa 2014)
State v. Oetken, 613 N.W.2d 679 (Iowa 2000)
State v. Owens, 635 N.W.2d 478 (Iowa 2001)
State v. Plaster, 424 N.W.2d 226 (Iowa 1988)
State v. Robinson, 506 N.W.2d 769 (Iowa 1993)
State v. Rodriquez, 636 N.W.2d 234 (Iowa 2001)
State v. Romer, 832 N.W.2d 169 (Iowa 2013)
State v. Smith, 576 N.W.2d 634 (Iowa Ct. App. 1998)
State v. Winters, 690 N.W.2d 903 (Iowa 2005)
State v. Wright, 191 N.W.2d 638 (Iowa 1971)
Iowa Code § 709.15
Iowa R. Crim. P. 2.6(1)

III. K.S. had lodged multiple false claims of abuse, and the trial court abused its discretion by excluding those claims from evidence.

Crane v. Kentucky, 476 U.S. 683 (1986)
Gilmore v. Taylor, 508 U.S. 333 (1993)
Grissom v. State, 572 N.W.2d 183 (Iowa Ct. App. 1997)
Harrington v. State, 659 N.W.2d 509 (Iowa 2003)
Millam v. State, 745 N.W.2d 719 (Iowa 2008)
State v. Alberts, 722 N.W.2d 402 (Iowa 2006)
State v. Baker, 679 N.W.2d 7 (Iowa 2004)
State v. Fox, 491 N.W.2d 527 (Iowa 1992)
State v. Mahoney, 515 N.W.2d 47 (Iowa 1994)
State v. Orte, 541 N.W.2d 895 (Iowa Ct. App. 1995)
State v. Taylor, 881 N.W.2d 72 (Iowa 2016)
State v. Winters, 690 N.W.2d 903 (Iowa 2005)

Iowa R. Evid. 5.412
Due Diligence, *Black's Law Dictionary* 208 (3d Pocket Ed. 2006)

IV. Improper vouching testimony was admitted, without objection by trial counsel, regarding the alleged victim's credibility.

Bowman v. State, 710 N.W.2d 200 (Iowa 2006)
People v. Beckley, 456 N.W.2d 391 (Mich. 1990)
State v. Brotherton, 384 N.W.2d 375 (Iowa 1986)
State v. Brown, 856 N.W.2d 685 (Iowa 2014)
State v. Dudley, 856 N.W.2d 668 (Iowa 2014)
State v. Martens, 521 N.W.2d 768 (Iowa Ct.App.1994)
State v. Myers, 382 N.W.2d 91 (Iowa 1986)
State v. Jaquez, 856 N.W.2d 663 (Iowa 2014)
State v. Kinsel, 545 N.W.2d 885 (Iowa Ct. App. 1996)
State v. Payton, 481 N.W.2d 325 (Iowa 1992)
State v. Pitsenbarger, No. 14–0060, 2015 WL 1815989 (Iowa Ct. App. April 22, 2015)
State v. Tjernagel, No. 15–1519, 2017 WL 108291 (Iowa Ct. App. Jan. 11, 2017)
State v. Tracy, 482 N.W.2d 675 (Iowa 1992)
State v. Wilkins, 693 N.W.2d 348 (Iowa 2005)
Iowa R. Evid. 5.701
Iowa R. Evid. 5.801
Iowa R. Evid. 5.802
CNN Library, *Boston Marathon Terror Attack Fast Facts* (https://www.cnn.com/2013/06/03/us/boston-marathon-terror-attack-fast-facts/index.html, accessed Aug. 8, 2018)
Maggie Astor, *Gymnastics Doctor Who Abused Patients Gets 60 Years for Child Pornography*, N.Y. Times, December 7, 2017 (https://www.nytimes.com/2017/12/07/sports/larry-nassar-sentence-gymnastics.html, accessed Aug. 8, 2018)

V. Trane is entitled to a new trial because the State cannot prove a single count of child endangerment using multiple alleged victims.

Burmac Metal Finishing Co. v. W. Bend Mut. Ins. Co., 825 N.E.2d 1246 (Ill. App. 2005)

Clinton Phys. Therapy Servs. v. John Deere Health Care, Inc., 714 N.W.2d 603 (Iowa 2006)
Employers' Mut. Liab. Ins. Co. v. Tollefsen, 263 N.W. 376 (Wisc. 1935)
State v. Ambrose, 861 N.W.2d 550 (Iowa 2015)
State v. Harris, 891 N.W.2d 182 (Iowa 2017)
State v. Hickman, 576 N.W.2d 364 (Iowa 1998)
State v. Kidd, 562 N.W.2d 764 (Iowa 1997)
State v. Millsap, 704 N.W.2d 426 (Iowa 2005)
State v. Richardson, 890 N.W.2d 609 (Iowa 2017)
State v. Ross, 845 N.W.2d 692 (Iowa 2014)
State v. Schlitter, 881 N.W.2d 380 (Iowa 2016)
State v. Sloan, 203 N.W.2d 225 (Iowa 1972)
State v. Smith, 184 P.2d 301 (N.M. 1947)
State v. Spates, 779 N.W.2d 770 (Iowa 2010)
State v. Tyler, 873 N.W.2d 741 (Iowa 2016)
State v. Velez, 829 N.W.2d 572 (Iowa 2013)
Iowa Code § 707.1
Iowa Code § 708.4
Iowa Code § 708.6
Iowa Code § 714.1(6)
Iowa Code § 726.6
Iowa R. Evid. 5.401
Iowa R. Evid. 5.403
Iowa R. Evid. 5.404(b)
Bryan A. Garner, *A Dictionary of Modern Legal Usage* (2d ed. 1995)
Iowa State Bar Ass'n, Iowa Criminal Jury Instructions 2610.1 (updated through June 2017)
Webster's Third New International Dictionary (1993)

VI. The verdicts are not supported by substantial evidence; Trane's convictions violate the Fourteenth Amendment's Due Process Clause.

In re Winship, 397 U.S. 358 (1970)
State v. Smith, 508 N.W.2d 101 (Iowa Ct.App. 1993)
Iowa Code § 709.11
Iowa Code § 709.15
Iowa Code § 726.6

Routing Statement

This appeal presents a threshold issue of first impression: whether a defendant may raise a claim of ineffective assistance of trial counsel at the new-trial phase of a criminal case. Iowa R. App. P. 6.1101(2)(c). This appeal presents a second issue of first impression: whether the State can convict a defendant of *one* count of child endangerment using evidence related to *two* children, using an "and/or" theory. *Id.* A third issue presents a substantial question related to a defendant's right to speedy trial pitted against 21st-century discovery, in which thousands of electronic documents are retained and withheld by the State in advance of trial. *Id.* r. 6.1101(2)(f). When discovery is withheld, Mr. Trane asks this Court to find good cause to file an otherwise untimely motion as to the admissibility of evidence at trial.

Statement of the Case

On September 18, 2017, the Appellant, Mr. Benjamin Trane, was charged by Trial Information with Third-Degree Sexual Abuse, a class "C" felony in violation of Iowa Code sections 709.1 and 709.4(1)(a) (Count I); Sexual Exploitation by a Counselor, a class "D" felony in violation of Iowa Code sections 709.15(1), 709.15(2)(a)(1), and 709.15(4)(a) (Count II); and Child Endangerment, an aggravated misdemeanor in violation of Iowa Code

sections 726.6(1)(a) and 726.6(7). (App. 5). Trane entered a plea of not guilty on September 28 and demanded a speedy trial. (App. 8).

Trial was held December 12–15 and 18–22, 2017. Trane was found guilty of the lesser-included offense of Assault with Intent to Commit Sexual Abuse on Count I, Sexual Exploitation by a Counselor on Count II, and Child Endangerment on Count III. Trane filed a motion for a new trial, which was denied. (App. 45; App. 75, 5/9/2018 Supp.Mtn.forNewTrial). Trane appeals. (App. 83).

Statement of the Facts

I. Factual Background.

A. Founding of Midwest Academy. Trane owned and supervised a therapeutic boarding school in Keokuk, Iowa, called Midwest Academy. Born and raised in Utah, Trane was always passionate about helping troubled youth. (TT7 168:14–20; 169:14–16; 169:20–170:1). Trane recognized the Midwest had very few therapeutic treatment options for teenagers in need of rehabilitation and care to address mental health concerns. (TT7 170:15–17). After investigating several cities, including Keokuk, Trane purchased an old county building and moved his wife and five children to Iowa. (TT7 168:14–20; 169:20–170:1; 173:1–7). Trane was dedicated to Midwest Academy and

moved "on campus" in the winter of 2002. Midwest Academy opened shortly thereafter in June 2003. (TT7 182:1–7; 184:6–8).

Midwest Academy saw tremendous growth and success over the next decade. The school was unlike private, military, or residential schools because it included a blend of educational, character-building, and therapeutic programming for children with severe behavioral or disciplinary issues. (TT7 177:2–22). Trane initially hired twelve staff members to serve the students. (TT7 185:12–16; 186:2–3). The school grew quickly, and within months, Midwest Academy was serving at least 50 students. (TT7 187:16–17). Trane hired an academics director, a program director, and clinical director, along with dozens of staff members. (TT7 204:25–205:4). "Family representatives" would act as a liaison between a student and their parents regarding progress at the school. (TT7 47:17–21).

Enrollment grew to as many as 300 students, with several hundred staff. (TT7 194:17–19). Eventually, enrollment balanced out to approximately 100 students at a time. (TT7 195:1–5). After several leadership changes, Trane became the sole owner of Midwest Academy. (TT7 191:9–15; 193:3–5).

The typical student at Midwest Academy had experienced past academic struggles, a troubled home life, relationship issues, dishonesty issues, mental health issues, drug abuse, emotional stress, or high-risk sexual

activity. (TT7 195:21–196:17). Students were commonly referred by parents or grandparents. (TT7 196:23–24). An admissions coordinator at the school screened students through an extensive initial interview and application process. (TT7 195:11–15). Once admitted, treatment would take anywhere between ten and twenty-four months, depending on the number of issues involved and the student's progress. (TT7 245:13–246:11).

