IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. SHANNA DESSINGER, Defendant-Appellant.	)))))))))	S.CT. NO. 18-2116

APPEAL FROM THE IOWA DISTRICT COURT
FOR WEBSTER COUNTY
HONORABLE ANGELA L. DOYLE, JUDGE
(JURY TRIAL AND SENTENCING)

APPELLANT'S BRIEF AND ARGUMENT AND CONDITIONAL REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On November 15, 2019, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Shanna Dessinger, 1028 Williams Drive, Apt. 1, Ft. Dodge, IA 50501.

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Wayne R. LaFave et al., 7 Criminal Procedure, § 27.5(d) (4th ed. November 2018 update)

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ROUTING STATEMENT

Retention by the Iowa Supreme Court is appropriate because the issues raised in Divisions II and V involve substantial issues of first impression or of changing or clarifying legal principles in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c), (f).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant Shanna Dessinger from her jury trial conviction for Child Endangerment, an Aggravated Misdemeanor in violation of Iowa Code sections 726.6(1)(a) and 726.6(7).

Course of Proceedings: On July 13, 2018, the State charged Dessinger with Child Endangerment, an Aggravated Misdemeanor in violation of Iowa Code sections 726.6(1)(a) and 726.6(7) (2017). (7/13/18 TI)(App. pp. 4-5). The State alleged that Dessinger had knowingly acted in a manner that created a substantial risk to then four-year-old D.A.J.'s health or safety while acting as the child's daycare provider. (5/15/18 Complaint; 7/13/18 TI)(Conf. App. pp. 4-6; App. pp.

4-5). Dessinger pled not guilty. (7/26/18 Record.Arraign.) (App. pp. 6-7).

Prior to trial, Dessinger filed a September 27, 2018 Motion in Limine concerning certain evidentiary matters as well as a challenge to the then-five-year-old complaining witness's competency to testify. First, the motion noted that the child's recent deposition answers to questions gauging his understanding of the concept of 'truth' and 'lies' was essentially 'nope', and requested the district court to make a pre-trial determination of whether the child witness was competent to testify at trial. (9/27/18 Def.Mot. Part A)(App. pp. 8-9). Second, the motion addressed concerns of hearsay, confrontation clause violations, and lack of personal knowledge among a number of State witnesses who appeared to have no first-hand knowledge of the event at issue and should thus be prohibited from testifying to statements received from others. (9/27/18 Def.Mot. ¶¶14-15, 17)(App. p. 10). Specifically, the motion noted that only the child and witness Demetria Gully claimed to have had first-hand

knowledge or witnessed the event, but that those witnesses then made statements to other persons who were themselves listed as State witnesses, implicating multiple levels of out-of-court statements none of which were admissible. (9/27/18 Def.Mot. Part B)(App. pp. 10-11).

The State filed a written response resisting the defense motion, both as to the child-witness's competency to testify, and as to the evidentiary issue concerning State witnesses' recitations of out-of-court statements received from others. In support of its resistance on the competency issue, the State submitted the deposition transcript of the child. (9/27/18 Resist.; 10/1/18 Resist. with attached Depo.)(App. pp. 12-14; Conf. App. pp. 7-29). On the matter of State witnesses' recitations of out-of-court statements received from others, the State responded generally "These are exceptions to the hearsay rule." (9/27/18 Resist.¶15)(App. p. 13).

A jury trial commenced on October 2, 2018. (Tr.1:1-25). Just prior to trial, and while outside the presence of the jury, the district court addressed the issues of D.A.J.'s competency

to testify, as well as the issue relating to witnesses' recitation of out-of-court statements received from others. (Tr.10:15-13:25). On the in limine issue concerning out-of-court statements being recited by persons who may not have firsthand knowledge, the court determined that such hearsay would not be acceptable unless a hearsay exception were to apply. (Tr.10:15-11:5). The court then addressed the matter of D.A.J.'s competency to testify, receiving the parties' arguments on that matter. (Tr.11:6-13:25). Later, during a break following selection of the jury, a hearing on the child's competency was held outside the jury's presence. At that time, the court and the parties each asked questions of the child to determine whether the standard of competency to testify as a witness was satisfied. (Tr.16:20-45:15). After questioning of the child was completed, the court determined the child was competent to testify as a witness. (Tr.45:16-46:6). Upon Defendant's motion, the court also agreed that, if the child testified at trial as a State's witness, the State should

not lead the child with leading questions and should instead use open-ended questions. (Tr.47:7-48:5).

Trial then commenced in the presence of the jury at 1:00 p.m., with opening statements and presentation of evidence by the parties. The State ultimately did not call D.A.J. to testify at trial, presenting testimony only from daycare employee Demetria Gully, Officer Paul Samuelson, and daycare Director Cori Jewett. After the State rested, the Defense presented testimony from Defendant Dessinger, as well as character witness Kayleen Scott. (Tr.2:1-25, 126:22-25, 180:25). No rebuttal evidence was presented by the State. (Tr.181:1-6). The parties presented their closing arguments to the jury, and the jury then commenced its deliberations at 4:55 p.m. (Tr.184:11-14, 201:6-7). The jury deliberated for about three hours that evening (October 2) without reaching a decision. At about 7:58 p.m., the jury was sent home for the evening with directions to return at 9:00 a.m. the following day to continue its deliberations. (Tr.201:10-202:8). At 10:18 a.m. the following day (October 3), the jury rendered a verdict finding

Dessinger guilty of Child Endangerment as charged. (Verdict Tr.2:1-3:17); (10/3/18 Verdict)(App. p. 16).

A sentencing hearing was held on November 19, 2018. At that time, the district court entered judgment against Dessinger for Child Endangerment, an Aggravated Misdemeanor in violation of Iowa Code sections 726.6(1)(a) and 726.6(7) (2017). The court sentenced Dessinger to 365 days in Webster County Jail, with all but 30 days suspended with authorization for work-release and school-release as permitted by the Jail, and placed Dessinger on informal probation for a period of one year. The court also imposed a $625 fine and 35% surcharge, and directed Dessinger to submit a DNA sample for profiling. The court ordered Dessinger to pay "the court costs of this action." The court then inquired into whether Dessinger had an ability to pay court-appointed attorney fees; the court found Dessinger had no ability to pay such attorney fees, and thus ordered attorney fee reimbursement of $0. (Sent.19:5-20:12); (Exh.A-C; Sent.Order)(Conf. App. p. 31; App. pp. 17-22). The sentencing

order directed financial obligations to be paid within 30 days. (Sent.Order¶¶4(a), 4(c)(2)) (App. pp. 19, 21). Additionally, the paragraph prescribing Dessinger's jail sentence included a statement that: "Defendant shall pay fees as later assessed for… room and board" and "The actual amount assessed will be as set forth in the Room & Board Reimbursement Claim filed with the Clerk by the Sheriff" which "amount assessed shall have the force and effect of a judgment for purposes of enforcement" unless Defendant affirmatively requests a hearing to dispute the amount assessed. (Sent.Order¶4(b)) (App. p. 20).

Dessinger filed a Notice of Appeal on December 12, 2018. (12/10/18 NOA)(App. p. 23).

Facts: In May 2018, Defendant Shanna Dessinger worked as a child care provider at Tracey's Tots, a daycare facility in Fort Dodge, Iowa. She had worked there for approximately five months, since January 2018. Dessinger was also then-employed as a food service worker at the Fort Dodge Senior High School, where she would prepare food and

run the cash register for the high school kids. She was hired at Tracey's Tots on the recommendation of another Tracey's employee (Tammy) who had worked with her at the senior high school. Dessinger typically worked at the high school until 1:00 p.m., and then worked at the daycare from 2:00 p.m. until 5:00 or 6:00 p.m. (Tr.103:23-105:2, 131:17-133 L.13).

The instant prosecution arises out of an alleged May 9, 2018 incident at the daycare. The State alleged that, on that date, another employee of Tracey's Tots (17-year-old Dametria Gully) glanced through an interior window and observed Dessinger reach out her hand and intentionally choke and then push down four-year-old D.A.J., one of the children that was under Dessinger's care in the preschool room of the facility. (Tr.62:2-63:5, 67:3-68:3, 82:1-9). Dessinger testified at trial, and denied that any such choking incident or other assaultive act had occurred. But Dessinger did acknowledge that, while trying to help D.A.J. take off a dress-up apron, Dessinger stumbled against a bookcase and, in the process of catching herself, may have accidentally knocked the child

over. (Tr.152:7-158:16, 161:2-13, 165:6-166:23, 168:20-22). No physical injuries were ever visible on the child. (Tr.75:17-24, 78:19-22, 96:20-97:24, 107:24-108:1). Of the State's witnesses, only D.A.J. and Gully claimed to have actually observed the incident, and only Gully (not D.A.J.) testified at trial. (Tr.2:1-25, 111:18-25). The defense urged that Gully was incorrect in what she believed she observed, namely that she mistook Dessinger's accidental stumble and bumping of the child as an intentional assault of choking and pushing the child down. (Tr.53:17-59:9, 189:13-198:19).

Gully was seventeen years old, in high school, and worked at Tracey's Tot's part-time. She was new to the daycare, having started only the day prior to the May 9 incident. Although employment records confirmed May 9 was actually her second day of work, Gully testified that she was "sure" it was her first and not her second day. (Tr.60:8-62:1, 109:9-20).

On May 9, Dessinger worked in the preschool room, while Gully and another provider (Kelli) worked in the two-year-old

room next door. The wall separating the preschool room and the two-year-old room contained a large picture window through which a person on either side could see into the other room. Gully testified that in glancing at the picture window, she observed Dessinger grab then-four-year-old D.A.J. by his neck in a choking motion, then release his neck and push the child to the ground. (Tr.62:2-63:5, 67:3-68:3, 82:1-9). See also (Tr.80:1-82:9, 88:3-89:14, 91:23-4). The incident was very brief. (Tr.p.86:11-13). According to Gully, D.A.J. was immediately thereafter screaming and crying "I'm sorry, I'm sorry, I'm sorry." (Tr.67:16-69:5). She testified she was sure of what she saw, and that there was no chance the incident was an accident. (Tr.68:2-14). Gully immediately went to daycare Director Cori Jewett's office to report what she believed she saw, and Jewett immediately went to the preschool room while Gully returned to the two-year-room. (Tr.73:20-74:19, 83:23-84:9).

