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 REPLY BRIEF and REQUEST FOR ORAL ARGUMENT

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I hereby certify that I e-filed the Defendant/Appellant's Final Reply Brief with the Electronic Document Management System with the Appellate Court on the 26th day of February 2019. The following counsel will be served by EDMS:

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REPLY ARGUMENTS

I. Ineffective Assistance Must Be Considered on Motion for New Trial

A. Iowa R. Crim. P. 2.24(2)(b)(9) Encompasses Ineffective Assistance

In its assessment of the scope of Iowa R. Crim. P. 2.24(2)(b)(9), the State contends reading it in "conjunction with the subsections preceding it" shows it is limited to issues which "implicate circumstances involving the structure of the trial itself." (State Br. 37.) However, in assessing this to mean "[a] motion for new trial is one last opportunity…revisit alleged deficiencies that occurred during trial…", the State fails to account for Rule 2.24(2)(b)(8). (State Br. 39.) This subsection addresses newly discovered evidence "which the defendant could not with reasonable diligence have discovered and produced *at the trial*." Iowa R. Crim. P. 2.24(2)(b)(8) (emphasis added). As it expressly regards materials which cannot have been part of the trial, the State's limited view of Rule 2.24(2)(b) cannot be correct.

The central consideration in ruling on a motion for new trial is whether a defendant was *denied* a fair trial. *See State v. Compiano*, 154 N.W.2d 845, 852 (Iowa 1967) ("Everyone is entitled to one fair trial, but only one.") It is the fairness of the trial proceedings as a whole, not the specific means by which it may have been deprived, which is the focus of the Rule. As recognized almost sixty-years ago, "[A]nything that shows that the defendant did not receive a fair trial is sufficient."

State v. Thompson, 39 N.W.2d 637, 645 (Iowa 1949) (*citing State v. Burgess*, 21 N.W.2d 309, 309 (Iowa 1946)).

Importantly, *Thompson* and *Burgess* each demonstrate the focus on the deprivation over means in their recognition of newly discovered evidence as grounds for new trial despite not being specifically enumerated in the governing rule. *Thompson*, 39 N.W.2d at 645 (*citing* Iowa Code §787.3 (1946)) (new trial statute does not include newly discovered evidence). Because of the impact such evidence can have on the fairness of trial, though it was not an expressly enumerated ground, the Iowa Supreme Court determined: "A motion for new trial on the ground of newly discovered evidence really goes to the statutory ground of whether there was a fair and impartial trial." *Burgess*, 21 N.W.2d at 309.

The statutory ground reference in *Burgess* was in Iowa Code §787.3 (1946), which stated a new trial may be granted "[w]hen from any other cause the defendant has not received a fair and impartial trial." Iowa Code §787.3(8) (1946). This is the exact same language discussed in the present matter, with *Burgess* interpreting it to inherently include discovery of new evidence. *See* Iowa R. Crim. P. 2.24(2)(b)(9) ("The court may grant a new trial…[w]hen from any other cause the defendant has not received a fair and impartial trial.") According to *Burgess*, so long as the district court, in its discretion, determined defendant had made a sufficient showing that

absence of the newly discovered evidence "prevented him from having a fair trial, then a new trial should be granted." *Burgess*, 21 N.W.2d at 309.

This is how Iowa R. Crim. P. 2.24(2)(b)(9) must be applied where ineffective assistance is raised. As with newly discovered evidence, ineffective assistance is a matter which cannot be asserted during trial, but absolutely impacts the fairness of the trial. Where it is raised, a defendant must be entitled to present evidence in support the claim. If the evidence is sufficient to show trial counsel breached their constitutional duty, and in doing so prejudiced the defense, a new trial must be granted.

B. Neither Iowa Code §814.7 Nor Chapter 822 Preclude Ineffective Assistance Being Addressed on Motion for New Trial

The State cites to Iowa Code §814.7(1), which ties ineffective assistance claims to the postconviction relief "except as otherwise provided in this section." (State Br. 40.) However, the State does not discuss what is otherwise provided for in Iowa Code §814.7, which is:

> A party may, but is not required to, raise an ineffective assistance claim on direct appeal from the criminal proceedings if the party has reasonable grounds to believe that the record is adequate to address the claim on direct appeal.