Success at Midwest Academy was founded on its rigorous course load and strict campus rules. (TT7 230:10–12). The school used a points-based "level" disciplinary system for rule violations: the better a student's behavior, the greater amount of points and higher "level" of certain earned privileges, such as phone calls or off-campus field trips. (TT7 228:10–15; 231:11–18). No staff member could be alone with a single student. (TT3 187:2–5). The school also used "out of school suspension rooms," or "OSS rooms," for students with severe behavioral issues.[1] (TT7 234:6–10). OSS rooms were designed for single students for up to twenty-four hours at a time, with reasonable breaks and meals, and constant supervision. (TT7 234:6–10; 236:5–7; 240:5–241:20). The OSS rooms were a "last-ditch effort" at the school. (TT2 287:16–17). Students were placed in OSS rooms for significant

[1]Students placed in an OSS room would sometimes punch the walls so hard they would break a wrist, or kick things and break toes. (TT7 235:5–17).

cause, such as constant distractions in the classroom or for physically attacking staff. (TT7 56:8–12).

Trane engaged the students in a variety of exercises as part of treatment at Midwest, including a body-image exercise aimed to help the female students overcome body issues and build positive self-esteem. (TT7 266:15–270:7). Staff administered surveys, on topics including drugs, anger-management, divorce, or sex, to gather on information on how to best educate the students. (TT7 278:11–15). If students exhibited good behavior, Trane or other staff members would take the students to a shop at the mall for clothes or jewelry. (TT7 288:3–290:2).

B. A.H. and B.V. Among the hundreds of children admitted to Midwest Academy, A.H. and B.V. both entered the school in 2014. (TT2 281:6–7; TT3 148:4–5).

A.H., who did not testify at trial, entered Midwest Academy in 2014 at twelve years old. (TT7 244:2–4). A.H.'s parents observed behavioral issues as early as second grade, and A.H. was later diagnosed with anxiety, depression, and Oppositional Defiant Disorder. (TT2 281:17–282:3). Once A.H. entered junior high, he began to act out in class, became violent, and began to self-harm. (TT2 282:8–14; 284:4–6). A.H.'s parents admitted him to a psychiatric hospital, which only led him to become more defiant and

disrespectful. (TT2 284:7–19). A.H.'s parents turned to Midwest Academy, which came recommended by A.H.'s psychiatrist. (TT2 285:15–19).

A.H. was placed in OSS almost daily for being defiant, causing distractions in classrooms, and cursing. (TT2 293:10–15). A.H. was instructed to sit with his legs straight for hours, participate in individual counseling, and write 1,000-word essays. (TT2 294:4–23; TT7 252:8–15). OSS time was often unsuccessful, as A.H. would loudly sing in the OSS room, punch himself, and write on the walls with his own blood. (TT2 295:5–8). A.H. tried to hang himself with his clothing, urinated in the room, and threw his food at the supervision cameras. (TT2 295:9–25).[2] A.H. consequently spent days in the OSS rooms. (TT2 296:25–297:1).

B.V., who entered Midwest Academy several months after A.H., was also twelve years old at the time. (TT3 118:9–9). B.V. was diagnosed with Attention Deficit Hyperactivity Disorder and bipolar disorder, and had engaged in assaultive behavior at school, which led his mother to consider Midwest Academy. (TT3 118:13–16; 119:19–20; 120:7–11). B.V. was initially denied because of his age and immaturity; however, after pleading from his mother, B.V. was admitted on a trial basis. (TT7 244:16–25).

[2]At trial, Trane explained that staff would begin a process to transfer the student to a psychiatric facility or mental institution if the student continued such extreme behavior. (TT7 258:16–22).

B.V. was physically aggressive at Midwest Academy when he did not get his way. (TT7 249:20–23). As with A.H., B.V.'s disregard for the rules often left him in an OSS room. (TT7 256:21–22). B.V. defecated and urinated in the room and became extremely aggressive with other students. (TT7 256:22–25). In mid-February 2015, Midwest Academy began preparing documentation to have B.V. admitted into a mental institution or residential treatment center. (TT7 257:15–21). B.V. told counselors he did not want to leave the OSS rooms because he did not want to go to school. (TT4 278:1–8). Staff continued to accommodate B.V.'s academics when he was in the OSS room. (TT7 259:12–17).

In March 2015, the Iowa Department of Human Services came to Midwest Academy and took out several children, including A.H. and B.V. (TT4 274:9–275:2). Both A.H.'s and B.V.'s parents were notified. (TT2 299:8–14; TT3 136:17–21). B.V.'s mother removed him from Midwest Academy on March 30, 2015. (TT3 139:3–10). A.H.'s parents made the decision to leave A.H. at Midwest Academy for another month, when they received another phone call from DHS. (TT2 303:23–25). At that point, A.H. was also removed from the Academy. (TT2 281:10–12).

C. K.S. K.S., a female student, came to Midwest Academy when she was sixteen years old. (TT3 160:19–22). Prior to entering Midwest Academy

K.S. had a troubled family environment. K.S. had bad experiences with DHS when she was younger and was placed in the foster-care system in Oregon and California. (TT3 159:12–23; 261:21–24). She lived with her grandparents in Kansas until she was eight years old. (TT3 159:12–23). K.S. was then adopted by her biological aunt and lived in Wisconsin. (TT3 159:3–6; 159:24–160:1). For the next several years, she was a runaway. (TT3 161:6–9). K.S. was eventually dropped off at Midwest Academy, by strangers, in January 2015. (TT3 161:11–13).

K.S. followed the rules at Midwest Academy and quickly began "leveling up" due to good behavior. (TT3 166:8–14). She earned more responsibility and began supervising other students who did not progress. (TT3 174:19–175:5). She became eligible to make phone calls and received one-on-one counseling sessions with staff. (TT3 176:1–18). Still, K.S. became frustrated or stressed out at times and asked to go to the OSS room on at least two occasions. (TT3 178:18–179:6).

In the Spring of 2015, "some statements were made [by K.S.] concerning foster care and [K.S.'s] parents that forced [Trane] to get involved." (TT7 295:20–22). K.S. was referred to the Child Protective Center because of the statements. (TT7 296:18–25). Trane began paying K.S. more attention and gathered information for follow-up on the statements. (TT7

296:8–13; TT3 185:8–24). Trane visited with K.S. about her family life and what she wanted to accomplish after her time at Midwest Academy. (TT7 304:23–305:12). In August 2015, a senior staff member left the school and Trane became "family rep" for K.S. and another student, M.B.G. (TT7 303:17–23). K.S. made clear she did not want to live with her adoptive parents after she left the Academy. She wanted to live with her biological sister. (TT7 305:25–306:7). She also mentioned living with her biological parents or grandfather. (TT7 305:19–22).

In November 2015, Trane began arranging for an off-campus visit for K.S., as her family representative, with K.S.'s biological parents, her sister, and her grandfather around Thanksgiving. (TT7 324:2–12). Although K.S. disliked her adoptive parents, the off-campus visit had to be approved through them as legal guardians. (TT7 325:3–8). K.S. then had second thoughts about inviting her biological parents and grandfather, and instead only wanted her sister visit over Thanksgiving and travel off campus. (TT7 326:16–20). Ultimately, though, K.S.'s adoptive mother reneged and would not authorize K.S. to travel off campus with anyone. (TT7 327:4–8).

K.S. became "very angry" with Trane and told him to cancel the entire Thanksgiving visit. (TT7 328:15; 327:21–24). In Trane's words, "[K.S.]'s anger wasn't like an explosive anger. It was more of like an inner rage." (TT7

328:7–9). K.S. began venting her anger, which culminated in a report by staff for suicidal behavior on November 23, 2015. (TT7 154:24–155:12; 329:3–11; 331:18–20).

The very next day, November 24, K.S. disclosed to staff for the first time that Trane had been sexually abusing her. (TT5 18:13–18; 60:6–20; TT7 160:11–19; 164:11–19). K.S. stated Trane began paying attention to her as far back as Spring of 2015, which she said made other female students jealous. (TT3 184:18–185:1). She stated she began receiving shampoo, earrings, makeup, and leggings from Trane. (TT3 187:15–24). She described ten or eleven incidents of physical or sexual contact with Trane, sometimes in front of other students or staff, others when they were alone together, and another at Trane's on-campus home. (TT3 208:3–14; 213:11–214:16; 221:6–21; 227:22–228:11; 242:11–18).[3] K.S. stated Trane had sexual intercourse with her on at least two other occasions. (TT3 242:5–8). After K.S. made these disclosures to staff while she was on suicide watch, staff reported the allegations to DHS. (TT3 256:10–21; TT5 28:22–19:2). K.S. was removed from the school shortly thereafter. (TT7 332:12–15).

[3]K.S.'s disclosure was not corroborated by physical or electronic evidence, nor was it confirmed by third-party witnesses—even when witnesses were present at the time. (TT3 321:3–6). K.S. testified Trane video-taped one encounter; however, no footage was ever located among the terabytes of documents from Midwest Academy. (TT8 119:19–120:18).

II. Procedural Background.

The State the Trial Information against Trane, to which he pled not guilty and demanded a speedy trial. (App. 5; App. 8). Trial was set for December 12, 2017. (App. 10).

Months passed before the State provided discovery to Trane. A discovery agreement entered into by the parties on October 27, 2017 provided "[t]he discovery in this case is voluminous and contains the identifying information of hundreds of persons." (App. 13). The parties therefore agreed to keep discovery confidential so Trane could obtain discovery without undue delay; however, that did not happen. (App. 13.). The State continued to delay disclosure of discovery.

As of November 7, 2017, defense counsel wrote "The State has indicated there are over 2 TB [terabytes] of discovery documents."[4] (Ap. 15). More than a week later (i.e., less than one month from trial), defense counsel wrote "The State advises that there is approximately 5-6 TB of documentary evidence to provide." (App. 18). The State refused to provide discovery for defense counsel until the State received a brand new external hard drive. (App. 18). Defense counsel resorted to filing a motion with the court to obtain

[4]Two terabytes equal roughly one hundred million pages of information. Carole Casri and Mary Mack, *eDiscovery for Corporate Counsel* § 12:9 (West, Westlaw updated Jan. 2018).

that cost. (App. 18.). Ultimately, defense counsel received the terabytes of discovery from the State on November 28, 2017—fourteen days before trial, and on the first day of depositions. (Trans. of 5/10/2018 Hearing, 20:5–9; 81:1–2). Trane had no opportunity to personally review those documents prior to trial. (TT8 71:10–15; 72:1–3).