Gully testified she could not tell whether D.A.J. was physically injured by the incident, and she did not observe any

marks or injuries on him afterward. She was convinced there should have been marks on D.A.J. given the nature of the incident; but she believed that, because D.A.J. had darker skin, marks may not have been visible. (Tr.75:17-24, 78:19-79:16). Gully testified on direct examination that D.A.J. was emotionally upset by the incident (Tr.75:14-16), but on cross-examination she testified D.A.J. was "perfectly fine" afterwards. (Tr.76:6-13). Gully also acknowledged that, at the time of the alleged incident, she was in another room supervising nine to ten two-year-olds, such that she wasn't completely focused on Dessinger. She testified that she just happened to look through the window and see the incident. (Tr.77:2-21). But she testified that once she noticed the incident occurring, she focused on it and believed she observed the very short incident clearly. (Tr.86:2-15).

On cross-examination, Gully testified that, after the incident (and after Dessinger left at the direction of Jewett), Gully and Jewett "both talked to [D.A.J.] and asked him what happened and he showed us what happened…." (Tr.79:14-

16). On redirect examination, the State asked Gully to testify to what she observed D.A.J. demonstrating when showing Gully and Jewett what happened to him. Defense counsel objected on hearsay grounds, but the court overruled the objections concluding that the witness could not testify to any words the child said but the witness could testify to the child's conduct during the demonstration. Gully testified that she observed D.A.J. demonstrate what happened to him by grabbing Jewett by her neck and lifting[1] as if he was lifting himself up. Gully testified she would characterize that as choking. (Tr.89:15-90:16).

Jewett testified that Gully came to her office at approximately 3:00 p.m. to report what she believed to have observed seeing in Dessinger's room. (Tr.106:3-17). While Gully was reporting the matter, Jewett believed she could hear D.A.J. crying (without words) in the other room. (Tr.108:2-12).

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[1] Gully never saw any lifting when observing the alleged interaction between Dessinger and D.A.J. through the window. (Tr.90:23-91:2).

Jewett testified that, when she got into the preschool room, D.A.J. was not crying but was sort of whimpering. (Tr.108:13-18). Upon entering the preschool room, Jewett told Dessinger to get her things and leave. (Tr.106:25-107:4). Dessinger did not seem initially to understand that she was being disciplined, seeming to believe Jewett was just sending her home early as sometimes occurred over as kids started leaving and less staff was needed over the afternoon. (Tr.116:4-8, 117:20-118:2). Jewett did not ask Dessinger what happened, but did ultimately inform her before she left of what had been reported to Jewett. (Tr.115:5-13).

After Dessinger left, Jewett turned her attention fully to D.A.J. Jewett testified he seemed upset and was off by himself in the room. She testified that she had seen him in good spirits in fairly recent proximity to the incident, and this seemed like a change in attitude. She did not notice anything unusual about his face, neck, or anywhere on his body. (Tr.107:16-108:1, 108:19-109:8).

At the State's request, Jewett testified to what D.A.J. demonstrated Dessinger had allegedly done. She testified that D.A.J. indicated with his hands around his own neck. She testified she would describe the action as somebody putting their hands around his throat and choking him. She testified he also indicated (but without physical demonstration) that he was picked up after that. (Tr.112:1-113:15). Jewett did not ask any of the other children in the room what happened. (Tr.115:14-17).

After the incident, Jewett (a mandatory reporter) called the DHS child abuse hotline to report the matter. On the same day, DHS issued a responsive letter stating the information provided was insufficient to infer child abuse or neglect, but that the reported information was forwarded to the County Attorney's office. A copy of the DHS letter was admitted into evidence as State's Exhibit 2. (Tr.110:15-111:10, 114:17-20, 123:3-125:8); (Exh.2)(App. p. 30).

D.A.J.'s father arrived at the daycare in the middle of Jewett's dealing with the incident, after Dessinger had left.

Jewett explained to D.A.J's father what had been reported to her, and what D.A.J. had shown her. Jewett testified D.A.J. himself also told his father what had happened to him, and that what D.A.J. told his father was consistent with what D.A.J. had earlier demonstrated to Jewett. (Tr.113:119-114:10).

Fort Dodge Police Officer Paul Samuelson testified on behalf of the State. On May 9, 2018, he was dispatched to the lobby of the Fort Dodge Police Department to make contact with someone making a report of a child allegedly being harmed at a daycare. In the lobby, Officer Samuelson made contact with the child's parents, sibling, and the child (D.A.J.). He testified "They reported that their child was at Tracey's Tots for daycare, and the child had been picked up and then put down. So basically a form of abuse that occurred from one of the workers at Tracey's Tots." (Tr.95:21-95:17). He testified any information he was provided that day was from the parents only, not from the child. (Tr.99:11-18). Officer Samuelson testified he investigated by speaking immediately

with Gully, possibly speaking briefly with Jewett (while with Gully), and speaking with Dessinger by phone. He visually inspected D.A.J. but did not observe any injuries and, therefore, took no photographs. (Tr.95:18-96:24). Upon inquiry by the State, he testified that despite the absence of visible injury, he "believed it was a credible allegation" that "the child had been picked up and pushed down to the ground." (Tr.97:8-99:6).

According to Jewett, Dessinger had been a good employee during the approximately five-month period she'd worked at the daycare, and Jewett had no reasons to be unhappy or concerned with Dessinger prior to the alleged May 9 incident. (Tr.104:2-14).

Testimony was provided concerning an earlier interaction between Gully and Dessinger on the playground. Gully testified that, about fifteen minutes prior to observing the alleged incident through the window into the preschool room, Gully and Kelli's two-year-old room was out on the playground while Dessinger's preschool room was also outside. Gully

testified she observed one of Dessinger's kids (not D.A.J.) climbing on a playground fence and Gully told Dessinger to get the child down, to which Dessinger responded that she didn't care what the child was doing because she was quitting after today. (Tr.63:12-65:19, 66:21-67:2, 83:1-6). Gully testified she did not find this response from Dessinger to be odd, because it appeared Dessinger was just having a hard day at work and was overwhelmed at the moment. (Tr.65:20-66:2). Gully testified that, to her knowledge, this was not Dessinger's typical temperament, as others at the daycare had told Gully Dessinger was always nice and they'd never expected anything problematic from her. (Tr.66:6-10). Gully testified she or Kelli ultimately went and told the child to get down from the fence. Gully acknowledged that she had not been watching the child earlier (as he was not one of the kids she was responsible for), and that she did not know whether he had been climbing the fence the whole time they were outside or whether Dessinger might have earlier instructed the child off the fence. (Tr.66:11-16, 82:10-25).

Jewett testified that sometime between 2:00 (when Dessinger started her shift at the daycare) and 3:00 (when the alleged incident with D.A.J. had occurred), a staff person had let Jewett know that Dessinger had complained out on the playground that she was not coming back the next day. Jewett testified she would not characterize such matter being reported to her as a complaint; rather, it was just staff letting Jewett know Dessinger was not coming back the next day. Jewett testified there is a lot of turnover in the daycare business, and people tend to come and go. She testified she did not have any reason to believe Dessinger was going to quit prior to that, and Dessinger had not actually quit as far as Jewett was aware. (Tr.116:9-117:19).

After presenting testimony from Dametria Gully, Officer Samuelson, and Cori Jewett, the State rested. (Tr.126:22-25). Dessinger then testified in her own defense, explaining both the interaction on the playground and the subsequent alleged incident in the preschool room.

As to the interaction on the playground, Dessinger testified: that the child was not climbing high or in danger of getting hurt but the daycare had a rule against kids playing on the fence; that the child climbing the fence tended to have a harder time listening than the other kids; that she'd already told that child three separate times that day not to climb the fence; and that she had just finished telling that child again to not climb the fence when Gully told Dessinger to get the child down. Dessinger agreed she'd responded to Gully by saying that she didn't care and that she was going to quit. Dessinger testified she'd said so out of frustration, which passed quickly, and she had not actually been intending to quit – rather it was merely something to say to vent the momentary frustration she'd felt. After Gully instructed the child off the fence, it was time for the preschool room to go inside. (Tr.142:9-145:16, 147:8-18, p.148:12-16).

After returning to the preschool room, Dessinger's kids had free play, meaning they could play with whatever toys they wanted to at centers set up around the room. The

centers included things like a building center with blocks and tools; a play kitchen with toy appliances and dress-up aprons; a reading area; a place to play with trucks and cars; and a place to play with trains. Dessinger testified that she walked around supervising as the kids played, that the kids were playing and sharing nicely, and that the frustration she'd felt while on the playground had already passed. (Tr.145:23-147:18).

When it was time to clean up from free play, D.A.J. was wearing a dress-up apron and needed help taking it off. He was at the entrance of the small kitchen play center, and his apron was crooked as he was trying to lift it off over his head but wasn't able to get it. Dessinger leaned down to helped D.A.J. with the apron, taking the apron in her hand, straightening it, and lifting it over D.A.J.'s head, but the apron got stuck on his ear requiring Dessinger to lift it up further. Dessinger testified she is "kind of round" and was not "graceful" in the tight space of the children's kitchen play area, which is only three to four feet wide with book shelves on

either side. Dessinger bumped her foot on the right-side bookshelf, causing her to lunge forward and hit her knee on the bookshelf. She grabbed her hand out and caught herself on the book shelf to avoid falling. She testified D.A.J.'s apron ended up in her hand, and D.A.J. might have fallen over but she was not sure. She testified that when she turned around after catching herself on the bookshelf, D.A.J. was still there, was not crying, and seemed fine. Dessinger put the apron away, then continued around the room supervising clean-up time. Dessinger denied the State's allegations that D.A.J. had been screaming, crying, yelling "I'm sorry", or whimpering. But she noted that a roomful of four-year-olds is typically pretty noisy, and the kids in her room would have been yelling and being loud like any other day. (Tr.152:7-158:16, 165:6-166:23, 170:12-16).

