IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-2116

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SHANNA DESSINGER,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WEBSTER COUNTY
THE HONORABLE ANGELA L. DOYLE, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

The Supreme Court should not retain this case because the Court does not need to decide any substantial issues of first impression. First, the defendant alleges an issue of first impression in Section II of her brief by arguing against a per se rule that the Confrontation Clause is inapplicable to statements of young children. However, she did not preserve error on the Confrontation Clause, and the child's statement in the case was nontestimonial for a variety of reasons in addition to his young age. *See* Section II(A), pp. 37–43. Second, the defendant alleges an issue of first impression in Section V of her brief regarding the application of Senate File 589's change prohibiting ineffective assistance challenges on direct appeal. However, this Court has already determined the new legislation does not apply to appeals like the defendant's that were pending before the July 1 effective date. *See State v. Macke*, 933 N.W.2d 226, 230–36 (Iowa 2019). Consequently, this case can be decided without addressing any issues of first impression.

Next, the State's restitution argument seeks application of the plain language of *State v. Albright*, 925 N.W.2d 144 (Iowa 2019), which held that an incomplete, temporary restitution order is not

appealable. *See* Section IV, pp. 57–61. However, the Court of Appeals has been reversing all restitution cases raising *Albright*-like claims. The State is seeking Supreme Court retention in three other cases to resolve the tension between the holding and the remedy in *Albright*. *See State v. Witham* (18-1548), *State v. Lyon* (19-0363), and *State v. Stakke* (19-0451). Because those other cases involve only the restitution issue, they are better vehicles for the Supreme Court to clarify *Albright*.

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

STATEMENT OF THE CASE

Nature of the Case

Defendant Shanna Dessinger appeals her conviction and sentence following a jury's verdict finding her guilty of child endangerment.

Course of Proceedings

The State accepts the defendant's statement of the course of proceedings as substantially correct.

Facts

Defendant Dessinger was having a hard day and seemed overwhelmed. Trial Tr. p. 65, line 20 – p. 66, line 10. She had worked at Tracey's Tots daycare center in Fort Dodge for about five months. Trial Tr. p. 103, line 23 – p. 104, line 8. On May 9, 2018, she had been telling coworkers that she was quitting and not coming back the next day. Trial Tr. p. 116, line 16 – p. 117, line 6.

Dessinger was assigned to supervise the 3- and 4-year-old children in the preschool room. Trial Tr. p. 105, lines 3–17. That afternoon, she took the preschoolers outside to the playground. Trial Tr. p. 140, line 20 – p. 141, line 8. At the same time, children from the 2-year-old classroom were using the playground while being supervised by teachers Dametria Gully and Kelli Smith. Trial Tr. p. 63, line 12 – p. 64, line 8, p. 141, line 9 – p. 142, line 2. Gully alerted Dessinger that one of the preschoolers was attempting to climb the fence, because the teachers are supposed to stop the children from climbing on the fence. Trial Tr. p. 64, lines 9–19, p. 142, line 9 – p. 144, line 1. Although it was Dessinger's responsibility to supervise the preschoolers, she responded that she "didn't care" and that she was going to quit. Trial Tr. p. 64, line 20 – p. 65, line 19, p. 144, lines 2–9.

According to Dessinger, she was frustrated that the kids were not listening to her: "I had already told him three times to stay off the fence and he wasn't listening." Trial Tr. p. 144, lines 10–15. Because Dessinger would not act, one of the other teachers had to intervene and get the child off the fence. Trial Tr. p. 66, lines 11–13, p. 144, line 23 – p. 145, line 5.

About 15 minutes later, Dessinger and her class were back inside the preschool room. Trial Tr. p. 66, line 17 – p. 67, line 5. Gully had a clear view through the large window separating the preschool and 2-year-old rooms. Trial Tr. p. 62, lines 2–17, p. 85, line 3 – p. 86, line 1, p. 107, lines 9–15, State's Ex. 1 (photo); App. 15. Dessinger grabbed 4-year-old D.A.J. by the neck, squeezed, and pushed him to the ground. Trial Tr. p. 67, line 6 – p. 68, line 1. Gully was "absolutely sure" what she saw and had an "absolutely clear view" of the incident. Trial Tr. p. 68, lines 2–6. There was no chance that Dessinger had accidentally bumped into the child and knocked him over. Trial Tr. p. 68, lines 7–15, p. 72, lines 13–19.

D.A.J. began crying and screaming, "I'm sorry, I'm sorry, I'm sorry" over and over again. Trial Tr. p. 68, line 16 – p. 69, line 8. Gully went to the office right away to report what she saw to daycare

director Cory Jewett. Trial Tr. p. 72, line 20 – p. 73, line 24, p. 106, lines 3–17. Jewett could hear crying all the way from the office. Trial Tr. p. 108, lines 2–12. When Jewett got to the preschool room, D.A.J. was whimpering and sitting in the corner by himself, which was an unusual shift from his normal high-spirited attitude. Trial Tr. p. 108, line 13 – p. 109, line 8. Jewett told Dessinger to gather her things and leave. Trial Tr. p. 106, line 23 – p. 107, line 8. Dessinger seemed glad to be sent home early. Trial Tr. p. 117, line 20 – p. 118, line 5.