Trane identified eighteen individuals he intended to depose; however, the primary alleged victim, K.S., was not deposed until December 11, 2017—the afternoon immediately before trial. (App. 17; TT1 6:17–20). During that deposition, Trane learned details of prior instances where K.S. had accused other persons of sexual abuse, including both her adoptive parents and foster parents, prior to her attending Midwest Academy. As trial counsel later explained,

> My understanding after deposing [K.S.] is that the allegations of physical abuse had occurred prior to her going to Midwest Academy; that there had been at least two or more occasions where the Department—or Wisconsin's version of the Department of Human Services had done assessments…. *And those allegations involved not only her adoptive parents but also some foster parents in, I believe, the state of Oregon*. And those were disclosed-- According to [K.S.], they occurred when she was younger, but they were disclosed when she was at Midwest Academy.

(TT2 236:21–237:13) (emphasis added).

Defense counsel returned to her office and spoke with K.S.'s adoptive mother by phone. (TT1 7:14–15). Counsel received more information

showing the prior allegations were false. (TT2 234:23–235:8). Accordingly, at 5:39 p.m. on December 11, 2017, defense counsel filed a Rule 5.412 Motion seeking court authorization to "introduce testimony through both cross-examination and through the complaining witness' adoptive mother as to the falsity of those allegations." (App. 23).

Because the motion had not yet been electronically approved the following morning, the parties tabled discussion until after jury selection. (TT2 233:22). Defense counsel reiterated the adoptive mother would testify to the "pattern of behavior that [K.S.] would engage in of making false allegations against [the adoptive mother] and her husband," of both physical and sexual abuse. (TT2 236:4–7). The State's resistance to the Motion was primarily based on claims of the Motion being untimely and procedurally deficient. According to the State, Trane "wanted a speedy trial, and this is of his making." (TT2 240:4–5). The State also claimed Trane could have raised the issue once he received the external hard drive of discovery. (TT2 240:4–25).[5]

[5]The State provided Trane six terabytes of electronic discovery on November 28, 2017—fourteen days prior to trial. (Trans. of 5/10/2018 Hearing, 20:5–9). Hence, even if the false allegations amounted to the proverbial needle in the haystack, defense counsel would have been required to file the Rule 5.412 Motion the same day she received the hard drive.

The trial court denied the 5.412 Motion without hearing evidence from the adoptive mother, finding the Motion "untimely, and even if timely, the information would not show that the statements are false, based on a preponderance of the evidence." (TT2 242:22–243:10; App. 28).

III. Trial.

Trial began on December 12, 2017. (TT2 244:9–11). From opening, the State made clear Counts I and II depended upon K.S.'s credibility: "[I]'ll tell you right up front, nobody else is going to say that they saw the Defendant have sex with [K.S.]. So you need to know that right now." (TT2 6–9). Count III involved separate a separate theory and evidence related to A.H. and B.V.'s treatment in the OSS rooms. (TT2 266:3–9).

Among other witnesses, the State called Dr. Anna Salter as an expert witness. (TT4 190:1). Under the guise of explaining the concept of "counterintuitive victim behavior," Salter tied the behavior of the purported victims in this case to that of the City of Boston following the Boston Marathon bombing. (TT4 206:25–207:17). She likened perpetrators in a sexual-abuse case to "Boy Scout leaders or your coach when you're trying to get to the Olympics." (TT4 209:10–12). She discussed cases involving sexual abuse within the Big Brothers and Big Sisters organization, and related to volunteers at the Special Olympics. (TT4 211:12–25).

The State agreed to call two former students, M.B.G. and K.M., to testify at trial. (Trans. of 5/10/2018 Hearing, 64:12–17). However, during their depositions only days earlier, the students had unexpectedly provided testimony favorable to Trane. (*Id.* 92:7–14). The State released those out-of-state witnesses before conferring with Trane, knowing the witnesses were favorable to him. (*Id.* 92:21–25).[6]

Trane testified in his own defense. (TT7 168:1). Trane stated that although he did see A.H. and B.V. while in the OSS rooms, the children were supervised by a clinical director, therapist, and direct-care staff—several of which had completed child-abuse training in the past. (TT7 252:8–10; 254:3–22; 131:10–13; 133:13–16; 144:24–145:2). Children were supervised, fed, and always given an opportunity to rejoin their classmates. (TT7 124:15–126:1; 137:1–18). Trane testified he was "[a]bsolutely" concerned how much time A.H. and B.V. were in OSS. (TT7 252:16–19).

Trane further denied all allegations raised by K.S. regarding physical or sexual contact. (TT7 299:3–7; 310:14–16; 313:3–8; 320:17–321:9). Trane explained this was the point of having other students accompany one another

[6]The depositions were admitted into evidence at the new-trial hearing. (Trans. of 5/10/2018 Hearing, 140:12–18). M.B.G.'s testimony directly contradicted one of K.S.'s allegations of abuse. (SA-4-6). K.M. indicated that several students—including K.S.—had promised "they were going to try to trap Ben in a room and seduce him." (SA-7-9).

while interacting with any staff member at the school. (TT7: 319:8–10). In his own words,

> [T]o be accused of something that you've fought your whole life to stop is just the most horrible feeling in the world. I've been around abused kids. That's what I've dealt with from alcohol and all sorts of different abuse. And it's the worst thing in the entire world. And to be accused of something that you hate is just the most horrible thing you can do. That's -- I would never do that. I'd never put myself in a position to do that.

(TT7 320:5–16).

The case was submitted to the jury on December 21, 2017. As to Count III, child endangerment, the jury was instructed it could find one count of child endangerment based on evidence relating to "B.V. and/or A.H." (App. 38 and 39).

The jury found Trane guilty of lesser-included Assault with Intent to Commit Sexual Abuse on Count I, guilty of Pattern, Practice, or Scheme to Engage in Sexual Exploitation by a Counselor or Therapist on Count II, and guilty of Child Endangerment on Count III.

IV. New Trial Hearing.

Following trial, Trane retained new counsel. (App. 40). Trane's trial counsel filed a motion to withdrawal, which was granted. (App. 42; App. 43). A Motion for New Trial alleged numerous claims justifying a new trial pursuant to Iowa Rule of Criminal Procedure 2.24. (App. 45). Trane raised

multiple ineffective-assistance-of-counsel claims in violation of Trane's rights under the U.S. and Iowa constitutions. (App. 49).

The State resisted the posttrial motion in part because "Rule 2.24 does not list ineffective assistance as a ground upon which a new trial may be granted." (App. 58). The State contended "[r]eceiving ineffective assistance does not render the trial unfair or partial toward either party." (App. 59). Trane filed a supplemental Motion for New Trial prior to hearing, alleging yet another ground of ineffective assistance. (5/9/2018 Supp.Motion).

At hearing, the trial court concluded it would not consider any issues in Trane's Motion for New Trial pertaining to ineffective assistance of trial counsel. (Trans. of 5/10/2018 Hearing, 5:14–18). Trane had subpoenaed his trial counsel to testify at the new-trial hearing; however, Trane was limited by the court to ask questions unrelated to his ineffective-assistance claims. (*Id.* 15:18–16:2). The court later allowed an offer of proof. (*Id.* 73:24–74:1).

Following the hearing, the court entered a written ruling on its refusal to consider ineffective-assistance claims in deciding whether to grant a new trial:

> That to the extent it was heard, or should have been heard in a motion for new trial, any allegation of ineffective assistance of counsel was unproven or there was insufficient record to prove it. Any other allegations under Rule 2.24(2)(b)(9), ("When from any other cause the defendant has not received a fair and impartial trial") are denied. The trial of this case was not one-

> dimensional, meaning solely based on one or two factors. There was considerable evidence in this case from many persons. This was all presented to the jury who made the decision in this case. The court does not find the defendant was denied a fair trial.

(App. 77).

Trane was sentenced to an indeterminate term of incarceration not to exceed two years on Count I, five years on Count II, and two years on Count III, each consecutive to one another. (App. 79). Trane appeals. (5App. 83l).

Argument

I. The trial court violated Rule 2.24 when it refused to consider Trane's ineffective-assistance-of-counsel claims in the posttrial proceeding of this case.

A. *Error Preservation.*

After obtaining new counsel after trial, Trane filed a Motion for New Trial and alleged several instances of trial counsel's ineffectiveness. (App. 49). The State resisted. (App. 54).

During the new-trial hearing, the Court indicated in chambers it would not consider any ineffective-assistance-of-counsel claims, later confirmed on the record. (Trans. of 5/10/2018 Hearing, 5:13–6:2; 13:5–13). The Court denied the ineffective-assistance-of-counsel claims. (App. 77). Error is preserved. *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

B. *Standard of Review.*

A claim involving the interpretation of court rules, here Rule of Criminal Procedure 2.24, is reviewed for correction of errors at law. *Estate of Cox by Cox v. Dunakey & Klatt, P.C.*, 893 N.W.2d 295, 302 (Iowa 2017). To the extent the trial court's failure to consider ineffective claims results in a violation of Trane's right to a fair trial as guaranteed by the state and federal constitutions, review is de novo. *State v. Kukowski*, 704 N.W.2d 687, 690 (Iowa 2005).

C. *Rule 2.24(2)(b)(9) requires ineffective-assistance-of-counsel claims to be considered at a new-trial proceeding.*

The trial court incorrectly concluded ineffective-assistance-of-counsel claims cannot be considered in determining whether to grant a new trial under Rule 2.24. Subsection (b) of that rule states, "The court may grant a new trial for *any or all* of the following causes." (Emphasis added.) The ninth catchall provision of that rule provides: "When from *any other cause* the defendant has not received a fair and impartial trial." Iowa R. Crim. P. 2.24(2)(b)(9) (emphasis added). This broad language accounts for "any" kind of claimed infringement upon a defendant's constitutional right to a fair and impartial trial. Because ineffectiveness claims bear on a defendant's right to a fair trial, those claims must be heard pursuant to Rule 2.24.

Iowa courts have recognized, in other contexts, the breadth of the word "any." *See, e.g., Roth v. Evangelical Lutheran Good Samaritan Soc.*, 886 N.W.2d 601, 611 (Iowa 2016) ("[T]he word 'any' is broad."); *see also Dolphin Res. Coop., Inc. v. Iowa City Bd. of Review*, 863 N.W.2d 644, 660 (Iowa 2015) (Zager, J., dissenting) (noting the breadth of the term "any"). The word means "unmeasured or unlimited in amount, number, or extent." *Any*, *Merriam-Webster's Online Dictionary*, https://www.merriam-webster.com/dictionary/any (last available July 13, 2018).