Dessinger testified that when Jewett subsequently came in and told her to get her things to leave, Dessinger had initially thought she was just being let off early for the day (as staff reduced when kids started going home in the afternoon),

not that she was being fired. Jewett then told Dessinger what another employee reported. Dessinger testified she was shocked, and said something like "I didn't do that" but didn't know what else to say. She testified she tried to explain herself, but it did not appear Jewett wanted to listen as she just wanted Dessinger to leave. (Tr.148:19-11,158:17-159:18, 167:5-168:5, 172:11-25).

Dessinger testified it was not uncommon to have trouble getting four-year-olds to listen, rather that happens all the time and is just how four-year-olds are. She testified she had no issues with D.A.J., and he was not a child that she would get frustrated with. (Tr.171:3-17). Dessinger testified to her long history of experience with children, without issue. She testified it was precisely because she had experience and was known to be responsible that she was placed by herself in the preschool room to supervise the large number of preschoolers

(more than 20)[2] present there that day. (Tr.130:10-20, 135:14-138:18, 159:19-20, 177:2-5). She testified she is not easily frustrated, and her frustration does not lead her to do physical acts or to hurt people. She testified that she's never hurt a child in any way, and that she did not do so on May 9. (Tr.148:17-23, 173:1-8).

Dessinger insisted Gully was mistaken in what she believed she saw. (Tr.161:17-162:4). Dessinger testified it was possible she might have knocked D.A.J. over when stumbling and catching herself on the bookshelf, and that her hands would have been out in front of her at the time. But she denied that she choked or squeezed D.A.J.'s neck with her hands. (Tr.161:2-13, 165:15-166:23). She testified anything that happened between she and D.A.J. that day had been an accident. (Tr.168:20-22).

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[2] Jewett did not have a specific recollection but estimated there may have been 20 children across the entire facility that afternoon. (Tr.103:12-22, 115:18-116:8). Gully testified there were between 10-20 children in the preschool room that day. (Tr.83:7-17).

Dessinger's friend Kayleen Scott testified as a character witness on her behalf at trial. Scott testified she is a very protective mother of five (ages 14, 12, 9, 4, and 5 months), that she trusts Dessinger and Dessinger has always provided proper and safe care to her kids, that she has also observed Dessinger around other children (such as Dessinger's boyfriend's son), and that she's never had any concerns or observed any issues in Dessinger's interactions with children. Scott testified Dessinger does not frustrate easily or raise her voice to children, and in fact on those occasions that Scott has raised her voice to her own children it has been Dessinger that has encouraged her to stay calm. (Tr.175:4-178:18, 180:6-16).

Other relevant facts will be discussed below.

ARGUMENT

I. The court erred in admitting D.A.J.'s out-of-court statements over Dessinger's hearsay objection. Alternatively, trial counsel rendered ineffective assistance in failing to properly object to such hearsay.

A. Preservation of Error: Defense counsel filed a pretrial motion in limine urging, on hearsay, confrontation clause, and lack of personal knowledge grounds, that State's witnesses should not be permitted to recite out-of-court statements by other persons. The motion in limine specifically noted that D.A.J. and Dametria Gully were the only State's witnesses with any personal knowledge as to the event, and that other States' witnesses should not be permitted to recite in their own testimony any statements received from D.A.J. or Gully. (9/27/18 Def.Mot. Part B)(App. pp. 10-11). In considering the motion in limine, the court determined such out-of-court statements would not be acceptable unless a hearsay exception applied. (Tr.10:15-11:2).

During its opening statement at trial, the State informed the jury that the child would appear and testify. (Tr.52:23-

53:9). Ultimately, however, the State did not present testimony from D.A.J. Nevertheless, D.A.J.'s out-of-court statements (in the form of either the child's verbal statements or the child's assertive conduct) were testified to by other witnesses and, thereby, placed before the jury.

First, hearsay was presented in the form of D.A.J.'s out-of-court nonverbal statements, namely D.A.J.'s assertive conduct in physically demonstrating to Dametria Gully and Cori Jewett what allegedly happened with Dessinger. (Tr.79:15-16, 89:15-90:16, 112:1-113:15). Gully and Jewett were both present and simultaneously viewed such demonstration, which D.A.J. provided in response to Gully and Jewett's talking to him and asking him what happened. (Tr.79:15-16). First, over defense counsel's hearsay objection, Gully was permitted to testify that in this demonstration D.A.J. "grabbed [Jewett] by her neck and lifted, acted as if he was lifting himself up", which Gully characterized as "a choking". (Tr.89:15-90:16). Subsequently, Jewett similarly testified to D.A.J.'s demonstration, namely that: "He showed

me with his hands like this and then he went like this", motioning "around his own neck", which Jewett testified she would "describe… as that somebody had put their hands around his throat and choked him." (Tr.112:1-113:15).

Second, hearsay was also presented in the form of D.A.J.'s out-of-court verbal statements – testified to by Cori Jewett and Officer Samuelson. (Tr.95:12-17, 114:5-10). Jewett testified that when D.A.J.'s father arrived, D.A.J. told him what happened and it was consistent with what D.A.J. had earlier demonstrated to Jewett and Gully. (Tr.114:5-10). Officer Samuelson testified that he then met with D.A.J. and his parents at the law enforcement center and D.A.J.'s parents reported an incident of abuse, including specifically that D.A.J. "had been picked up and then put down." (Tr.95:12-17).

As to the nonverbal hearsay of what D.A.J. showed Gully and Jewett in demonstration of what Dessinger had allegedly done, defense counsel raised a timely hearsay objection when such assertive conduct was testified to by the first State's

witness Dametria Gully. See (Tr.89:22-23) ("Q Could you tell us what you observed? [DEFENSE COUNSEL]: I object to hearsay."). The court overruled that objection, concluding that, while the witness could not repeat the child's verbal statements, she could testify to what she observed the child demonstrating. (Tr.89:22-90:10).

When the State subsequently sought to elicit the same nonverbal hearsay (D.A.J.'s demonstration) through the other observer Cori Jewett, defense counsel did not again attempt to interpose an objection to the *nonverbal* hearsay of what the child *demonstrated* (Tr.112:5-20), but did object when the witness veered into D.A.J.'s *verbal* hearsay of what the child *said* (Tr.112:21-113:15).

Despite counsel's failure to repeat the objection to D.A.J.'s nonverbal hearsay during Jewett's testimony, counsel's earlier hearsay objection at the time of the first witness Gully's recitation of D.A.J.'s assertive conduct was sufficient to preserve error even as to the subsequent witness Jewett's recitation of the same assertive conduct by D.A.J.

"Once a proper objection has been made and overruled, an objector is not required to make further objections to preserve his right on appeal when a subsequent question is asked raising the same issue. Repeated objections need not be made to the same class of evidence." State v. Kidd, 239 N.W.2d 860, 863 (Iowa 1976); State v. Padgett, 300 N.W.2d 145, 146 (Iowa 1981). This is so whether the subsequent questions are posed to the same witness or to a different witness, so long as they concern "the same class of evidence" to which objection was already made but overruled. Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168, 181 (Iowa 2004). Here, the court's ruling that testimony as to witness observations of what the child *demonstrated* would be allowed (and only testimony of what the child *said* would be excluded) served to "adequately inform defense counsel that additional objections on the same ground to testimony of the same kind would be to no avail." Padgett, 300 N.W.2d at 146. And indeed when counsel objected to Jewett's veering into D.A.J.'s verbal hearsay of what the child said, the court again ruled that the witness could not testify to

the child's words but could testify to what he physically demonstrated. (Tr.112:21-113:15). Error was thus preserved as to both Gully's and Jewett's recitations of D.A.J.'s nonverbal hearsay in the form of his assertive conduct demonstrating what Dessinger allegedly did.

Defense counsel did not then specifically object to Jewett and Officer Samelson's subsequent recitation of certain *verbal* statements uttered by D.A.J. – namely, Jewett's testimony that that the child's statements telling his father what Dessinger had done were consistent with what the child had earlier demonstrated to Gully and Jewett (Tr.114:5-10); and Officer Samuelson's testimony that D.A.J.'s parents reported that D.A.J. "had been picked up and then put down" (Tr.95:12-17).

But the *substance* of these verbal assertions were already in evidence by way of the earlier objected-to recitation of D.A.J.'s *nonverbal* assertions to the same effect – Gully had already been permitted to testify over defense counsel's hearsay objection that, during D.A.J.'s demonstration of what Dessinger did, "[D.A.J.] grabbed Cori by her neck and lifted,

acted as if he was lifting himself up", which Gully characterized as "a choking". (Tr.89:15-90:16). Thus, these statements also fall within the rule discussed above that "Repeated objections need not be made to the same class of evidence." Kidd, 239 N.W.2d at 863; Padgett, 300 N.W.2d at 146.

Alternatively, to the extent this Court determines error was not sufficiently preserved for any reason, Dessinger respectfully requests that the issue be considered under the Court's familiar ineffective assistance of counsel framework. See State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

B. Standard of Review: Where preserved for appellate review, hearsay challenges to the admission of evidence are reviewed for correction of errors at law. State v. Long, 628 N.W.2d 440, 447 (Iowa 2001).

Alternatively, ineffective assistance of counsel challenges are reviewed de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). A defendant must demonstrate both (1) a breach of essential duty, and (2) prejudice in the form of a reasonable

probability of a different result sufficient to undermine confidence in the outcome. State v. Carrillo, 597 N.W.2d 497, 500 (Iowa 1999); Strickland v. Washington, 466 U.S. 668, 694 (1984).

C. Discussion: "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(c) (2017). Hearsay statements are not admissible unless they fall within a recognized exception as permitted by constitution, statute, or rule. Iowa R. Evid. 5.802 (2017). The State, as the proponent of the hearsay, has the burden of proving it falls within an exception to the hearsay rule. Long, 628 N.W.2d at 443. The State's burden includes the obligation to lay any foundational facts necessary to invocation of the exception. State v. Reynolds, 746 N.W.2d 837, 841-843 (Iowa 2008).