Iowa Code §814.7(2). Typically, the record is not sufficient to pursue this ground on direct appeal, for the same reason it is not often pursued on a motion for new trial,

as trial counsel cannot be expected to see where they were ineffective in a proceeding while its ongoing. No record can be made where the attorney cannot raise the error.

However, as in this case, where a defendant obtains new counsel prior to the entry of judgment, and within the timeframe for seeking new trial, a record can be made on ineffective assistance. While the defendant would not have access to the full civil discovery process afforded under Chapter 822, they would still have the ability to compel trial counsel to testify about the alleged error. Such testimony, more often than not, would create a sufficient record to assess whether counsel failed in performing essential duties. *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). It would also give trial counsel the opportunity to explain their strategy and defend their actions/inactions, with the benefit of the trial being fresh in their minds.

Admittedly, there would be situations where having civil discovery would aid in building the record on prejudice. But Iowa Code Iowa Code §814.7(2) inherently contemplates cases where prejudice can be sufficiently developed on the original trial record. It should be for the defendant to determine which route pursue, and bear the consequences of that decision.

The trial court improperly denied Trane the opportunity to develop his record on ineffective assistance. It was appropriately raised under Iowa R. Crim. P. 2.24(2)(b)(9). It is not precluded by Iowa Code Iowa Code §814.7, nor Chapter 822.

The trial court decision is in error, and the case must be remanded to allow Trane to develop his record, and for the trial court to rule on the issue.

II. Failure to Sever Count III Denied Trane A Fair Trial

In arguing against severance of Count III from Trane's trial, the State relies heavily on *State v. Elston*, 735 N.W.2d 196 (Iowa 2007), putting more weight on this decision than it can bear. (State Br. 46, 48-50.) *Elston* is used by the State to support its claim of a "common scheme" between the allegations of sexual abuse and exploitation in Counts I and II, and child endangerment in Count II, as well as to show how joinder was necessary for efficiency and showing intent and *modus operandi*. (State Br. 46, 48-49.) A review of the case shows it supports neither in the present matter.

Elston involved eighteen counts of sexual exploitation of a minor and one count of indecent contact with a child. 735 N.W.2d at 197. After being acquitted of all sexual exploitation counts, the defendant appealed the denial of his motion to sever the indecent contact charge, of which he was convicted. *Id*. at 198. In affirming the denial of severance, the Iowa Supreme Court concluded a common scheme existed between the counts as the crimes alleged could all "have been motivated by his desire to satisfy sexual desires through the victimization of children." *Id*. at 199. Importantly, several allegations of sexual exploitation alleged defendant had "participated in…taking illicit photographs of A.E.", while "[t]he indecent contact

count alleged Elston inappropriately touched A.E. within the same timespan." *Id*. at 197. Even those sexual exploitation counts not directly involving A.E. were connected to the indecent contact charge as the offensive conduct was still alleged to have occurred in A.E.'s home. *Id*.

The overlapping facts in the present matter are nowhere near the degree of *Elston*. The only direct overlapping fact is the geographic location of the allegations. As charged in the Trial Information, Count I alleged conduct across the entirety of 2015, while Counts II and III alleged conduct over a year-and-a-half. At trial, the evidence showed A.H. attended Midwest Academy from May 2014 to April 2015, while B.V. attended from May 2014 through March 2015. (TT2 281:6-12; TT3 118:8-9, 139:9-10.) This limited the time frame of Count III to an eight-month period. Comparatively, K.S., the complaining witness under Counts I and II, was at Midwest Academy from January 2015 to the start of December 2015. (TT3 160:18-20.) This creates a temporal overlap in attendance of only five months. However, with the bulk of the alleged conduct toward K.S., at least as it regards Count I, is not claimed to have occurred until Summer 2015, after both A.H and B.V. had left. (TT3 178:5-12, 202:14-15, 217:2-218:3; TT4 23:10-15, 76:17-77:23.)