The only limiting language in Rule 2.24 is that the claim infringes upon a fair and impartial trial—to any degree. Hence, the plain language of the Rule suggests an expansive, not restrictive, interpretation. *See Mall Real Estate, L.L.C. v. City of Hamburg*, 818 N.W.2d 190, 199 (Iowa 2012) (applying expansive interpretation of the term "material" to achieve statutory consistency). To be sure, thousands of errors can occur during a two-week jury trial. At some point, a broad provision such as Rule 2.24(2)(b)(9) becomes the practical rule-making solution. Nowhere within the rule are ineffective-assistance claims excluded.

Under the trial court's interpretation of Rule 2.24, no claim may be heard under Rule 2.24 if the defendant's trial attorney bears responsibility for an error occurring at trial. This is inconsistent with the purpose of a new trial.

See Iowa Code § 4.6(1), (5) (a court may consider the "object sought to be attained" and the "consequences of a particular construction" when interpreting a statute). A new trial is appropriate if "a miscarriage of justice may have resulted" from the claimed error. *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). The caselaw makes no distinction between miscarriages of justice 'attributed to the prosecutor' or errors 'attributed to defense counsel.'

Excluding ineffective-assistance claims from Rule 2.24(2)(b)(9) runs contrary to the remainder of the rule, which is disfavored. *State v. Pickett*, 671 N.W.2d 866, 870 (Iowa 2003) ("[W]e consider the context of the provision at issue and strive to interpret it in a manner consistent with the statute as an integrated whole."). Iowa courts have long recognized the trial court has "wide discretion" in ruling on a motion for new trial. *White v. Walstrom*, 118 N.W.2d 578, 649 (Iowa 1962). Accordingly, "After giving the parties notice and an opportunity to be heard, the court may grant a motion for a new trial *even for a reason not asserted in the motion*." Rule 2.24(2)(a) (emphasis added).

Yet again, under the trial court's interpretation, a court would be permitted to grant a motion for new trial under Rule 2.24(2)(a) if the ineffective claim *isn't* included in the defendant's motion; however, if the claim *is* included in the motion, the court would be helpless under Rule

2.24(2)(b). This is absurd. Under the State's construction of the rule, a newly retained defense lawyer should purposely omit a meritorious claim and hope the trial court identifies the issue. This is inconsistent with an attorney's duty to zealously represent a client. *Cf. Brakke v. Iowa Dep't of Nat. Res.*, 897 N.W.2d 522, 539 (Iowa 2017) ("We have, on occasion, expanded the meaning of a statute through interpretation in order to avoid an absurd result.").

Interpreting the phrase "any other cause" in Rule 2.24 to include ineffective claims also ensures a defendant's constitutional rights will be upheld. *See Simmons v. State Pub. Def.*, 791 N.W.2d 69, 84 (Iowa 2010) ("[T]he statute should be interpreted in a fashion to avoid constitutional difficulties, if reasonably possible."). The rule allows "any cause" that ties to a defendant's guarantee of a fair and impartial trial. The phrase "fair and impartial trial" in Rule 2.24(2)(b)(9) should be given the same meaning as its constitutional counterpart. The right to a fair and impartial trial is expressly guaranteed by the Iowa and United States Constitutions. Iowa Const. art. I, § 6; U.S. Const. amend. VI; *see State v. Dahl*, 874 N.W.2d 348, 351 (Iowa 2016) ("The doctrine of constitutional avoidance counsels us to construe statutes to avoid constitutional issues when possible.").

Remarkably, the State argued below that receiving constitutionally ineffective assistance of counsel—in a felony jury trial—does not render the

trial unfair or impartial toward any party. This position is absurd. If trial counsel renders ineffective assistance, the trial becomes fundamentally unfair. The two concepts are inextricably linked. *State v. Wesson*, 149 N.W.2d 190, 195 (Iowa 1967) ("Defendant, of course, was entitled to effective assistance of counsel and to receive a fair trial."). As the Iowa Supreme Court recognized long ago:

> Security of the right to a fair trial is as much the aim of the right to counsel as it is of other guaranties of Amendment 6 of the federal constitution—the right of the accused to a speedy and public trial by an impartial jury, his right to be informed of the nature and cause of the accusation, and his right to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor.
>
> The right to counsel is the right to the effective assistance of counsel, and an accused is assured under the provisions of section I, Amendment 14 of the federal constitution and sections IX and X of Article I of the Iowa Constitution of this right and the right to receive a fair trial.

State v. Williams, 207 N.W.2d 98, 104 (Iowa 1973); *see State v. Kendall*, 167 N.W.2d 909, 910 (Iowa 1969). Further, precluding a defendant from raising an ineffectiveness claim at the new-trial proceeding itself deprives the defendant of a fair and impartial trial.

Finally, to the extent the rule of lenity applies, interpretation of Rule 2.24(2)(b) must favor the accused, and permit ineffective claims. *State v. Hoyman*, 863 N.W.2d 1, 18 (Iowa 2015).

There is no persuasive reason to interpret Rule 2.24(2)(b)(9) to disallow such claims. The trial court in this case noted, impatiently, that a five-month gap resulted between the jury's guilty verdict and the hearing on new trial. (Trans. of 5/10/2018 Hearing, 9:13–21) ("To delay this matter any further is ridiculous.")). Respectfully, Trane raised at least eight separate instances of ineffective assistance of trial counsel in support of a new trial. That attorney appeared at the new-trial hearing, willing and able to testify. Trane's new counsel was prepared to argue the ineffective claims and provide evidence in support of those claims. To deny relief because of a five-month delay—when Trane was sentenced to *years* of consecutive terms of imprisonment because of the court's denial—is wholly unpersuasive.

It is similarly unacceptable to argue Trane can simply raise his ineffective claims in a postconviction-relief action, years down the road, under Iowa Code chapter 822. Any experienced Iowa litigator recognizes the amount of time and resources necessary to raise, pursue, and succeed in a postconviction-relief action. It therefore defies common sense to believe Trane must wait years to raise claims that may be litigated in the current proceeding under Rule 2.24(2)(b)(9). *See* Iowa Code § 822.3 (providing the timetable in which to initiate an action for postconviction relief).

Practically speaking, ineffective-assistance claims are rarely raised by counsel under Rule 2.24 because the attorney would be criticizing his or her own work from only months or weeks earlier. To that end, trial counsel is typically not allowed to withdraw between trial and sentencing. *State v. Brodene*, 493 N.W.2d 793, 795 (Iowa 1992). However, the "ordinary" does not dictate an individual's constitutional right to a fair trial, nor does it control this Court's interpretation of Rule 2.24. Here, Trane's trial counsel *did* withdraw, the trial court *authorized* the withdrawal, and new counsel *did* intend to raise several meritorious claims in support of a new trial.

Because the trial court denied Trane from presenting ineffective-assistance claims pursuant to Rule 2.24, this matter must be remanded to the district court for evidentiary hearing. At a minimum, the district court abused its discretion by refusing to consider evidence in support of Trane's Motion for New Trial. This Court must instruct the trial court to consider Trane's claims of ineffective assistance of counsel in determining whether to grant a new trial.

Alternatively, Mr. Trane recognizes this Court may choose to address other issues raised in this appeal, as is commonly done. In that case, Mr. Trane requests an affirmative ruling that ineffective-assistance-of-counsel claims must be considered by a trial court at a new-trial proceeding. An interpretation

of the plain language of Rule 2.24 is needed to foster judicial economy and assist Iowa's district courts in uniformly deciding this increasingly common question of law.

II. Trane was denied a fair trial because of trial counsel's failure to sever Counts I & II from Count III.

A. *Error Preservation*.

Trane's trial counsel did not attempt to sever the counts involving alleged victim K.S. (Counts I & II) from the count involving alleged victims B.V. and/or A.H (Count III), depriving Trane of a fair trial. Because the error arrives to this Court through a claim of ineffective assistance of counsel, error-preservation rules do not apply. *Nguyen v. State*, 878 N.W.2d 744, 750 (Iowa 2016).

B. *Standard of Review*.

Ordinarily, this Court reviews the refusal to sever multiple charges against a single defendant for abuse of discretion. *State v. Romer*, 832 N.W.2d 169, 174 (Iowa 2013). However, this Court reviews claims of ineffective assistance of counsel de novo. *State v. Elston*, 735 N.W.2d 196, 198 (Iowa 2007).

C. *There is nothing in common between the State's allegations as to K.S. and its allegations as to B.V. and/or A.H.*

While the State may be authorized to include multiple counts involving multiple victims in a single trial information, this does not limit the court's

discretion when it comes to severance. This is recognized in the Iowa Rules of Criminal Procedure:

> Multiple offenses. 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) (emphasis added). The alleged existence of a "common scheme or plan" only indicates when charges should be joined in the charging document, with the court retaining full discretion to sever the charges when good cause exists to do so. *Romer*, 832 N.W.2d at 183 (quoting *Elston*, 735 N.W.2d at 199).

Rule 2.6(1) vests the trial court with broad discretion. *State v. Dicks*, 473 N.W.2d 210, 214 (Iowa Ct.App. 1991). A court is empowered to exercise its discretion on any ground or reason not clearly untenable or to an extent clearly unreasonable. *State v. Lopez*, 633 N.W.2d 774, 778 (Iowa 2001). A ground or reason is untenable only when it is not supported by substantial evidence or when it is based on an erroneous application of the law. *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001).

The court must determine whether there is a common link between the charges sufficient to support the charging of separate offenses in a single

document. *State v. Delaney*, 526 N.W.2d 170, 174 (Iowa 1994). Even should the court determine a "common scheme or plan" exists for purposes of bringing charges, this does not mean the court is prohibited from severing the charges, as it sees fit, when good cause exists to do so. It is the duty of the trial court when considering a trial on multiple charges to strike the proper balance between the antipodal themes of ensuring defendant a fair trial and preserving judicial efficiency. *State v. Geier*, 484 N.W.2d 167, 173 (Iowa 1992). Furthermore, the only intention of Iowa R. Crim. P. 2.6(a) is:

> . . . to require that all contemporaneous criminal filings in which the crimes charged grow out of the same transaction or are part of *a common scheme* be combined in a single indictment or information. The rule will facilitate uniformity in charging practices to assure the comparability of statistical data derived from case filings and will eliminate *unnecessary* multiple filings which place an *unnecessary* administrative burden on the court system.

Iowa R. Crim. P. 2.6(1), Comment (emphasis added). The division of counts for separate trials should be done in a way which ensures the defendant is not subject to unfair prejudice, with judicial economy being impacted so far as necessary to ensure a fair trial.