As discussed above, there were two categories of hearsay statements at issue in the present case – (1) D.A.J.'s nonverbal statements in the form of assertive conduct (his

demonstration), and (2) D.A.J.'s verbal statements to his father (observed by Jewett, and subsequently relayed by D.A.J.'s parents to Officer Samuelson). D.A.J.'s hearsay in the form of his *nonverbal* assertive conduct came in first at trial, but the *content* of both his verbal and nonverbal assertions were the same – that Dessinger put her hands around his throat, lifting up, and choking him.

D.A.J.'s hearsay first came in at trial in the form of his nonverbal statements by assertive conduct (his demonstration) as testified to by the State's first witness Dametria Gully over defense counsel's hearsay objection. The district court overruled Defense counsel's hearsay objection to the witness's "observations" of D.A.J.'s demonstration, ruling that the witness could not testify to the child's verbal statements, but that the witness could testify to the child's nonverbal conduct. In so-ruling, the court appeared to have been under the misapprehension that the child's nonverbal assertions through conduct would not qualify as hearsay.

The court's apparent conclusion that only verbal statements (and not nonverbal statements in the form of assertive conduct) would fall under the hearsay rule was incorrect. "A statement is defined under our rules of evidence as '(1) an oral or written assertion *or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.*'" State v. Dullard, 668 N.W.2d 585, 590 (Iowa 2003) (emphasis added; quoting Iowa R. Evid. 5.801(a)). According to Gully, D.A.J. provided the demonstration when "me and Cori both talked to him and asked him what happened and he showed us what happened". (Tr.79:15-16). Such demonstration, provided in response to being asked what happened, would clearly qualify as assertive conduct and therefore a nonverbal statement for purposes of the hearsay rule. See e.g., State v. Mueller, 344 N.W.2d 262, 264 (Iowa Ct. App. 1983)(child psychologist's testimony concerning three-year-old child's nonverbal conduct with dolls depicting sex act "was offered in the belief that [the child] intended to assert what had happened to him, so his

conduct amounted to a 'statement' for purposes of the hearsay rule.").

Here, the district court explicitly ruled that any verbal assertions by D.A.J. during the demonstration would constitute inadmissible hearsay. (Tr.89:22-90:10). However, the court mistakenly believed that D.A.J.'s assertive conduct which simultaneously but nonverbally demonstrated what he claimed to have happened would not fall under the hearsay rules. But if D.A.J.'s verbal statements constituted inadmissible hearsay, his simultaneous nonverbal statements (in the form of assertive conduct or demonstration) to the same effect were also inadmissible hearsay.

For the same reasons, when State's Witness Cori Jewett subsequently testified to the same nonverbal assertions of D.A.J. (his demonstration), that constituted inadmissible hearsay as well. (Tr.112:1-113:15).

When Jewett then testified to D.A.J.'s *verbal* assertions to his father, stating they were consistent with what D.A.J. had earlier demonstrated to Jewett, this also fell within the

hearsay prohibition as a verbal statement offered for the truth of the matter asserted. (Tr.114:5-10). See Iowa R. Evid. 5.801(a), (c); State v. Huser, 894 N.W.2d 472, 497 (Iowa 2017) ("backdoor hearsay").

Finally, when Officer Samuelson testified that, when he met with D.A.J. and his parents, their report of abuse included the specific statement that "the child had been picked up and then put down", this fell within the hearsay prohibition as well. (Tr.95:12-17). State v. Sowder, 394 N.W.2d 368, 371 (Iowa 1986). ("By bringing out the specific statements made, not merely focusing on the fact a conversation occurred, the State attempted to establish the truth of the facts asserted in the conversation").

As discussed, above, the substance of all hearsay statements of D.A.J. (both verbal and nonverbal) ultimately testified to by Jewett and Officer Samuelson were the same as the substance of the nonverbal assertion first testified to by Gully over Defense Counsel's objection – namely that in indicating what Dessinger did, "[D.A.J.] grabbed Cori [Jewett]

by her neck and lifted, acted as if he was lifting himself up", which Gully characterized as "a choking." (Tr.89:15-90:16). As discussed above, defense counsel's timely objection to this initial nonverbal assertion testified to by Gully served to preserve error also as to the subsequent hearsay statements testified to by the other witnesses: 1) Jewett's testimony of D.A.J.'s nonverbal assertion via the demonstration; 2) Jewett's testimony of D.A.J.'s verbal statements telling his father what happened; and 3) Officer Samuelson's testimony reciting what D.A.J.'s parents told him had specifically happened to D.A.J.

Alternatively, to the extent this Court concludes error was not preserved as to the challenged statements for any reason, Dessinger respectfully requests that the matter be considered under an ineffective assistance of counsel framework. For the reasons discussed above, the challenged statements were inadmissible hearsay and counsel's failure to properly object and obtain their exclusion amounted to a breach of essential duty. Counsel clearly sought to exclude out-of-court statements, demonstrating there was no strategic

reason not to properly object. See (9/27/18 Def.Mot.¶¶14-15, 17, and Part B); (Tr.10:15-24, 89:22-90:10, 106:18-22, 112:21-113:4)(App. pp. 10-11).

The matter was prejudicial and constituted reversible error whether considered as preserved or instead under an ineffective assistance of counsel framework. Where preserved, "admission of hearsay evidence over a proper objection is presumed to be prejudicial error unless the contrary is affirmatively established." State v. Nims, 357 N.W.2d 608, 609 (Iowa 1984). That is, if the error was preserved, reversal is required unless the error was harmless beyond a reasonable doubt. Sowder, 394 N.W.2d at 372. Alternatively, if considered under an ineffective assistance of counsel framework, reversal is required if there is a reasonable probability of an altered outcome, sufficient to undermine confidence in the result. Carrillo, 597 N.W.2d at 500; Strickland, 466 U.S. at 694.

Here, prejudice is established and reversal required under either standard. The dispute at trial centered on the

nature of the interaction between Dessinger and D.A.J. The State alleged Dessinger had intentionally choked and pushed the child, while Defendant vigorously denied any choking or intentional assault but testified she may have accidentally knocked the child over when stumbling against a bookshelf. No objective proof of the interaction between Dessinger and D.A.J., as by surveillance video, was available or introduced. Nor were any injuries ever visible on the child, as might corroborate the State's allegations. Of the three State's witnesses presented at trial, only Gully claimed to have actually observed the incident – and that was not from the same room but instead through a window from an adjoining room where she and another provider had been supervising a room of two-year-olds, such that her attention would not have been focused on Dessinger at the outset. The incident itself would have occurred very quickly, and the defense urged Gully had incorrectly interpreted what she saw, apparently mistaking Dessinger's stumble for assaultive conduct. Further, the jury did not appear to find this an easy case to

decide, deliberating for three hours into the evening (until 7:58 p.m.) before returning the following morning to reach a verdict (Tr.184:11-14, 201:6-202:8; Verdict Tr.2:1-3:17).

On this record, the improper hearsay statements from the child would have carried a heavy impact, and the jury would certainly have relied on such hearsay statements in ultimately deciding to credit the State's claim of intentional assault over Dessinger's claim of an accidental stumble. And indeed, the State relied heavily on the child's hearsay statements, introducing them through each of the State's three witnesses (Tr.89:15-90:16, 95:12-17, 112:1-113:15, 114:5-10), referencing them during its questioning of Dessinger (Tr.169:19-24), and emphasizing them during closing argument (Tr.189:20-25, 199:4-14).

The error was not harmless, and even if considered under an ineffective assistance framework, there is at least a reasonable probability sufficient to undermine confidence in the outcome that but-for counsel's breach the jury would have acquitted Dessinger. A new trial must be granted.

II. The court erred in admitting D.A.J.'s out-of-court statements in violation of Dessinger's Confrontation rights. Alternatively, trial counsel rendered ineffective assistance in failing to properly object on Confrontation grounds.

A. Preservation of Error: Defendant urges that the same out-of-court statements of D.A.J. (both verbal and nonverbal) addressed above in Division I as inadmissible hearsay, also violated the Confrontation Clause.

Defense counsel's pretrial motion in limine had asserted that recitation of D.A.J.'s out-of-court statements by other witnesses at trial would violate not only hearsay limitations but also Confrontation Clause protections. (9/27/18 Def.Mot.¶14)(App. p. 10). Counsel's contemporaneous objections during trial, however, explicitly referenced only hearsay and did not also reference the Confrontation Clause. (Tr.89:22-90:10, 112:21-113:4). Nevertheless, Defendant respectfully urges that error should be deemed preserved on Confrontation Clause grounds in addition to Hearsay grounds under the unique circumstances present here.

It would appear that, at the time D.A.J.'s assertive statements were placed into evidence by the State's very first witness (Dametria Gully) immediately after the State's opening statement, defense counsel would have been unaware that the State would ultimately not produce D.A.J. at trial. Just that morning, the State resisted Defendant's competency challenge to D.A.J., and obtained a favorable ruling thereon from the Court. (Tr.11:6-25, 17:4-48:13). And then during the State's opening statement, the State indicated the child would be testifying and telling the jury certain things. (Tr.52:23-53:11). Dametria Gully then testified immediately after opening statements, without any break or recess in between. (Tr.59:7-60:12). Thus, at the time Gully testified to D.A.J.'s nonverbal statement (the child's demonstration of what Dessinger allegedly did), Defense Counsel would have been laboring under the belief that the child would be testifying at trial, such that only a hearsay objection and not also a confrontation clause objection would be proper. See DeVoss v. State, 648 N.W.2d 56, 63 (Iowa 2002)(rule of "error preservation is based

on fairness"); Jasper v. State, 477 N.W.2d 852, 856 (Iowa 1991)(discussing invited error); State v. Rasmus, 90 N.W.2d 429, 430 (Iowa 1958)(applying doctrine of invited error against State); State v. Ayers, 590 N.W.2d 25, 28 (Iowa 1999)("In these circumstances, we think it would be fundamentally unfair to invoke the error preservation rule."). The district court would also have been laboring under the same belief that the child would be testifying, meaning that any confrontation clause challenge even if asserted would have been overruled by the court. See State v. Neiderbach, 837 N.W.2d 180, 209 (Iowa 2013)(motion for mistrial not required to preserve error where it would be "futile" given court's overruling of objection).