More importantly, there is no logical connection between the alleged conduct in Counts I and II and that in Count III, or how one provides necessary insight into the other. Counts I and II allege sexual conduct involving a teenage female. Count

III involve corporal punishment toward teenage males. While the State asserts testimony regarding the acts alleged toward A.H. and B.V. are necessary to give insight into "Trane's intent and *modus operandi*", this is nonsensical. Even if Trane was the self-righteous disciplinarian the State alleges him to be, this goes nowhere in establishing a sexual intent, which is what needs to be proven under Counts I and II. There is nothing in the conduct alleged for Count III suggesting a sexual motivation, as is required for Counts I and II, which was a critical connection justifying a joint trial in *Elston*. 735 N.W.2d at 199.

Nor do the acts concerning Count III show a similar *modus operandi* to Counts I and II. In discussing *modus operandi* for sexual exploitation, the Iowa Supreme Court has recognized it involves the repetition of the same conduct toward each victim. *See State v. Romer*, 832 N.W.2d 169, 182-83 (Iowa 2013) ("Romer displayed a similar modus operandi with all of the minors involved" including cell phone communication and texting, nude or seminude photographs which he choreographed and encouraged, and providing alcohol). The State's own citations bear out the need for a repeated methodology to show a *modus operandi*. *See State v. Oetken*, 613 N.W.2d 679, 689 (Iowa 2000) (describing "similar methods of operation" for two burglaries); *State v. Delaney*, 526 N.W.2d 170, 175 (Iowa 1994) (similar methods used in committing eight fraudulent loan transactions). There is simply no overlap.

This case is not so complex, nor the Counts so intertwined, that judicial efficiency is sufficient to justify a joint trial where a jury empaneled to determine if a man sexually abused a female student would hear the State accuse him of having separately starved and isolated two male students months earlier. The result of this is a desire to inflict punish on Trane regardless of his guilt based on the unproven concept of a widespread abusive behavior. This approach is a play to emotion, not a call to rational adjudication of fact. It should not have occurred, the risk was clear, and trial counsel was ineffective in failing to seek a severance.

III. The District Court's Refusal to Hold a 5.412 Hearing on K.S.'s Prior False Abuse Claims

A. Timeliness

The issue at hand is the district court's error in refusing to hold a Rule 5.412 hearing which trial counsel had timely sought under the circumstances. The State's argument as to information regarding K.S.'s prior claims being in the discovery released is irrelevant where the State knowingly slow-played the production of all discovery as a ploy to undermine the preparation of Trane's defense or leverage the waiver of his speedy trial right. The circumstances causing delay are a far cry from an "honest misunderstanding" justifying a delay "no more than was reasonably necessary, under the circumstances, to comply with defendant's request", nor was the delay reasonable to the instigating request. *See State v. LaPlant*, 244 N.W.2d 240, 241 (Iowa 1976) (four-month delay of trial warranted due to defendant's

request for witness deposition, own unavailability for trial on only other date in speedy trial period, and misunderstanding between counsel as to scheduling new date).

While the State relies on the size and amount of discovery as justifying the delay (State Br. 55), this overlooks how the State was capable of producing discovery weeks earlier with the resolution of confidentiality concerns. (App. 13) Instead, the State decided to impose an extra financial cost on an indigent defendant as a prerequisite for fulfilling its discovery obligation, delaying release by nearly a month, with the State ultimately covering the cost anyways. (App. 18) Delayed disclosure in the face of a speedy trial deadline cannot be justified by the State's desire to pass and extraordinary financial cost off on the defense, particularly in light of indigency. Had discovery been timely produced, K.S. would have been deposed earlier, notice of the false claims would have been filed earlier, and a full Rule 5.412 hearing would have been had. In light of these circumstances, the district court abused its discretion in failing to hold a hearing.

B. Denial of Hearing Was Prejudicial

With timeliness established, the question becomes simply whether Trane was afforded a proper hearing under Rule 5.412. The State on appeal, and the district court in its Ruling, each skip over the provision of the required hearing and go directly to addressing the motion on the merits. (State Br. 56; TT2 238:15-239:2;

App. 31) The district court skipped directly from considering whether a hearing should be held to ruling on the merits, supplanting the presentation of evidence on the issue with mere consideration of the offer of proof. (TT2 242:15-21.)