The fact separate conduct charged by the State occurred at the same approximate time as other conduct does not necessarily make the conduct so related as to require a single trial, even if all conduct was directed toward the same person or group:

> In deciding whether multiple charges should be joined, the prosecutor and the trial judge may start, then, with the initial guideline that if a complete account of one charge necessarily includes details of the other charge, the charges must be joined to avoid a later double jeopardy defense to further prosecution. We construe this test of interrelated events as necessitating joinder only where the facts of each charge can be explained adequately only by drawing upon the facts of the other charge.

State v. Bair, 362 N.W.2d 509, 512 (Iowa 1985) (citing *State v. Boyd*, 533 P.2d 795, 799 (Or. 1975)). "The test focuses in three ways on how the crimes are linked together: time, place, and the circumstances. Joinder must occur where 'the facts of each charge can be explained adequately only by drawing upon the facts of the other charge." ' *Id*. (citing *Boyd*, 533 P.2d at 799). Neither time nor the circumstances of Counts I & II and III are the same. The fact they all allegedly occurred at the same place—Midwest Academy—is insufficient to present all evidence to a single jury.

Given that one of the charges is violation of Iowa Code § 709.15(3)(a), it is important to emphasize that the issue is whether a "common scheme or plan" as set out in Rule 2.6(1) has been sufficiently established—not whether there is evidence of a "pattern or practice or scheme of conduct." *See State v. Oetken*, 613 N.W.2d 679, 688 (Iowa 2000) (citing *State v. Wright*, 191 N.W.2d 638, 641 (Iowa 1971)) ("A common scheme or plan requires more than the commission of two similar transgressions by a single person."); *cf. State v. Robinson*, 506 N.W.2d 769, 772 (Iowa 1993) (where question before

the court was whether two acts constituted a single violation, error was found in applying the test for "same transaction or occurrence" under the old Rule 6(1), when it should have focused on the language "single scheme, plan, or conspiracy" in the statute defendant was charged with violating).

While Iowa R. Crim. P. 2.6(1) and Iowa Code § 709.15(3)(a) use similar language, their intentions differ. *Compare* Iowa R. Crim. P. 2.6(1), Comment; *with State v. Nicoletto*, 845 N.W.2d 421, 423 (Iowa 2014) (concluding that because section 709.15(3)(a) prohibits "[s]exual exploitation by a school employee," conviction of part-time assistant coach was reversed). Based on their divergent purposes, "pattern or practice or scheme" should not be interpreted as having the same meaning as "common plan or scheme". To do so would hold that severance could never be granted so long as the Trial Information charged a violation of Section 709.15(3)(a)—a disregard of the court's discretion.

This Court must not place an undue emphasis on judicial economy where the counterbalancing consideration is the fairness of the trial. *Dicks*, 473 N.W.2d at 214. The interests of judicial economy are subservient to a defendant's constitutional interests in a fair trial. *See State v. Owens*, 635 N.W.2d 478, 483 (Iowa 2001) (where potential for prejudice is great, the State is required to duplicate its efforts in separate trials); *State v. Belieu*, 288

N.W.2d 895, 902 (Iowa 1980) ("Considerations of judicial economy must give way when they have the effect of denying an accused a fair trial."); *Cf. State v. Winters*, 690 N.W.2d 903, 910 (Iowa 2005) (the convenience and economic benefits of a joint trial do not take precedence over a defendant's right to a speedy trial).

One purpose of severance is to prevent the prejudice that inherently attends evidence of other crimes or wrongs. *State v. Smith*, 576 N.W.2d 634, 637 (Iowa Ct.App. 1998). Unfair prejudice means "an undue tendency to suggest decisions on an improper basis, commonly though not necessarily, an emotional one." *Id*. (*quoting State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988)). "Unfair prejudice" may occur because an insufficient effort was made to avoid the dangers of prejudice, or because the theory on which the evidence was offered was designed to elicit a response from the jurors not justified by the evidence. *Id*.

As it relates to this case, evidence of sexual abuse or conduct with a minor is inherently prejudicial. *See State v. Castaneda*, 621 N.W.2d 435, 442-43 (Iowa 2001) (quoting *State v. Marvin*, 197 Iowa 443, 197 N.W. 315 (1924)) (holding that evidence of other sexual acts "...leave in the minds of the jurors the impression of the defendant's proneness to do such things, and the knowledge which the jury had received in relation to the acts of the defendant

with another girl could not be erased by a mere direction on the part of the trial court").

The same is true regarding claims of the same children who are alleged to have been sexually abused were also being malnourished and subjected to isolation. It is impossible for the jury to hear evidence going to one charge without that same evidence being used to find Trane committed the other. Where such inherent prejudice exists, and severance can remove or reduce such prejudice, and should be granted. *Cf. State v. Brown*, No. 02–0086, 2003 WL 1967828, at *3 (Iowa Ct.App. April 30, 2003) ("Because of the inherently prejudicial nature of evidence relating to gang membership and activity...we have substantial doubt concerning whether the district court was correct in denying Brown's motion to sever.").

The evidence presented by the State at trial created such a general sense of propensity that Trane was deprived of a fair trial. *See State v. Cox*, 781 N.W.2d 757, 772 (Iowa 2010) (admitting evidence of a defendant's sexual abuse of other victims based only on its value as general propensity evidence violates the due process clause of the Iowa Constitution.) Nothing within the realm of evidence for the child endangerment claim was necessary to prove the sexual assault or "pattern and practice" claims. Trane's constitutional rights to testify, present witnesses, and present a defense as guaranteed by the

Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, and these similar rights under Article I, Sections 9 and 10 of the Iowa Constitution, were prejudiced by all the alleged offenses having been tried together. *See Rock v. Arkansas*, 483 U.S. 44, 52-53 (1987) (Fifth and Sixth Amendment rights to testify and put on defense); *Faretta v. California*, 422 U.S. 806, 818 (1975) (Sixth and Fourteenth Amendment rights to call witnesses and put on defense); *State v. Clark*, 814 N.W.2d 551, 560 (Iowa 2012) (right to due process, fair trial, and present defense covered by Article I, Sections 9 and 10).

The State's interest in a joint trial arises from a desire to avoid multiple trials and having the alleged witnesses testify multiple times. These concerns cannot outweigh Trane's right to a fair trial on every count. A severance should have been sought. The failure to do so was ineffective and prejudicial. A new trial is required.

III. K.S. had lodged multiple false claims of abuse, and the trial court abused its discretion by excluding those claims from evidence.

A. *Error Preservation*.

Trane filed a Rule 5.412 Motion before trial commenced. (App. 23). The court considered the motion and heard argument. (TT2 233:22–241:19). The court denied the motion on the record, and later filed a written ruling

denying Trane from seeking to admit certain evidence at trial. (TT2 241:20–243:14; *see* App. 28). The court's final ruling was definitive and therefore error is preserved. *State v. Alberts*, 722 N.W.2d 402, 407 (Iowa 2006).

B. *Standard of Review.*

"We review trial court rulings on admissibility of evidence under rule 5.412 in criminal prosecutions for abuse of discretion." *Id.* If the court exercised its discretion on grounds or for reasons clearly untenable, or to an extent clearly unreasonable, reversal is warranted. *Id.* at 408.

C. *The 5.412 Motion was filed immediately after K.S.'s deposition and raised critical concerns regarding her credibility.*

Iowa Rule of Evidence 5.412 states, in part, evidence of a victim's "[r]eputation or opinion evidence offered to prove that a victim engaged in other sexual behavior" and the "victim's other sexual behavior other than reputation or opinion evidence" is not admissible in criminal proceedings on sexual abuse. Iowa R. Evid. 5.412. However, as the Iowa Supreme Court has recognized:

> [P]rior false claims of sexual activity do not fall within the coverage of our rape-shield law. Because a false allegation of sexual activity is not sexual behavior, such statements fall outside both the letter and the spirit of the rape-shield law.

State v. Baker, 679 N.W.2d 7, 10 (Iowa 2004). Though such evidence would ultimately not be covered under Rule 5.412, it has also been recognized "that

a claim of sexual conduct (or misconduct) by the complaining witness [must] be shown to be false before it is admissible at trial," thus the procedural requirements of Rule 5.412 apply. *Alberts*, 722 N.W.2d at 409 n.3.

1. The Rule 5.412 Motion was timely filed.

Procedurally, Rule 5.412 requires a motion to offer such evidence be filed "at least 14 days before trial *unless* the court determines that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence," with an offer of proof filed alongside the motion describing the evidence to be offered and the purpose for which it is offered. Iowa R. Evid. 5.412(c)(1) (emphasis added).

While it does not appear Iowa courts have interpreted what is considered "newly discovered" evidence under Rule 5.412(c)(1), the plain language of the Rule suggests evidence is newly discovered if, though existing more than 14 days before trial, was not known until after this time. *See Grissom v. State*, 572 N.W.2d 183, 184 (Iowa Ct.App. 1997) ("Acts or events occurring subsequent to trial do not generally qualify as newly discovered evidence.") Due diligence is simply, "The diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." *Due Diligence*, *Black's Law Dictionary* 208 (3d Pocket Ed. 2006).

The evidence at issue involves claims of prior sexual abuse occurring prior to K.S.'s attendance at Midwest Academy. The details of these claims were not made known to Trane until K.S. was deposed. K.S. was not deposed until the day before trial because of the State slow-playing the disclosure of discovery in Trane's case. The State had full control over the disclosure of information in this case, going back to the year-long investigation which preceded the charge.

Following the actual charge being filed on August 18, 2017, the State did not provide the information until November 28, 2017. A discovery agreement entered by the parties on October 27, 2017 asserted, "[t]he discovery in this case is voluminous and contains the identifying information of hundreds of persons." (App. 13). The State continued to delay disclosure of information, as shown in the Motion for Extraordinary Discovery Expense, filed November 16, 2017: "The State advises that there is approximately 5-6 TB [terabytes] of documentary evidence to provide pursuant to the discovery agreement[.]" (App. 18) Less than a month before trial, the State was refusing to provide an incredible amount of information until Trane's court-appointed counsel paid for a hard drive on which to produce the information. (*Id.*).