Given this unique posture, counsel's failure to renew the in limine Confrontation Clause challenge at the time of the contemporaneous hearsay objections at trial should not be deemed to have waived error.

Alternatively, to the extent this Court determines error was not sufficiently preserved for any reason, Dessinger respectfully requests the issue be considered under the

Court's familiar ineffective assistance of counsel framework. State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

B. Standard of Review: Confrontation Clause challenges are reviewed de novo. State v. Brown, 656 N.W.2d 355, 362 (Iowa 2003).

Ineffective assistance of counsel challenges are also reviewed de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). A defendant must demonstrate both (1) a breach of essential duty, and (2) prejudice in the form of a reasonable probability of a different result sufficient to undermine confidence in the outcome. State v. Carrillo, 597 N.W.2d 497, 500 (Iowa 1999); Strickland v. Washington, 466 U.S. 668, 694 (1984).

C. Discussion: Where out-of-court statements are testimonial and the declarant is not present at trial, the admissibility of the statements depends not only on the rules of evidence but also on the Confrontation Clauses of the United States and Iowa constitutions. Crawford v. Washington, 541 U.S. 36, 68 (2004); Davis v. Washington, 547

U.S. 813, 820 (2006); U.S. Const. amend. VI; Iowa Const. art I, § 10. Pursuant to Confrontation Clause protections, testimonial statements of witnesses absent from trial may be admitted only where (a) the declarant is unavailable and (b) the defendant has had a prior opportunity to cross-examine the declarant. Crawford, 541 U.S. at 59-68.

Crawford provided various, but non-comprehensive, formulations of core "testimonial" statements. At minimum, testimonial statements include "statements made under circumstances that would lead witnesses to objectively believe the statements might be used at trial." State v. Shipley, 757 N.W.2d 228, 235 (Iowa 2008). Statements are testimonial if their "primary purpose" is "to establish or prove past events potentially relevant to later criminal prosecutions." Davis, 547 U.S. at 822. Fundamentally, the focus on testimonial statements is grounded in "the Confrontation Clause's express reference to 'witnesses against the accused' – that is, to those who 'bear testimony' against the accused, whether in court or out of court." State v. Bentley, 739 N.W.2d 296, 298 (Iowa

2007)(quoting Crawford, 541 U.S. at 51). "One who 'bears testimony' makes '[a] solemn declaration or affirmation ... for the purpose of establishing or proving some fact.'" Id. (quoting Crawford, 541 U.S. at 51).

D.A.J.'s statements at issue here were testimonial. They would have been made to relay past events, with an understanding that they would be used to get Dessinger in trouble. The child was present when Dessinger was ordered to leave by Jewett. The child was then asked what Dessinger did. While young children may not directly have an understanding of a "trial" or "criminal prosecution", they certainly understand the concept of "telling on" someone, or getting another person into trouble – where such an understanding would exist, it renders their statements testimonial in nature. D.A.J. bore testimony by making a solemn declaration for the purpose of establishing the facts of what Dessinger allegedly did. Bentley, 739 N.W.2d at 298. Gully and Jewett were seeking to determine and D.A.J. was seeking to relay "not... 'what is happening' but rather 'what

[had] happened.'" Davis, 547 U.S. at 830. Such statements recounting how potentially criminal past events occurred, and made after the described events were over "are an obvious substitute for live testimony because they do precisely *what a witness does* on direct examination; they are inherently testimonial." Id. 547 U.S. at 831. The conclusion that D.A.J.'s statements were testimonial is only reinforced by the fact the district court concluded, "Taking into account the child's age", D.A.J. was competent to testify, and that "He's a pretty sharp little fella." (Tr.46:1-2).

Defendant acknowledges that, in Ohio v. Clark, the United States Supreme Court, after applying the primary purpose test to statements made by a three-year-old child to his preschool teachers, noted that the declarant's young "age fortifies our conclusion that the statements in question were not testimonial." Ohio v. Clark, 135 S.Ct. 2173, 2181-2182 (2015). The Court stated that because it is unlikely a very young child "would intend his statements to be a substitute for trial testimony", statements "by very young children will

rarely, if ever, implicate the Confrontation Clause." Id. at 2182. "Notably, however, the majority in Ohio v. Clark stopped short of declaring that statements by young children can never be testimonial." State in Interest of A.R., 149 A.3d 297, 316-317 (N.J. Super. Ct. App. Div. 2016). See also 7 Laurie Kratky Dore, *Iowa Practice Series*, *Evidence* § 5.802:2 (2016 ed.).

The language in Ohio v. Clark pertaining to statements by young children was discussed by our Iowa Supreme Court in In re J.C., 877 N.W.2d 447, 455 (Iowa 2016). Three of the Iowa justices in the majority there suggested that it could be appropriate to rely solely on the young age of the child in that case to conclude that statements by the child to the medical director of the Child Protection Center were non-testimonial.

Id. at 456 (Mansfield, J.; joined by Waterman and Zager, JJ.).[3] But four justices appeared to have rejected any per se exception for statements of young children. See Id. at 460 (Cady, C.J., concurring); Id. at 461-62 (Wiggins, J., dissenting; joined by Hecht and Appel, JJ.). See also 7 Ia. Prac., Evidence § 5.802:2, n.169 (2016) (discussing In re J.C.).

A number of state courts in other jurisdictions have rejected the suggestion that statements by very young children are per se non-testimonial. See e.g., State in Interest of A.R., 149 A.3d 297 at 316-317; State v. Henderson, 160 P.3d 776, 785 (Kan. 2007); State v. Siler, 876 N.E.2d 534, 541-544 (Ohio 2007); Commonwealth v. DeOliveira, 849 N.E.2d 218, 225-226 (Mass. 2006).

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[3] Even those justices, however, appear not to have actually relied solely on the age of the child, applying the primary purpose test as well. In re J.C., 877 N.W.2d at 457-458 (Mansfield, J; joined by Waterman and Zager, JJ.). Indeed as to the child's separate statements to a forensic interviewer, those justices "assume[d] without deciding" that a Confrontation Clause violation resulted though it ultimately concluded any such violation was harmless. Id. at 459.

This Court should now squarely address the issue and hold that statements by young children are not excluded from confrontation clause protections under either the Federal or State Confrontation Clauses. However, even if this Court concludes statements by young children are per se non-testimonial for Sixth Amendment Confrontation Clause purposes, a different result should nevertheless be reached under article I, section 10 of the Iowa Constitution. The Court is free to follow an independent approach under the state constitution. State v. Cox, 781 N.W.2d 757, 761 (Iowa 2010).

Pursuant to Confrontation Clause protections, testimonial statements of witnesses absent from trial may be admitted only where (a) the declarant is unavailable and (b) the defendant has had a prior opportunity to cross-examine the declarant. Crawford, 541 U.S. at 59-68. Here, D.A.J. was not unavailable – rather, the court ruled that he was competent to testify at trial. Absent unavailability, the Confrontation Clause required the State to present the witness at trial if it wished to use the witness's statements (out-of-

court or otherwise) at trial. State v. Holland, 389 N.W.2d 375, 379 (Iowa 1986); State v. Dean, 332 N.W.2d 336, 339 (Iowa 1983). Nor had Dessinger had an adequate prior opportunity to cross-examine D.A.J. While defense counsel examined the child by way of a pretrial discovery deposition, counsel did not have a similar motive to cross-examine the witness at that time as the purpose of that deposition was merely to gather evidence (to determine what the child remembered, claimed, and would potentially testify to) not to attack the witness's credibility. Compare State v. West, No. 15-1431, 2016 WL 5930629, at *4 (Iowa Ct. App. Oct. 12, 2016)(where deposition evidenced opportunity and similar motive for cross-examination).

Because D.A.J. did not testify at trial, was not unavailable, and Dessinger was not provided an adequate prior opportunity to cross-examine him, the admission of D.A.J.'s statements into evidence at trial violated Dessinger's right to confront and cross-examine him as a witness.

Defendant urges error should be deemed preserved. But even if this Court declines to address the matter as preserved error, the confrontation clause challenge was meritorious and counsel's failure to properly object on confrontation clause grounds amounts to a breach of essential duty. And for the reasons discussed above in Division I, the erroneous admission of D.A.J.'s statements at trial (which admission violated the confrontation clause) was prejudicial and warranted reversal whether considered under a harmless error standard for preserved error or under the Strickland prejudice standard for unpreserved error. Dessinger must be afforded a new trial.

III. Trial counsel rendered ineffective assistance in failing to object to improper opinion testimony from Officer Samuelson bolstering D.A.J. and Gully's credibility.

A. Preservation of Error: Appellate review is not precluded if failure to preserve error results from a denial of effective assistance of counsel. State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

B. Standard of Review: Ineffective assistance of counsel claims are reviewed de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

C. Discussion: A criminal defendant is entitled to effective assistance of counsel. U.S. Const. amend VI; Iowa Const. art. I, §10; Strickland v. Washington, 466 U.S. 668, 694 (1984); State v. Ambrose, 861 N.W.2d 550, 556 (Iowa 2015). To establish an ineffective assistance claim, a defendant must demonstrate both (1) a breach of essential duty, and (2) prejudice in the form of a reasonable probability of a different result sufficient to undermine confidence in the outcome. State v. Carrillo, 597 N.W.2d 497, 500 (Iowa 1999); Strickland, 466 U.S. at 694.