The offer of proof a procedural requirement designed to clarify the specific issues to be presented for court and parties, with Rule 5.412 making clear it is not a substitute for an evidentiary hearing: "The motion must be accompanied by a written offer of proof and the trial court must order a hearing in chambers to determine the admissibility of such evidence." *State v. Alberts*, 722 N.W.2d 402, 410 n.3 (Iowa 2006) (*citing* Iowa R. Evid. 5.412). Should the procedural requirement be met, each party is then entitled to "call witnesses, including the victim, and offer relevant evidence" during the *in camera* hearing. Iowa R. Evid. 5.412(c)(2)(A). There is nothing in Rule 5.412 which permits a court to make a merits ruling on a motion based on the sufficiency of an offer of proof as the district court did here.[1] (App. 31)

If filed timely, the procedural requirements were met. The district court accepted trial counsel's oral offer of proof as being a functional equivalent of a written offer. Had the district court considered it insufficient, it would have found

[1] At trial, the prosecution itself appeared to inherently recognize no ruling on the merits could be made without a hearing: "So I don't see how [a decision on whether K.S. made false statements is] possible without a full hearing that both sides have the opportunity to present evidence on." (State Br. 239:22-25.)

Trane's motion to be procedurally deficient, rather than leaping to a conclusion on the merits.

Outside of its arguments on timeliness, the State goes directly to the motion's merits, arguing "neither party offered sworn testimony concerning the allegedly false prior claims." (State Br. 56.) This deficiency only exists because the district court erroneously denied Trane the opportunity to present sworn testimony. Trane had a witness available to testify as to the falsity of K.S.'s prior abuse claims. (TT2 238:2-4.) The district court considered telephonic testimony to be improper under *In re Estate of Rutter*, 633 N.W.2d 740 (Iowa 2001). (TT2 238:4-8; App. 30) This concern, however, has not a basis for the district court's ruling and has little bearing on Trane's right to a hearing.

The district court interpreted *Rutter* as requiring in-person testimony "unless the parties agree to telephonic testimony, or the legislature has specifically authorized telephonic testimony[.]" (App. 30) Assuming this to be a correct reading of *Rutter*, the district court never inquired as to whether there was an objection to the telephonic testimony. More importantly, even if there were an objection, this would not have warranted denial of a hearing, rather it would have required the parties to obtain the physical presence of the witnesses. Any resulting delay would have been minimal and, once again, originally attributable to the State's gamesmanship in discovery production.

The applicability of *Rutter* is questionable. Even if the district court's interpretation is correct, *Rutter* dealt with a probate hearing on objections to a final report and accounting. *Rutter*, 633 N.W.2d at 744. The witness testifying by phone did so in the trial of the final report and accounting. *Id*. at 745. This is wholly different from providing testimony during an *in camera* hearing on a preliminary evidentiary issue which is the issue in the present matter. Even if physically present, there would be no "oral evidence *taken in open court*", *Id*. at 746 (original emphasis), as Rule 5.412 expressly requires "a hearing in camera." Iowa R. Evid. 5.412(c)(2). This renders *Rutter* inapposite even assuming a correct reading by the district court.

The State cannot use the district court's error in denying a Trane a full opportunity to present evidence of the false as proof that Trane failed to carry his burden to present sufficient evidence at hearing. Whether the evidence would be admissible is a subsequent question to be determined after a full evidentiary hearing. The pertinent question here is simply whether Trane has presented a viable claim that the district court could find K.S. made prior false claims. The offer of proof is sufficient to create the potential of such a finding. This was the crux of the decision in *Alberts*:

> By denying Alberts the opportunity to prove to the court R.M. made a prior false claim of sexual misconduct, the court hampered Alberts' ability to argue R.M. accused another man of improper conduct to disguise her own questionable behavior. This error may have unduly prejudiced Alberts' defense and

> therefore requires us to remand the case so the trial court may determine whether R.M. made false statements to Josh.

722 N.W.2d 402, 412 (Iowa 2006). Evidence of prior false claims would be relevant as "reflect[ing] on [K.S.'s] credibility as a witness." *Id*. at 411. Nor would it confuse a jury, waste time on cumulative evidence, nor be misleading as K.S. "would have had ample opportunity to deny or explain her allegedly untruthful statements." *Id*.

Given the high potential for this evidence to be admissible upon being determined false, *see* Iowa R. Evid. 5.412(c)(2)(C), the denial of a hearing was prejudicial. This matter must be remanded for a hearing on K.S.'s false statements, and if the trial court finds a threshold showing as to falsity, a new trial is required.