Trane has a right to speedy trial pursuant to Article I, Section 10 of the Iowa Constitution. *State v. Taylor*, 881 N.W.2d 72, 76 (Iowa 2016). The right

to a speedy trial is also protected by the Sixth Amendment to the United States Constitution. *State v. Orte*, 541 N.W.2d 895, 898 (Iowa Ct.App. 1995). As the Iowa Supreme Court has recognized, "[D]efendants do not forfeit their speedy trial rights by pursuing discovery of State's evidence." *Winters*, 690 N.W.2d at 909. The State's months-long delay in disclosing a tremendous amount of discovery—to which Trane was constitutionally and procedurally entitled to timely receive—cannot be used by the State to accuse Trane of a lack of diligence. *See Harrington v. State*, 659 N.W.2d 509, 512 (Iowa 2003) (State's failure to disclose police reports containing information regarding another suspect prevented defendant from discovering evidence even in exercise of due diligence).

Trane's trial counsel filed the Rule 5.412 Motion at the earliest possible time: immediately following discovery of the information about K.S.'s false allegations. While no written offer of proof was included, this defect was not prejudicial to the State, as the State was well aware of the claims at issue from having attended K.S.'s deposition, and from the verbal professional statement made by trial counsel on December 13, 2017 regarding her investigation of the false allegations. Given these circumstances, there was no procedural defect on which to base a denial.

2. Trane met his burden under Rule 5.412(c) and a hearing should have been held.

As to the merits of the issue, Trane had the burden "to 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." *Alberts*, 722 N.W.2d at 409. A full hearing should have been held so Trane could have submitted evidence as to the falsity of the accusations. In *Alberts*, given the importance of the accuser's credibility in that case, the Iowa Supreme Court found "the trial court abused its discretion by excluding evidence of the skinny-dipping incident without first giving Alberts the opportunity to prove at a 5.412(c) hearing that R.M. made a prior false claim of sexual misconduct." *Id*. at 413; *see also Millam v. State*, 745 N.W.2d 719, 724 (Iowa 2008) ("We conclude that the possibility that this evidence would have impugned J.S.'s credibility is 'sufficient to undermine confidence in the outcome."). The failure to allow Trane to present the evidence available to support his Motion was erroneous.

Such a hearing could have been held without disrupting the trial to a significant degree. Trane's primary witness, the adoptive mother, was available to testify by telephone. This testimony could have been arranged to occur outside the presence of the jury, allowing the trial court to weigh it directly, instead of from a simple offer of proof. K.S. was set to testify the

following day. Again, the court could have taken her testimony on this issue outside of the jury's presence, and weighed it against Trane's evidence. Additionally, both parties indicated they had documents available which would support their respective positions. The court should have allowed the evidence to be presented prior to making its decision. To do otherwise deprived Trane of his right to present a defense without the benefit of an evidentiary hearing.

K.S.'s credibility was a critical issue at trial. Evidence of prior false allegations against other persons would have been strong evidence discrediting K.S.'s claims. Trane has a constitutional right to prepare and present a defense. *See Gilmore v. Taylor*, 508 U.S. 333, 343 (1993) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (in the context of exclusion of evidence, "We have previously stated that 'the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."'")); *State v. Fox*, 491 N.W.2d 527, 531 (Iowa 1992) ("[A] defendant should have a meaningful opportunity, at least on par with that of the prosecution, to present a case…."); *State v. Mahoney*, 515 N.W.2d 47, 50 (Iowa 1994) (stating a defendant is required to be given "a meaningful opportunity to present a complete defense"). It is fundamentally unfair to use this right as leverage against Trane asserting his right to a speedy trial,

particularly when the State's failure to timely disclose discovery was a direct cause of Trane's inability to investigate an available defense. Trane's conviction must be reversed and remanded for a new trial, with directions to hold a Rule 5.412 hearing prior to such new trial. *Alberts*, 722 N.W.2d at 412.

IV. Improper vouching testimony was admitted, without objection by trial counsel, regarding the alleged victim's credibility.

A. *Error Preservation*.

Rules of error preservation do not apply to claims of ineffective assistance of counsel. *Nguyen*, 878 N.W.2d at 750.

B. *Standard of Review*.

This Court reviews hearsay rulings for correction of errors at law, "and will reverse the admission of hearsay evidence as prejudicial unless the contrary is shown." *State v. Dudley*, 856 N.W.2d 668, 675 (Iowa 2014). This Court reviews claims of ineffective assistance of counsel de novo. *Elston*, 735 N.W.2d at 198.

C. *Testimony from the State's expert and other witnesses crossed the line of permissible testimony and trial counsel was ineffective for failing to object.*

It is impermissible for an expert to comment on a witness' credibility. *State v. Myers*, 382 N.W.2d 91, 97 (Iowa 1986). The line between "opinion which would be truly helpful to the jury and that which merely conveys a

conclusion concerning defendant's legal guilt" is "fine but essential." *Id*. at 98.

> [E]xperts will be allowed to express opinions on matters that explain relevant mental and psychological symptoms present in sexually abused children. On the improper side of the line would be expert testimony that either directly or indirectly renders an opinion on the credibility or truthfulness of a witness.

State v. Payton, 481 N.W.2d 325, 327 (Iowa 1992) (citations omitted). Vouching testimony has been recognized as a particular problem in child sex abuse cases:

> We understand and recognize the State's concern about the sexual abuse of children. These cases are difficult to prosecute because of the age of the victims and the lack of eyewitnesses. Such crimes are indeed detestable and society demands prosecution of these abusers. However, a sexual abuse charge alone carries a large stigma on the accused and conviction provides a serious penalty. In interpreting our Rules of Evidence, we must not only be aware of the needs of society but also the defendant's right to a fair trial.

Myers, 382 N.W.2d at 97.

Recent Iowa decisions reaffirm this "well-settled Iowa law" prohibiting expert evidence about a victim's credibility. *Dudley*, 856 N.W.2d at 676; *State v. Brown*, 856 N.W.2d 685 (Iowa 2014); *State v. Jaquez*, 856 N.W.2d 663 (Iowa 2014). In these cases, the Iowa Supreme Court has stated:

> [W]e continue to hold expert testimony *is not admissible merely to bolster credibility*. Our system of justice vests the jury with the function of evaluating a witness's credibility. The reason for not allowing this testimony is that a witness's credibility "is not

> a 'fact in issue' subject to expert opinion." Such opinions not only replace the jury's function in determining credibility, but the jury can employ this type of testimony as a direct comment on defendant's guilt or innocence. Moreover, when an expert comments, directly or indirectly, on a witness's credibility, the expert is giving his or *her scientific certainty stamp of approval on the testimony* even though an expert cannot accurately opine when a witness is telling the truth. In our system of justice, *it is the jury's function to determine the credibility of a witness*. An abuse of discretion occurs when a court allows such testimony.

Dudley, 856 N.W.2d at 676 (internal citations omitted); *Brown*, 856 N.W.2d at 689; *Jaquez*, 856 N.W.2d at 665 (emphasis added). It is necessary to break down each objectionable statement "to determine if the State crossed the line." *Dudley*, 856 N.W.2d at 678.

A review of decisions on this issue shows the distinction between proper testimony and vouching. *See Myers*, 382 N.W.2d at 97-98 (testimony regarding statistics on lack of fabrication and who expert believes children "improperly suggest[ed] the complainant was telling the truth and, consequently, the defendant was guilty."); *State v. Brotherton*, 384 N.W.2d 375, 378 (Iowa 1986) (opinion negating child's ability to fantasize sexual activity "indirectly opined on the truthfulness of the complaining witness"); *State v. Tracy*, 482 N.W.2d 675, 678 (Iowa 1992) (testimony about small number of children who make false allegations concerned the truthfulness of minor's testimony); *Dudley*, 856 N.W.2d at 676 (statement that social worker recommended minor attend therapy and avoid accused indirectly vouched for

credibility); *Brown*, 856 N.W.2d at 689 (statement that disclosure was significant and warranted investigation indirectly conveyed the accusation was true); *Jaquez*, 856 N.W.2d at 665 (opinion that child's demeanor was consistent with a child who had been traumatized vouched for credibility).

The testimony of Dr. Anna Salter contained several improper statements to which trial counsel should have objected. Under the guise of explaining the concept of "counterintuitive victim behavior," Salter tied the behavior of the purported victims in this case to that of the City of Boston following the Boston Marathon bombing:

> Now, in Boston when there was the Boston Marathon, after the city reopened people went back to work. People went on with their lives. People tried to act normal. In some cases, they were pretending normal but they were trying. And the whole country labeled it Boston Strong.
>
> But when sexual abuse survivors go back about their lives; when they pretend nothing happened; when they go back to work or they act like they're fine, then we tend to say it didn't happen.
>
> So we he have a double standard. It's courageous when the terrorists – the victims of terrorism do it, but we typically think it means it didn't happen when victims of sexual abuse do it.

(TT4 206:25–207:17).

The bombing of the Boston Marathon was an act of terrorism, with the act, the aftermath, and the manhunt observed live around the world. CNN Library, *Boston Marathon Terror Attack Fast Facts*

(https://www.cnn.com/2013/06/03/us/boston-marathon-terror-attack-fast-facts/index.html, accessed Aug. 8, 2018). There is no dispute a bomb was set off in a public square resulting in injuries to hundreds of people. *Id*. Salter's testimony relies on this widely known event to show that the alleged acts of sexual abuse by Trane should be similarly obvious. It asserts Trane's alleged victims are credible because their attempts at normalcy are just another version of "Boston Strong," with their courage being shown in the face of Trane's alleged abuse. It also charges that should the jury find otherwise, they are simply utilizing a double standard against the victims of a different kind of "terrorism."

This is not the only place in Salter's testimony where she seeks to tie Trane to criminal acts known through nationally publicized news stories. Salter made clear references to convicted pedophile Larry Nassar, former USA Gymnastics and Michigan State University doctor, who abused over 100 women and girls over twenty years. Maggie Astor, *Gymnastics Doctor Who Abused Patients Gets 60 Years for Child Pornography*, N.Y. Times, December 7, 2017 (https://www.nytimes.com/2017/12/07/sports/larry-nassar-sentence-gymnastics.html, accessed Aug. 8, 2018). The following testimony by Salter is clear reference to the Nassar case, which was highly publicized and being held at the same time as Trane's trial:

> So when perpetrators are not jumping out from the bushes, when they're fathers or mothers or teachers or doctors or music teachers or Boy Scout Leaders *or your coach when you're trying to get to the Olympics*, and the next morning they come out and act like nothing happened; they tell you to do your homework or whatever; they go on like normal, kids and adults try to pretend it didn't happen, too, and go back to normal.

(TT4 209:7–17) (Emphasis added.)

> 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 get 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.