It is well-established that "[u]nder Iowa law, neither expert nor lay witnesses may 'express an opinion as to the ultimate fact of the accused's guilt or innocence.'" State v. Paulsen, No. 10–1287, 2011 WL 3925699, *8 (Iowa Ct. App. Sept. 8, 2011)(quoting State v. Oppedal, 232 N.W.2d 517, 524 (Iowa 1975)). Opinions concerning truthfulness of another

witness "bear similarity to expressing an opinion on the defendant's guilt or innocence" as "[t]ypically, the truthfulness of the victim or the accused bears heavily upon, and is intertwined with, the guilt or innocence of the accused." State v. Myers, 382 N.W.2d 91, 94 (Iowa 1986). "Both matters, credibility of a witness and the determination of the guilt or innocence of the accused, are reserved solely for the fact finder." Id.

Moreover, an expert may not "opine on matters 'that either directly or indirectly render[] an opinion on the credibility or truthfulness of a witness.'" State v. Brotherton, 384 N.W.2d 375, 378 (Iowa 1986)(quoting Myers, 382 N.W.2d at 97). Expert opinions as to the truthfulness of a witness are not admissible under Iowa Rule of Evidence 5.702 because they "go a step beyond merely aiding the fact finder in understanding the evidence and actually invade the exclusive domain of the jury, that is, the determination of the guilt or innocence of the accused." Myers, 382 N.W.2d at 95.

In the present case, the State presented testimony from Paul Samuelson, a Fort Dodge Police Officer with 23 years of law enforcement experience. (Tr.93:10-94:20).

Q Did you observe any injuries on the child?

A No, I did not.

Q Did that make you believe that there were, in fact, no injuries on the child?

A There still could have been injuries, but none that were visible to me at that point in time.

Q Okay. In your experience as a law enforcement officer, is there a difference in how easy it is to observe injuries on someone who's darker complected?

A Yes, sir.

Q Okay. So not seeing an injury on the child, did that weigh into whether you thought this was a credible allegation?

A I still believed it was a credible allegation.

Q Okay. So in conclusion of your investigation you believed there was a credible allegation?

A Yes.

Q Of what?

A That the child had been picked up and pushed down to the ground.

Q Okay. And what did you think, based on your training and experience, that qualified as a violation of in terms of an Iowa Code criminal violation?

[DEFENSE COUNSEL]: I would object as to relevance, speculation and doesn't add to the credibility determination.

THE COURT: Sustained as to relevance.

Q Okay. Did you ultimately make a charging decision in this case?

A Yes, I did.

Q Do you know what charge that you elected to charge the defendant with?

A I believe it was some form of assault. I can't remember which one, though I contacted somebody from the county attorney's office first to make sure that I had the right charge.

Q Okay. If I told you that –

[DEFENSE COUNSEL]: Would object to the –

THE COURT: Finish your sentence first.

Q If I told you that the charge was child endangerment, would that refresh your recollection?

A Yes.

THE COURT: Same objection?

[DEFENSE COUNSEL]: Same objection, and I would ask that it pre-date the question and answer.

THE COURT: The objection is sustained objection will precede the witness's answer. The answer is stricken from the record.

Q In any event, regardless of what the charge is, you did recommend that a criminal charge be filed in this case, correct?

A Yes.

Q Okay. And a warrant was issued?

[DEFENSE COUNSEL]: I would object. May we approach?

THE COURT: Yes, you may.

(Short discussion off the record.)

[PROSECUTOR]: Thank you, officer. I believe that's all the questions I have for you.

(Tr.96:20-99:6) (emphasis added).

Such testimony was improper in that it opined on and vouched for the truthfulness of the allegations of abuse, and therefore on the ultimate fact of Dessinger's guilt or innocence. See Myers, 382 N.W.2d at 97-98 (The "effect of the opinion

testimony was to improperly suggest the complainant was telling the truth and, consequently, the defendant was guilty."). The officer did not merely inform the jury of objective or observable *facts* he observed, from which facts the jury could make its *own* assessment of whether the complainant's allegations were credible. Rather, the officer explicitly provided *his own ultimate assessment* that he found the allegations to be credible.

The Officer was represented to the jury as an expert, and the prosecutor's questions eliciting the vouching testimony clearly emphasized that expertise. See e.g., (Tr.93:10-94:20) (outlining 23-years of training and experience, including law enforcement academy, ongoing continuing education and training hours, as well as history of employment in law enforcement); (Tr.97:4-11) ("Q: ***In your experience as a law enforcement officer***, is there a difference in how easy it is to observe injuries on someone who's darker complected? […] Q: Okay. So not seeing an injury on the child, did that weigh into whether you thought this was a credible allegation?");

(Tr.97:12-17) ("Q: Okay. ***So in conclusion of your investigation*** you believed there was a credible allegation? […] Q: Of what?"); (Tr.97:18-20) ("Q: Okay. And what did you think, ***based on your training and experience***, that qualified as a violation of in terms of an Iowa Code criminal violation?") (emphasis added). See also Spahr v. State, No. 17-1681, 2019 WL 719164, *4 (Iowa Ct. App. Feb. 20, 2019) (Deputy was represented as an expert).

But even if the Officer hadn't been specifically represented as an expert, it is improper even for lay witnesses to opine on the credibility or truthfulness of a complaining witness or on the closely intertwined issue of guilt or innocence of the accused. Paulsen, 2011 WL 3925699 at *8 (quoting Oppedal, 232 N.W.2d at 524). See also Id. at *9-10 ("Counsel was ineffective for permitting the peace officer to express his overall opinion that D.D. was telling the truth", requiring a new trial). And statements of law enforcement officers, like statements of experts, carry a heavy impact with a jury. State v. Kino Davis, No. 13–1099, 2014 WL 5243343,

*6 (Iowa Ct. App. Oct. 15, 2014)(Noting, as to law enforcement officers: "statements by state officials, who are largely perceived to be 'cloaked with governmental objectivity and expertise,' create 'a real danger the jury will be unfairly influenced.'")(quoting State v. Huston, 825 N.W.2d 531, 537-38 (Iowa 2013). This is particularly true where, as here, the State's questions emphasized that the officer's credibility assessment was "in conclusion of [his] investigation", and based on his extensive "training and experience" as a law enforcement officer. (Tr.96:20-99:6).

Defense counsel ultimately did object to this improper line of questioning, but not until after the witness already testified and reaffirmed that he believed this to be a credible allegation (after which point the State nevertheless persisted in the line of questioning, requiring yet another defense objection). Counsel should have objected as soon as the State asked its "make you believe" question or, at minimum, when the State asked its first question about "whether you thought this was a credible allegation". (Tr.96:25-97:1, 97:8-10). A

timely objection at that point would have properly been sustained, and would have successfully kept out all of the officer's subsequent vouching testimony. Instead, by the time defense counsel ultimately objected, the State had already elicited and placed before the jury that Officer Samuelson, "in conclusion of [his] investigation… believed there was a credible allegation" of the child having "been picked up and pushed down to the ground". (Tr.97:8-17). Even after counsel's later objection was sustained, the State thereafter still elicited testimony that the officer "ultimately ma[d]e a charging decision in this case", and that the officer "did recommend that a criminal charge be filed in this case". (Tr.97:18-99:6). Although normally an officer's mere act of commencing a criminal charge would not necessarily cross the line, in context with the State's line of questioning clearly seeking vouching testimony, these latter responses would have been understood as direct or indirect vouching as well.

Defense counsel breached an essential duty in failing to immediately object to, and obtain exclusion of, Officer

Samuelson's vouching testimony. Paulsen, 2011 WL 3925699, *9 ("Counsel was ineffective for permitting the peace officer to express his overall opinion that D.D. was telling the truth."). There is no possible strategic reason for not objecting to such testimony. Id. (citing Johnson v. State, 495 N.W.2d 528, 531 (Iowa Ct. App. 1992)).

Dessinger was prejudiced by counsel's breach. In the instant prosecution, there wasn't any physical evidence nor objective evidence (such as surveillance video) to corroborate Gully and D.A.J.'s claims of intentional abuse by Dessinger. The State's case thus turned entirely on the jury's assessment of the credibility of testifying witness Gully and non-testifying out-of-court-declarant D.A.J., as compared with Defendant. Officer Samuelson's testimony bolstered and vouched for the credibility of the allegations of abuse, making it substantially more likely that the jury would ultimately credit Gully and D.A.J.'s allegations of abuse. See Myers, 382 N.W.2d at 93 (testimony had effect of "bolster[ing] the child complainant's credibility" which was the fighting issue between the parties).

There is a substantial danger that the jurors relied upon and deferred to Officer Samuelson's explicit assessment of the credibility of the allegations in convicting Dessinger. Confidence in the outcome is undermined and Dessinger should be afforded a new trial. See State v. Tracy, 482 N.W.2d 675, 679-680 (Iowa 1992)(reversing under ineffective assistance rubric); Johnson, 495 N.W.2d at 530-31 (same); Paulsen, 2011 WL 3925699, *10 (same).

IV. The restitution aspect of the sentence concerning court costs and correctional fees fails to comport with the requirements of Albright and Coleman.

A. Preservation of Error: Restitution is part of the criminal sentence. State v. Janz, 358 N.W.2d 547, 548–49 (Iowa 1984); State v. Jose, 636 N.W.2d 38, 44 (Iowa 2001). Void, illegal, or procedurally defective sentences may be corrected on appeal even absent an objection before the trial court. State v. Lathrop, 781 N.W.2d 288, 292-93 (Iowa 2010); Iowa R. Crim. P. 2.24(5)(a) (2017).

B. Standard of Review: This Court reviews restitution orders and challenges to the legality of a sentence for

correction of errors at law. State v. Albright, 925 N.W.2d 144, 158 (Iowa 2019); State v. Sisk, 577 N.W.2d 414, 416 (Iowa 1998).

C. Discussion: A defendant's reasonable ability to pay is a constitutional prerequisite for a criminal restitution order provided by Iowa Code chapter 910. State v. Haines, 360 N.W.2d 791, 797 (Iowa 1985); State v. Harrison, 351 N.W.2d 526, 529 (Iowa 1984); State v. Dudley, 766 N.W.2d 606, 615 (Iowa 2009). Thus, the Iowa Code specifically provides that imposition of restitution for items such as the cost of legal assistance and court costs is subject to a determination of the defendant's reasonable ability to pay. Iowa Code § 910.2(1); Iowa Ct. R. 26.2(10)(a).