IV. The State Cannot Prove a Single Count of Child Endangerment Using Multiple Alleged Victims

A. Error Is Preserved

The Iowa Supreme Court has historically recognized preservation of error on legally incorrect and misleading jury instructions can be done by motion for new trial, so long the issue is specifically set out therein: "We have always held this to be the case." *State v. Youngbear*, 202 N.W.2d 70, 72 (Iowa 1972) (citations omitted). This is due to the purpose of the rule, which is "to permit the trial court, whether the matter is called to its attention when the instructions are submitted or by motion after conviction, to correct any mistake and to cure the matter without the necessity of an appeal." *Id*. (*citing* Iowa Code §787.3(5), (7)). *See also State v. Brown*, 172 N.W.2d

152, 159 (Iowa 1969) ("When the court has misdirected the jury in a material matter of law (Code section 787.3(5)) or has refused properly to instruct the jury (section 787.3(7)) either or both grounds may be raised for the first time in motion for new trial and still properly present issue for review.").

While the citation has changed, the substance of the effective language originating in Iowa Code §787.3 has not. Prior to the revision of the Iowa Code in 1979, this code section read: "The court may grant a new trial for the following causes, or any of them: …5. When the court has misdirected the jury in a material matter of law. … 7. When the court has refused properly to instruct the jury.") Iowa Code §787.3 (1977). The change in codification from statute to Rule of Criminal Procedure, while adding additional grounds on which new trial could be sought, did not diminish this language, its effect, or scope: "The court may grant a new trial for any or all of the following causes: …(5) When the court has misdirected the jury in a material matter of law,… (7) When the court has refused properly to instruct the jury." Iowa R. Crim. P. 23(2)(b) (1979). The language of the current rule remains the same today. Iowa R. Crim. P. 2.24(2)(b)(5), (7).

The grounds for new trial based on the improper statement of the law set out in Instructions 31 and 33 was specifically stated in the Motion for New Trial. It made clear the instruction was legally erroneous in instructing the jury it could convict Trane of child endangerment for his actions against "B.V. *and/or* A.H." As set out

in initial briefing, and as discussed further below, this is a complete misstatement of the law.

B. Jury Instructions 31 and 33 Were Misleading and Legally Incorrect in Permitting Jury to Convict on Count III Without Unanimity as to the "Child" Endangered

The State blatantly argues, "The identities of the boys is a fact on which the jurors need not have agreed[.]" (State Br. 71.) This position is legally incorrect and arguably unconstitutional. A unanimous jury verdict is required in a criminal trial. Iowa R. Crim. P. 2.22(5). For Trane to be convicted of Child Endangerment requires the State to prove he was a person "having custody or control over *a child*" and that he "knowingly act[ed] in a manner that created a substantial risk to *a child's*…health or safety." Iowa Code §726.6(1)(a). That he had such custody and created such substantial risk to "a child" are facts which must be proven beyond reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.")

Importantly, the State does not attempt to refute Trane's argument as to the "unit of prosecution" for Iowa Code §726.6. (Trane Br. at 68.) That "a child" is singular cannot be reasonably disputed. *See State v. Kidd*, 562 N.W.2d 764, 765 (Iowa 1997) ("'A' is defined as an article 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.'")

Under these instructions, and the State's argument, if Juror One believed Trane endangered B.V., but not A.H., while Juror Twelve believed the reverse, Trane is guilty of Child Endangerment because twelve jurors agree Trane endangered *somebody*, even though he could not be convicted for either if each child was considered under separate counts. This is an absurd result, and proves the State's own hypothetical that the result would have been the same under a correct instruction to be false. (State Br. 71.)

It is impossible to know how the jury reached its verdict on this Count III, and neither the State nor the Court can presume to know. What is clear, however, is the instruction misstated the law in a manner which permitted Trane's conviction without unanimity or proof beyond a reasonable doubt as to all facts. This conviction must be reversed and the matter remanded for new trial.

CONCLUSION

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

ORAL ARGUMENT NOTICE

Counsel requests oral argument.

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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) (no more than 7,000 words) because this brief contains 3,999 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 Word for Office 365 MSO in font size 14, Times New Roman.

/s/ *Alfredo Parrish* Date: February 26, 2019
Alfredo Parrish