(TT4 212:24–213:6) (Emphasis added.) While the Nassar case involved an Olympic program doctor, rather than a coach, Salter's attempt to equate the unproven allegations against Trane to the Nassar case simultaneously playing out in the news is clear.

Similarly, much of Salter's testimony is her providing extensive narratives about her personal interactions with sex offenders who have admitted to using their status and access to further their abuses. A review of the trial transcript reveals that these near monologues constituted a substantial portion of her testimony. (TT4 210:1-212:7; 226:17-229:4). The purpose of this testimony was to equate the allegations against Trane to the admitted acts of convicted sex offenders: "I have had – *and I'm talking about what offenders tell me now*, not even victims." (TT4 226:17–19) (Emphasis added.)

The Iowa Supreme Court has explained the purpose of expert testimony in child sexual abuse cases is to

> give the jury a framework of possible alternatives for the behaviors of the victim at issue in the case in relation to the class of abuse victims. In this respect, the expert's role is to provide sufficient background information about each individual behavior at issue which will help the jury to dispel any popular misconception commonly associated with the demonstrated reaction.

Dudley, 856 N.W.2d at 684 (quoting *People v. Beckley*, 456 N.W.2d 391, 406 (Mich. 1990)). Salter "educated" the jury by likening Trane to: (1) widely known acts of terrorism, (2) a headline-grabbing sexual predator, and (3) other high-status offenders was not educating the jury. This was designed to demean Trane in the minds of the jury, associate him with these other acts, and therefore make the testimony of K.S. more credible. Such testimony was wholly improper. *See State v. Wilkins*, 693 N.W.2d 348, 352 (Iowa 2005) (disapproving of prosecutor's reference in murder trial "calculated to link defendant in the minds of the jurors with O.J. Simpson, a perceived pariah in matters of homicide.").

Salter was not the only witness to provide improper vouching testimony. The first witness called was A.H.'s mother, whose testimony included the following discussion of his behavior following the alleged conduct:

> Q. Do you ever try to talk to [A.H.] about Midwest Academy?
>
> A. We have. We had tried since the day that he got home to talk to us about what his experience was. His doctor, Dr. Stiles, the psychiatrist, and his primary care doctor, Dr. Minnick, have also tried to talk to him. He won't talk to anyone.
>
> We've tried counseling. [A.H.] would just sit there in the room and not say a word. Dr. Stiles eventually said, we should not push him to try to talk about it. When's he ready he will talk.

(TT4 307:20–308:7). The only purpose of this testimony was to tie A.H.'s refusal to testify to his mother's belief that what was alleged actually occurred. While it did not come from an expert, this is still improper opinion testimony under Iowa Rule of Evidence 5.701:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> a. Rationally based on the witness's perception;
>
> b. Helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> c. Not based on scientific, technical, or other specialized knowledge . . . .

Iowa R. Evid. 5.701.

While the fact A.H. refused to speak may be based on his mother's perceptions, this testimony went beyond that: to opine as to his reasoning for not speaking—something unknown to her. As it relates something said to her by one of A.H.'s doctors, it also intrudes into an area involving "scientific, technical, or other specialized knowledge." *Id.* In fact, the reference to Dr.

Stiles is separately inadmissible as improper hearsay, as a statement made by Dr. Stiles outside of the trial proceedings, clearly offered for the truth of the matter asserted, namely that A.H. would not talk about being abused by Mr. Trane. *See* Iowa R. Evid. 5.801; Iowa R. Evid. 5.802.

Vouching testimony is not redeemed because a family member, rather than expert, made the statement. *See Bowman v. State*, 710 N.W.2d 200, 204 (Iowa 2006) (bright-line rule prohibits any witness from being asked to opine on whether another witness is telling the truth); *State v. Kinsel*, 545 N.W.2d 885, 889 (Iowa Ct.App. 1996) (lay witness opinion testimony limited to statements rationally based on perceptions and helpful to a clear understanding of testimony or determination of fact). In fact, because A.H.'s own mother gave the testimony, rather than some outside expert, the jury is more likely to accept it as true. *Cf. State v. Martens*, 521 N.W.2d 768, 772 (Iowa Ct.App.1994) ("[V]ouching for a witness may induce the jury to trust the judgment of the prosecutor rather than their view of the evidence since the prosecutor's opinion carries the imprimatur of the Government").

The above testimony was highly objectionable and should have been excluded. The failure of trial counsel to object was ineffective assistance, and given the prejudicial impact of the testimony, a new trial must be granted. *See State v. Tjernagel*, No. 15–1519, 2017 WL 108291, at *7–8 (Iowa Ct.App.

Jan. 11, 2017) (counsel was ineffective for failure to object to "statements made by Dr. Salter on direct examination by the State"); *State v. Pitsenbarger*, No. 14–0060, 2015 WL 1815989, *9 (Iowa Ct.App. April 22, 2015) (trial counsel has a duty to object to improper vouching testimony).

V. Trane is entitled to a new trial because the State cannot prove a single count of child endangerment using multiple alleged victims.

A. *Error Preservation*.

Trane was convicted on one count child endangerment as to "B.V. and/or A.H." (App. 38 & 39). Trane argued he was entitled to a new trial because the jury had been improperly instructed as a matter of law. *See* Iowa R. Crim. P. 2.24(2)(b)(7). The trial court denied Trane's claim in a written ruling. (App. 75). Error is preserved. *State v. Sloan*, 203 N.W.2d 225, 226 (Iowa 1972).

B. *Standard of Review*.

This Court reviews challenges to jury instructions for correction of errors at law, with an eye to determine whether the challenged instruction accurately states the law. *State v. Spates*, 779 N.W.2d 770, 775 (Iowa 2010). "Error in giving a particular instruction does not warrant reversal unless the error was prejudicial to the party." *Id.*

C. *Absent a special interrogatory, a single count of child endangerment cannot be sustained by a combination of evidence related to multiple children.*

As to B.V. and A.H., Trane was charged with a single count of child endangerment. The relevant statute provides,

> A person who is the parent, guardian, or person having custody or control over a child or a minor under the age of eighteen with a mental or physical disability, or a person who is a member of the household in which a child or such a minor resides, commits child endangerment when the person . . . [k]nowingly acts in a manner that creates a substantial risk to a child or minor's physical, mental or emotional health or safety.

Iowa Code § 726.6(1)(*a*). The State cannot secure one conviction under this statute by using evidence related to multiple children and fashioning an "and/or" instruction. The fighting issue is the appropriate "unit of prosecution" under Iowa Code section 726.6.

Jury Instruction 31 stated:

> Under Count III of the Trial Information, the State must prove all of the following elements of Child Endangerment:
>
> 1. On or about September 18, 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.
>
> If the State has proved all of the elements, the defendant is guilty of Child Endangerment. If the State has failed to prove any one

> of the elements, the defendant is not guilty of Child Endangerment.

(App. 38) (Emphasis added). Instruction 33 related to the defendant's mental state, and existence of "a substantial risk[ ] to *B.V. and/or A.H.*'s" health or safety. (App. 39). These instructions are not supported by a plain reading of the statute.

The prosecutor's closing makes clear the State sought to convict Trane of child endangerment based on two alleged victims. (TT8 155:1–173:3). The prosecutor discussed B.V. and A.H. interchangeably throughout the argument, switching between B.V.'s testimony and documents related to A.H.'s care. (TT8 162:12–163:5). At one point, the prosecutor discussed an entire group of children. (TT8 165:21–166:2). The prosecutor argued Trane's strict rules would not be bent "for [B.V.], nor for [A.H.], not for *anybody*." (TT8 166:14–15 (emphasis added)). These remarks confirm no one single child was the subject of the State's conviction for child endangerment.

The conjunctive/disjunctive "and/or" language used in the jury instructions was error because the unit of prosecution for child endangerment is per-child. If the State believed Trane placed B.V. *and* A.H. in danger, the State should have charged two counts. If the State believed Trane placed B.V. *or* A.H. in danger, it was required to pick one child and name him individually

in the instructions.[7] The approach in this case—absent a special interrogatory—is not allowed: offer a variety of evidence and then see what evidence sticks as to each element. *See Clinton Phys. Therapy Servs. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 611 (Iowa 2006) ("The purpose of a special interrogatory is not to instruct the jury, but to act as a check on its verdict." (quoting *Burmac Metal Finishing Co. v. W. Bend Mut. Ins. Co.*, 825 N.E.2d 1246, 1259 (Ill. App. 2005))).

The Iowa legislature defines the unit of prosecution for criminal offenses in a variety of ways. *See State v. Ross*, 845 N.W.2d 692, 705 n.3 (Iowa 2014). For example, the unit of prosecution for theft-by-fraudulent-document is defined by the number of checks or written orders. *Id.* (citing Iowa Code § 714.1(6)). The unit of prosecution for Iowa's willful-injury statute is based upon the number of acts of the defendant. *State v. Velez*, 829 N.W.2d 572, 580 (Iowa 2013) (citing Iowa Code § 708.4). The number of victims defines the unit of prosecution for murder. *Ross*, 845 N.W.2d at 705 n.10 (citing Iowa Code § 707.1). Yet in any case, "[t]he wording of the legislature strictly controls our analysis as to the appropriate unit of prosecution, and we have consistently resisted policy arguments in favor of

[7]Evidence related to the un-charged child would therefore become irrelevant and highly prejudicial. *See* Iowa Rs. Evid. 5.401, .403, .404(b).

interpreting a statute in a way the legislature did not explicitly intend." *Velez*, 829 N.W.2d at 579.

As with § 707.1, the unit of prosecution under § 726.6 is based upon the number of alleged victims—i.e., one conviction must be based upon evidence as to one child. The statute prohibits a person from "knowingly act[ing] in a manner that creates a substantial risk to *a child* or *minor*'s physical, mental or emotional health or safety." Iowa Code §726.6(1)(*a*) (emphasis added). The statute does not use the term "children" or "the children." Instead, the legislature chose to use the article "a," which "is used as a function word before most *singular* nouns other than proper and mass nouns when the individual in question is undetermined, unidentified, or unspecified." *State v. Kidd*, 562 N.W.2d 764, 765 (Iowa 1997) (quoting Webster's Third New International Dictionary 75 (1993)). The statute is unambiguous, and this Court need look no further than its plain language. *State v. Richardson*, 890 N.W.2d 609, 616 (Iowa 2017).