In the Albright line of cases, the Iowa Supreme Court recently set forth the procedure to follow when determining the restitution obligation of a defendant. Albright, 925 N.W.2d at 160–62. Under Albright, a district court cannot enter an enforceable final order of restitution against an offender until it has first assessed the offender's reasonable ability to pay

any obligations under Iowa Code section 910.2(1). Id. And any nonfinal orders of restitution (entered without the necessary ability to pay determination) shall not be enforceable against the offender. Id. at 161.

In the present case, the restitution obligations in the sentencing order pertaining to court costs "did not follow the statutory procedures as outlined in" Albright concerning restitution. State v. McMurry, 925 N.W.2d 592, 601 (Iowa 2019). Accordingly, the restitution obligations must be reversed and remanded "for resentencing on restitution". Id.

First, the sentencing court found Dessinger unable to pay legal assistance costs but ordered restitution for court costs without any consideration of her ability to pay such costs. During the sentencing hearing, the district court ordered Dessinger to pay "the court costs of this action"; it did so without any consideration of Dessinger's ability to pay court costs. Immediately thereafter, the court inquired into whether Dessinger had an ability to pay court-appointed attorney fees, found Dessinger had no ability to pay such

attorney fees, and thus ordered attorney fee reimbursement of $0. (Sent.19:17-20:12). The written sentencing order that followed ordered "court-appointed attorney fees of $0.00", but ordered Dessinger to pay "the court costs of this action." (Sent.Order¶4(a))(App. pp. 19-20).

The sentencing court thus found Dessinger unable to pay legal assistance costs but ordered restitution for court costs without any consideration of her ability to pay such costs. (Sent.19:17-20:12); (Sent.Order¶4(a))(App. pp. 19-20). "This is contrary to the statutory scheme" as outlined in Albright, 925 N.W.2d at 162. In State v. Perry, the Iowa Supreme Court granted relief where, like here, the sentencing court discussed reasonable ability to pay certain obligations but was silent as to the ability to pay other obligations. See State v. Perry, No. 18-0351, 2019 WL 1868225, at *1 (Iowa April 26, 2019)(per curium)("The sentencing order declared Perry was reasonably able to pay attorney fees but was silent about her ability to pay other court costs." "As to Perry's argument that the district court erred in ordering her to pay restitution in the

form of attorney fees and other costs, we find the restitution part of her sentence should be vacated" and remanded "to the district court to impose restitution consistent with… Albright."). The portion of the sentencing order addressing restitution must thus be vacated and remanded to the district court to order restitution in a manner consistent with Albright.

Second, the sentencing court treated the court cost obligation as immediately due and enforceable despite the absence of any attendant ability to pay determination. The financial page of the Combined General Docket shows $323 in "Court Costs" that are "Owed" and "Due" from Dessinger. (Comb.Gen.Docket p.9)(App. p. 25). See also McMurry, 925 N.W.2d at 596 (reviewing "the sentencing order together with the docket report from the clerk of court"). And the sentencing order itself provides that "Defendant shall pay all financial obligations owed to the Webster County Clerk of Court" in full within 30 days, after which the obligations may be sent to collections with collection fees imposed. (Sent.Order¶4(a))(App. pp. 19-20). It would

thus appear that the sentencing court treated the court cost obligation as a final order immediately due and enforceable against Dessinger (even though there was no attendant ability to pay determination as to costs), and it must be corrected on appeal. See Albright, 925 N.W.2d at 161 (non-final restitution orders are not "enforceable against the offender."); State v. Petty, 925 N.W.2d 190, 198 (Iowa 2019) (where court costs and attorney fees were ordered "due immediately" without determination of ability to pay, court "failed to follow our statutory procedures as outlined in Albright.").

Along the same line, the Combined General Docket also indicates a "Judgment/Lien Entry" for "Costs" against Defendant and for the State of Iowa. (Comb.Gen.Docket p.8) (App. p. 24). Under the Iowa Code, a restitution order creates "a judgment and lien", which judgment then "may be enforced". Iowa Code § 910.7A. Because entry of a judgment for restitution renders it enforceable, it would appear that no judgment entry for court costs should be made until the final order of restitution is entered containing the attendant ability

to pay determination. See Albright, 925 N.W.2d at 161 (non-final restitution orders are not "enforceable against the offender."). The fact that a judgment entry was already made for the obligation again indicates the court treated it as immediately due and enforceable, and it must be corrected on appeal. See Petty, 925 N.W.2d at 198.

Because the district court "did not follow the statutory procedures as outlined in" Albright concerning restitution, the restitution obligations must be reversed and remanded "for resentencing on restitution". McMurry, 925 N.W.2d at 601.

Third and finally, the language in the sentencing order should also be corrected as to sheriff's fees. Court costs include correctional fees. Iowa Code § 910.1(4) (2017). After ordering Dessinger to be responsible for "the court costs of this action", and ordering Dessinger to serve the 30-day unsuspended portion of her jail sentence, the sentencing order states: "Defendant shall pay fees as later assessed for… room and board" and "The actual amount assessed will be as set forth in the Room & Board Reimbursement Claim filed with

the Clerk by the Sheriff" which "amount assessed shall have the force and effect of a judgment for purposes of enforcement", unless Defendant affirmatively requests a hearing to dispute the amount assessed. (Sent.Order¶4(b)) (App. p. 20).

In State v. Coleman, our Supreme Court addressed analogous language in a sentencing order which stated the court would assess the entirety of defendant's appellate attorney fees against him unless Defendant filed a request for a hearing regarding his reasonable ability to pay them within thirty days of the issuance of procedendo following his appeal. Coleman, 907 N.W.2d 124, 149 (Iowa 2018). The Supreme Court stated "when the district court assesses any future attorney fees on Coleman's case, it must follow the law and determine the defendant's reasonable ability to pay the attorney fees without requiring him to affirmatively request a hearing on his ability to pay." Id. See also Dudley, 766 N.W.2d at 615 (reimbursement obligation "may not be constitutionally imposed on a defendant unless a

determination is *first* made that the defendant is or will be reasonably able to pay the judgment.") (emphasis added); Goodrich v. State, 608 N.W.2d 774, 776 (Iowa 2000)(similar). The same is true here.

The portion of the sentencing order relating to the obligation to pay sheriff's fees as set forth in any Room and Board Reimbursement Claim by the sheriff absent a request for hearing should be vacated and remanded for entry of an amended sentencing order omitting such language.

V. This appeal is not affected by § 31 of Senate File 589 (concerning ineffective assistance claims), which is non-retroactive and is unconstitutional. Alternatively if that amendment is valid and applies, plain error review should be applied to address any unpreserved errors.

A). Not Retroactive:

Senate File 589 did not take effect until July 1, 2019 and thus has no application to this appeal. S.F. 589, 88th GA, §§ 31-32 (2019); Iowa Const. art. III, § 26; Iowa Code § 3.7(1) (2017).

A statute that impacts substantive rights will be applied prospectively only, and even if a statute is deemed procedural

our courts have "refused to apply a statute retrospectively when the statute eliminates or limits a remedy." Iowa Beta Chapter v. State, 763 N.W.2d 250, 266-67 (Iowa 2009). Section 31 of S.F.589 seeks to amend Iowa Code § 814.7 to disallow resolution of ineffective assistance claims on direct appeal. In depriving Dessinger of her ability to remedy the constitutional ineffectiveness of her trial attorney on direct appeal even though the existing appellate record fully establishes her claim for relief, S.F.589 impacts Dessinger's substantive rights and deprives her of a remedy available under the pre-amended version of § 814.7. It must be given prospective application.

As with prior legislative changes constricting appeal rights, this amendment must (at minimum) not be applied retroactively to cases where the underlying conviction was entered prior to the July 1, 2019 effective date of the statute. Simberskey v. Smith, 27 Iowa 177, 178-180 (Iowa 1869); James v. State, 479 N.W.2d 287, 290 (Iowa 1991); Giles v. State, 511 N.W.2d 622, 624 (Iowa 1994).

Additionally, given that Dessinger's notice of appeal was filed before S.F.589 went into effect, the Iowa Code's general savings provision renders the amendments inapplicable to this case. Iowa Code § 4.13 (2017).

Moreover, retroactive application of S.F.589 to already-pending appeal cases to deprive the appellate court of authority or jurisdiction to address or remedy claims already before it would be unconstitutional as a violation of separation of powers. McSurely v. McGrew, 118 N.W. 415, 417–18 (Iowa 1908); Frink v. Clark, 285 N.W. 681, 685 (Iowa 1939).

B). Not Constitutional:

If S.F.589 does apply, it should be invalidated as unconstitutional.

(1). Separation of Powers

The separation-of-powers doctrine prohibits one branch of government from impairing another branch in "the performance of its constitutional duties." Planned Parenthood v. Reynolds, 915 N.W.2d 206, 212 (Iowa 2018). All judicial

power in Iowa is vested in the Iowa Supreme Court and its inferior courts. Iowa Const. art. V §§ 1, 4, 6.

The Iowa constitution confers upon District Courts general jurisdiction over all matters before them and the legislature can only prescribe the manner of its exercise, not deprive the courts of the jurisdiction. Matter of Guardianship of Matejski, 419 N.W.2d 576, 577 (Iowa 1988). Similarly, the Iowa constitution confers on the Iowa Supreme Court jurisdiction over appeals and over correction of lower court errors, and the legislature can impose only reasonable restrictions and procedures which do not alter or destroy this fundamental character and function of the Supreme Court. Dunbarton Realty Co. v. Erickson, 120 N.W. 1025, 1027 (1909) (equity action; "It is true that our state Constitution (article 5, § 4) gives to the Supreme Court appellate jurisdiction in equitable cases", but legislature can impose "*reasonable* rules and regulations" concerning how an appeal shall be taken and the time within which the right may be exercised); Tuttle v. Pockert, 125 N.W. 841, 842 (1910)(equity

action; legislature can prescribe procedure for appeal, meaning trial de novo, and "The form of procedure is unimportant *if such right be not thereby destroyed.*"); Brenton v. Lewiston, 236 N.W. 28, 29–30, modified, 238 N.W. 714 (Iowa 1931)(law action; "The Legislature may impose restrictions as by limiting appeals by the amounts in controversy…, *but it may not, by the enactment of restrictions, so change the character of the court as that it shall be other in reviewing a law action than 'a court for the correction of errors at law.*") (emphasis added).