In *State v. Ross*, the defendant challenged his conviction under section 708.6 (intimidation with a dangerous weapon) because the word "victim" was used in the instruction, rather than naming each particular victim. 845 N.W.2d at 698. The Court rejected that argument, but only after analyzing the statute under which Ross was convicted. *Id.* "To determine the validity of Ross's

claim, we must first decide what act the general assembly criminalized under Iowa Code section 708.6." *Id.* Because that statute does not necessarily criminalize an act on a particular person, "but rather an assault calculated to imperil the safety of the people in the assembly," the instruction properly stated that the broad term "victim" could be used to describe multiple people. *Id.* at 699 ("Although it would have been better for the court to use 'the people' rather than 'the victim' in element three, the instruction properly states the law.").

Conversely, here the statute is very clear. One charge of child endangerment must relate to one alleged child victim. This is because the statute relates to "a child," not "a group or pair of children." The State is entitled to bring multiple charges when more than one child is involved; however, in this case, it did not. *Cf. State v. Millsap*, 704 N.W.2d 426, 435 (Iowa 2005) (upholding a consecutive sentence for two counts of child endangerment because "the existence of two victims is clearly a circumstance of the crime").

Prosecutors brought one charge with wishy-washy instructions, and therefore, we do not know who the jury found to be endangered: B.V. or A.H. Courts and scholars agree: use of the term "and/or" in the law is ill-advised. "The upshot is that the only safe rule to follow is not to use the expression in

any legal writing, document or proceeding, under any circumstances." Bryan A. Garner, *A Dictionary of Modern Legal Usage* 56 (2d ed. 1995). Justice Fowler, of the Wisconsin Supreme Court, described the term as

> that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of some one too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning with view to furthering the interest of their clients.

Employers' Mut. Liab. Ins. Co. v. Tollefsen, 263 N.W. 376, 377 (Wisc. 1935). Another court remarked the phrase is a "linguistic abomination" that "has no place in pleadings, findings of fact, conclusions of law, judgments or decrees, *and least of all in instructions to a jury*." *State v. Smith*, 184 P.2d 301, 331 (N.M. 1947) (emphasis added).

The instructions were also contrary to the Uniform Iowa Criminal Jury Instructions, which require the State to name the alleged victim in a charge of child endangerment. Courts are generally "slow to disapprove of the uniform jury instructions." *State v. Ambrose*, 861 N.W.2d 550, 559 (Iowa 2015). The uniform instruction states:

> 1. On or about the _____ day of _____, 20___, the defendant was the [{parent} {guardian} {person having custody or control} of *(name)* {or a member of the household in which (name) resided}].

> 2. *(Name)* was [under the age of fourteen years] [a mentally or physically handicapped minor under the age of eighteen].
>
> 3. The defendant acted with knowledge that [he] [she] was creating a substantial risk to *(name)*'s [physical] [mental] [emotional] health or safety.
>
> 4. The defendant's act resulted in serious injury to *(name)*.

Iowa State Bar Ass'n, Iowa Criminal Jury Instructions 2610.1 (updated through June 2017) (emphases added); *see State v. Hickman*, 576 N.W.2d 364, 368–69 (Iowa 1998).

Not only were the instructions erroneous, their submission was not harmless error. "[E]rror in instructing the jury is presumed prejudicial unless the contrary appears from a review of the whole case." *Sloan*, 203 N.W.2d at 227. The jury was permitted to consider whether Trane had custody or control of B.V. *or* A.H. (App. 38). It separately considered whether B.V. *or* A.H. were under the age of fourteen. (*Id.*). In other words, because the "and/or" language appeared in all three elements of Instruction 31, the jury was allowed to mix and match evidence.

When it is impossible to tell whether the jury relied on invalid or supported claims to reach its verdict, error is not harmless and the verdict cannot stand. *State v. Schlitter*, 881 N.W.2d 380, 391 (Iowa 2016); *State v. Tyler*, 873 N.W.2d 741, 753–54 (Iowa 2016). Assuming this case is not remanded to the trial court for a proper new-trial proceeding, (*see* Issue I),

Trane's conviction for child endangerment must be reversed and remanded for a new trial on that offense. *State v. Harris*, 891 N.W.2d 182, 189 (Iowa 2017).

VI. The verdicts are not supported by substantial evidence; Trane's convictions violate the Fourteenth Amendment's Due Process Clause.

A. *Error Preservation*.

The court denied Trane's motion for judgments of acquittal. (TT6 86:7–88:3; 82:10–84:6). As to Count I, the jury found Trane not guilty of Third-Degree Sexual Abuse, but guilty of Assault with Intent to Commit Sexual Abuse. (App. 34). The jury found Trane guilty as charged on Counts II and III. (App. 34).

B. *Standard of Review*.

State v. Leckington provides:

> Review of sufficiency-of-evidence claims is for errors at law. The verdict must be supported by substantial evidence which is "such evidence as could convince a rational trier of fact that [the] defendant is guilty beyond a reasonable doubt." In determining whether there is substantial evidence, the record is viewed in a light most favorable to the State, and this includes all legitimate inferences that may fairly and reasonably be deduced from the evidence. We consider all the evidence presented, not just that of an inculpatory nature. Evidence that only raises suspicion, speculation, or conjecture is not substantial.

713 N.W.2d 218, 221 (Iowa 2006) (internal citations omitted).

C. *Challenge to Essential Elements*.

The State was required to prove the following elements of Assault with Intent to Commit Sexual Abuse:

1. On or between January 1, 2015, and December 31, 2015, Trane assaulted K.S.
2. Trane did so with the specific intent to commit a sex act by force or against the will of K.S.

(Instr. 22); *see* Iowa Code § 709.11.

The State was required to prove the following elements of Pattern, Practice, or Scheme to Engage in Sexual Exploitation by a Counselor or Therapist:

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

(Instr. 27); *see* Iowa Code § 709.15(2).

The State was required to prove the following elements of Child Endangerment:

1. On or between September 18, 2014, and January 31, 2016 Trane 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. Trane acted with knowledge that he was creating a substantial risk to B.V. *and/or* A.H.'s physical or mental or emotional health or safety.

(Instr. 31); *see* Iowa Code § 726.6(1), (3).

As to the first and second offenses, the State's convictions rest solely on the uncorroborated and unreliable statements of K.S. The accusations were not corroborated by any physical or electronic evidence. No third-party witnesses supported K.S.'s allegations. K.S. had made prior false sexual abuse allegations; however, because Trane was not put on notice of those allegations until the day before trial, he was denied the ability to confront K.S. before the jury. K.S. testified that Trane had video-recorded at least one incident; however, no video footage was ever located. (TT3 235:13–23; 237:11–18). K.S.'s mere statements are insufficient to support a verdict of guilty because they cannot convince a rational trier of fact that Trane committed such acts. *State v. Smith*, 508 N.W.2d 101, 105 (Iowa Ct.App. 1993).

Further, as to the second offense, the State did not prove that Trane engaged in a pattern, practice, or scheme with the requisite specific intent. Painting with a broad brush, the State pointed to evidence of the body-image education at Midwest, the sexual survey given to students, including K.S., and

Trane's trips to the mall with K.S. and others to buy basic necessities. (TT8 144:13–20). However, Trane's testimony confirms none of these activities were intended to arose or satisfy the sexual desire of himself or K.S. The body-image class was intended to educate young women on human development and attempted to remedy the concerning "fat shaming" trend in culture. (TT7 266:15–270:7). The sexual survey was intended to gather information on how to best educate students on safe sex and personal accountability. (TT7 275:22–278:8). Trips to the mall were for "designer" type clothes. (TT7 286:14–287:2).

Finally, as to the third offense, the State failed to prove Trane—personally—was creating a substantial risk to a child's health and safety. The best indicator the State's child-endangerment case was weak, of course, was its inclusion of *two*, not one, alleged victims in its charge. (App. 38). Trained staff supervised A.H. and B.V. while in the OSS rooms. Counselors provided therapy to A.H. and B.V. while in the OSS rooms. Yet the evidence establishing *Trane* creating a substantial risk to A.H.'s "and/or" B.V.'s health and safety was lacking. The conviction cannot be sustained.

The Due Process Clause of the Fourteenth Amendment protects against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358, 364

(1970). Trane requests this Court find there was insufficient evidence for a rational jury to find him guilty of Assault with Intent to Commit Sexual Abuse; Pattern, Practice, or Scheme to Engage in Sexual Exploitation by a Counselor or Therapist; and Child Endangerment.

Conclusion

For the reasons set out above, Mr. Trane requests this matter be reversed and remanded for a hearing on all grounds raised in his Motion for a New Trial. Alternatively, Mr. Trane requests this matter be reversed and remanded for a new trial or for dismissal.

Oral Argument Notice

Counsel requests oral argument.

PARRISH KRUIDENIER DUNN BOLES GRIBBLE GENTRY BROWN & BERGMANN L.L.P.

By: /s/ Alfredo Parrish

Alfredo Parrish AT0006051
Adam Witosky AT0010436
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: aparrish@parrishlaw.com
awitosky@parrishlaw.com
ATTORNEYS FOR DEFENDANT–APPELLANT

Certificate of Compliance
with Type-Volume Limitation, Typeface Requirements, and
Type-Style Requirements

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because it contains 13,964 words (less than 14,000 words), excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, statement of the issues, and certificates.

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in font size 14, Times New Roman.

/s/ Adam Witosky
Adam Witosky
Dated: February 26, 2019

Certificates of Filing and Service

I hereby certify that I e-filed the Defendant–Appellant's Final Brief with the Electronic Document Management System with the Iowa Judicial Branch on February 26, 2019. The following counsel will be served by Electronic Document Management System:

Sheryl Soich
Assistant Attorney General
Hoover State Office Building,
2nd Floor
Des Moines, Iowa 50319
Telephone: (515) 281-3648
Facsimile: (515) 281-8894
Email: sherri.soich@ag.iowa.gov
ATTORNEYS FOR APPELLEE

I hereby certify that on February 26, 2019, I did serve the Defendant–Appellant's Final Brief on Appellant, listed below, by mailing one copy thereof to the following Plaintiff–Appellant:

Benjamin G. Trane
Defendant–Appellant

PARRISH KRUIDENIER DUNN BOLES GRIBBLE GENTRY BROWN & BERGMANN L.L.P.

By: /s/ Alfredo Parrish

Alfredo Parrish AT0006051
Adam Witosky AT0010436
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: aparrish@parrishlaw.com
awitosky@parrishlaw.com
ATTORNEYS FOR DEFENDANT–APPELLANT