Although the Iowa Code contemplates the Iowa Supreme Court handling criminal appeals, S.F.589 would make constitutional claims of ineffective assistance of counsel specifically unreviewable on direct appeal *even where, in the appellate court's judgment, the record is adequate to do so.* Iowa Code § 602.4102(2) (2017). But the Iowa Supreme Court has the inherent jurisdiction and duty to invalidate state actions that conflict with the state and federal constitutions. See Varnum v. Brien, 763 N.W.2d 862, 875-76 (Iowa 2009);

Planned Parenthood, 915 N.W.2d at 212-13. And the power to grant a new trial exists independent of statute as "one of the inherent powers of the court essential to the administration of justice." Hensley v. Davidson Bros. Co., 112 N.W. 227, 227–28 (1907).

By removing consideration of constitutional claims of ineffective assistance from the realm of direct appeal, even where the *appellate court's judgment* is that the direct appeal record establishes the violation, S.F.589 intrudes on Iowa appellate courts' independent role in interpreting the constitution and protecting Iowans' constitutional rights. See State v. Abrahamson, 696 N.W.2d 589, 593 (Iowa 2005) (judgment exercised "must be that of the court – not the sheriff").

(2). Equal Protection

"Once the right to appeal has been granted…, it must apply equally to all. It may not be extended to some and denied to others." Waldon v. District Court of Lee County, 130 N.W.2d 728, 731 (1964). S.F.589 violates equal protection by

treating persons who are similarly situated with respect to the purposes of the law differently. U.S. Const. amend. XIV; Iowa Const. art. I § 6; State v. Doe, 927 N.W.2d 656, 662 (2019); Varnum, 763 N.W.2d at 883.

Within the group of criminal defendants who have been convicted based upon trial errors as shown by the record made in the district court, S.F.589 has singled out for disparate treatment those wrongly-convicted defendants who assert a violation of their constitutional right to effective assistance of counsel. Strict scrutiny should apply because Dessinger's claim of disparate treatment involves the deprivation of a fundamental right – the right to effective counsel. U.S. v. Cronic, 466 U.S. 648, 654 (1984).

Regardless of whether considered under strict or rational scrutiny, S.F.589 cannot stand. The stated purpose of the bill is to reduce "waste" caused by "frivolous appeals" in the criminal justice system. Senate Video 2019-03-28 at 1:49:10-1:49:20, statements of Senator Dawson, available at https://www.legis.iowa.gov/dashboard?view=video&chamber=

S&clip=s20190328125735925&dt=2019-03-28&offset=3054&bill=SF%20589&status=i. But "[p]reserving ineffective assistance of counsel claims that can be resolved on direct appeal wastes time and resources." State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004). To the extent S.F.589 prevents appellate courts from ruling upon claims of ineffective assistance *even where the existing record establishes both the breach and prejudice prongs of the claim*, the bill is neither narrowly tailored nor rationally related to its legislative purpose – rather it directly contravenes it.

(3). Due Process and Right to Effective Appellate Counsel

Both the Iowa and U.S. Constitutions ensure criminal defendants are accorded due process of law, and the right to effective assistance of counsel. U.S. Const. amends VI, XIV; Iowa Const. art. I §§ 9-10. The right to counsel (obligatory on states under the federal due process clause) extends to a first appeal as of right. Evitts v. Lucey, 469 U.S. 387, 396 (1985).

Section 31 of S.F.589 violates Dessinger's right to counsel on appeal and, therefore her right to due process, by interfering with appellate counsel's ability to effectively represent her. It purports to prohibit an appellate court from deciding her claims of ineffective assistance on direct appeal even though the direct appeal record conclusively establishes her claim for relief. Where a state provides an appeal as of right but refuses to allow a defendant fair opportunity to obtain adjudication on the merits of the appeal, the "right" to appeal does not comport with due process. Evitts, 469 U.S. at 405. A state's system of appeal cannot "extinguish" a defendant's ability to invalidate her conviction merely because her "right to effective assistance of counsel… has been violated". Id. at 399-400. In doing just that, S.F.589 denies Dessinger due process and the right to effective assistance of counsel on appeal.

C). Plain Error:

If this Court concludes S.F.589 does apply and prohibits resolution of her ineffective assistance claims, Dessinger urges

any unpreserved issues should be considered under plain error review.

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.

United States v. Atkinson, 297 U.S. 157, 160 (1936). Plain error review has been recognized by federal courts since 1896. Jon M. Woodruff, Note, Plain Error by Another Name: Are Ineffective Assistance of Counsel Claims a Suitable Alternative to Plain Error Review in Iowa?, 102 Iowa L. Rev. 1811, 1815 (May 2017). Further, the majority of jurisdictions recognize the authority of an appellate court to reverse on the basis of plain error for unpreserved errors. Wayne R. LaFave et al., 7 Criminal Procedure, § 27.5(d) (4th ed. November 2018 update). See generally Tory A. Weigand, Raise or Lose: Appellate Discretion and Principled Decision-Making, 17 Suffolk J. Trial & App. Advoc. 179, 199-241 (2012).

The foundation of the plain error doctrine was articulated in Wiborg v. United States, 163 U.S. 632, 658 (1896), and has since been codified in the federal rules. Fed. R. Crim. P. 52 (2019). But the advisory committee note accompanying Rule 52 explicitly states such Rule was merely a codification of already-existing law, citing to Wiborg. Id. (note to subdivision (b)).

The U.S. Supreme Court utilizes a three-part standard for plain error review, requiring that: (1) there must be an error, meaning a "[d]eviation from a legal rule", which has not been affirmatively waived; (2) the error must be plain, meaning clear or obvious; and (3) the error must affect substantial rights, meaning in most cases that the defendant must prove the error was prejudicial in that it affected the outcome below. U.S. v. Olano, 507 U.S. 725, 732-34 (1993). If these first three requirements are met, the appellate court may exercise its discretion to correct the error, if the error "seriously affect[s] the fairness, integrity, or public reputation of judicial

proceedings." Johnson v. United States, 520 U.S. 461, 466-467 (1997).

Iowa courts have historically declined to adopt a plain error doctrine. See State v. Johnson, 272 N.W.2d 480, 484 (Iowa 1978); State v. Rinehart, 283 N.W.2d 319, 324 (Iowa 1979); State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999); State v. McCright, 569 N.W.2d 605, 607 (Iowa 1997). However, this position has co-existed with Iowa Appellate Courts' ability to nevertheless redress plain and prejudicial unpreserved errors on direct appeal under an ineffective assistance of counsel framework where the existing record is adequate to do so. See State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978) ("There are cases when incompetency [of counsel] is so glaring that we are justified in saying so upon an examination of the [direct appeal] record"). Some Iowa jurists have recognized that the ineffective assistance doctrine sometimes functions as a substitute for plain error review of unpreserved claims in Iowa. See e.g., Rhoads v. State, 848 N.W.2d 22, 33 (Iowa 2014) (Mansfield, J., specially concurring,

joined by Waterman, J.); State v. Sahinovic, No. 15-0737, 2016 WL 1683039, at *2 (Iowa Ct. App. April 27, 2016) (McDonald, J., concurring).

Our Iowa Supreme Court has previously adopted exceptions to the usual error preservation rules. See State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982) (ineffective assistance); State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)(void, illegal or procedurally defective sentences). It should do so again to recognize the plain error doctrine. The Iowa Constitution vests in our Supreme Court inherent supervisory authority over lower courts, which permits the Court to implement necessary procedures to protect the rights of criminal defendants. Iowa Const. art V, § 4; State v. Dahl, 874 N.W.2d 348, 350 (Iowa 2016). Additionally, Iowa Code section 814.20 gives the appellate courts broad authority to affirm, modify, or reverse a judgment, order a new trial, or reduce a defendant's punishment. Iowa Code § 814.20 (2017). See State v. Young, 292 N.W.2d 432, 435 (Iowa 1980)(relying

on § 814.20 to correct illegal sentence despite absence of motion in district court).

Plain error review is applicable to evidentiary errors, including hearsay, improper opinions on credibility, and Confrontation Clause violations. 12 Fed. Proc., L. Ed. § 33:21, *When may error be predicated upon an evidentiary ruling - Notice of plain error* (evidentiary errors); United States v. Williams, 133 F.3d 1048, 1051 (7th Cir. 1998) (hearsay); United States v. Hill, 749 F.3d 1250, 1251 (10th Cir. 2014) (improper opinion testimony on credibility); State v. Mendoza-Lazaro, 200 P.3d 167, 170 (Or. Ct. App. 2008)(confrontation clause); United States v. Morales, 477 F.2d 1309, 1315 (5th Cir. 1973)(same).

For the reasons discussed above, the improper admission of the challenged evidence amounted to errors, plain on their face, and affected Defendant's substantial rights in that they affected the outcome of the trial proceeding below. If relief is not granted as preserved error or under an ineffective

assistance of counsel framework, relief should nevertheless be afforded as plain error.

CONCLUSION

Under Divisions I-III and V, Dessinger respectfully requests a new trial.

Under Division IV, Dessinger respectfully requests: (1) that the restitution part of her sentencing order be vacated and remanded to the district court for resentencing on restitution; and (2) that the portion of the sentencing order relating to the obligation to pay sheriff's fees as set forth in any Room and Board Reimbursement Claim by the sheriff absent a request for hearing should be vacated and remanded for entry of an amended sentencing order omitting that language.

CONDITIONAL REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument if such argument would assist the Court.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $4.81, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

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

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 13,960 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(f)(1).

/s/ Vidhya K. Reddy Dated: *11/15/19*

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