Jewett and Gully spoke with D.A.J., and he demonstrated what happened. Trial Tr. p. 79, lines 14–16. D.A.J. grabbed his neck and acted like he was lifting up. Trial Tr. p. 89, line 15 – p. 90, line 16, p. 112, lines 1–20. D.A.J.'s father arrived "in the middle of all of this happening," and both the staff and D.A.J. reported what happened. Trial Tr. p. 113, p. 19 – p. 114, line 10.

D.A.J.'s parents reported the incident to Officer Paul Samuelson. Trial Tr. p. 94, line 21 – p. 95, line 11. They said D.A.J. "had been picked up and then put down." Trial Tr. p. 95, lines 12–17. Based on that report, Officer Samuelson began an investigation. Trial Tr. p. 95, line 18 – p. 96, line 13.

At trial, Dessinger testified that she was "100 percent" sure she did not choke D.A.J. with her hand. Trial Tr. p. 166, lines 17–23. She said she was telling D.A.J. and the other children to put toys away, but they were not following her directions. Trial Tr. p. 149, line 7 – p. 151, line 17. Although she admitted that she was frustrated on the playground by the child who would not listen, she insisted that she was not frustrated by the children ignoring her inside. Trial Tr. p. 151, line 18 – p. 152, line 6, p. 168, line 23 – p. 169, line 18. She claimed that she was helping D.A.J. remove his apron, but it got caught on his ear. Trial Tr. p. 154, line 22 – p. 156, line 1. Then, she claimed, her foot hit the bookshelf, she "lunged" forward, and she hit her knee. Trial Tr. p. 156, lines 2–15. Dessinger said that D.A.J. "might have" fallen over or that it was "possible" she knocked him over, but she could not remember. Trial Tr. p. 156, lines 16–19, p. 166, lines 11–14. Dessinger insisted that D.A.J. was not crying or screaming and that he appeared fine afterward. Trial Tr. p. 156, line 20 – p. 158, line 6, p. 170, line 8–22. She suggested that Gully could have just been "mistaken" about what she saw. Trial Tr. p. 160, line 21 – p. 162, line 4.

ARGUMENT

I. Dessinger Failed to Preserve Her Hearsay Challenge, and Trial Counsel Did Not Have to Object Because the Victim's Demonstration Was Admissible Under Established Hearsay Exceptions.

Preservation of Error

Dessinger bears some responsibility for prompting the testimony about D.A.J.'s demonstration. Despite having deposed Dametria Gully and filing a motion in limine to exclude D.A.J.'s out-of-court statements, the defense asked her during cross examination whether she "approached" D.A.J. again after the assault. Trial Tr. p. 79, line 14. Gully answered, "I -- me and Cori both talked to him and asked him what happened and he showed us what happened, but no." Trial Tr. p. 79, lines 15–16. In response to the defense's cross examination, the State on redirect asked Gully about the demonstration. *See* Trial Tr. p. 89, lines 15–17 ("Now, when [defense attorney] was asking you questions, you indicated in your answer that [D.A.J.] showed you what happened to him?). Thus, the defendant is taking exception to demonstration evidence that was prompted by defense questioning.

Additionally, Dessinger did not make clear objections to nonverbal hearsay. First, although defense counsel did state "I object

to hearsay," he did not raise any further objection when the court ruled the witness could "testify about her observations." Trial Tr. p. 89, line 22 – p. 90, line 16. If the defense intended the hearsay objection to cover nonverbal assertions, it could have prevented this appeal simply by making that point to the district court in time for the court to take corrective action. *See State v. Krogmann*, 804 N.W.2d 518, 524 (Iowa 2011) ("[O]ur regular error preservation rules also require parties to alert the district court 'to an issue at a time when corrective action can be taken.'" (quotation omitted)). Second, Dessinger seeks to excuse her failure to raise subsequent objections by asserting that "'Repeated objections need not be made to the same class of evidence.'" Def. Proof Br. at 50 (quoting *State v. Kidd*, 239 N.W.2d 860, 863 (Iowa 1976)). However, the lack of subsequent objections could equally reflect that the defense did not object because it did not believe the nonverbal out-of-court demonstration constituted hearsay. For example, defense counsel later objected to D.A.J.'s verbal statements but did not object to his nonverbal demonstration. Trial Tr. p. 112, line 1 – p. 113, line 15. Because the defendant did not raise clear objections to each witness's testimony

about D.A.J.'s demonstration, this Court should find she failed to preserve error.

Within the context of doubtful error preservation, this Court should allow substantial leeway when considering alternate theories of admissibility. If the defendant had raised clear objections to D.A.J.'s out-of-court demonstration, the State would have offered hearsay exceptions to allow admission of the evidence. The State's resistance to the motion in limine expressed such an intent by referencing "exceptions to the hearsay rule." State's Resistance ¶ 15 (9/27/2018); App. 13; *see also* Trial Tr. p. 10, lines 15–24 (addressing the motion in limine and ruling that "hearsay will not be accepted by the court unless there is an applicable exception to the hearsay rule"). Because the record supports the foundation for established hearsay exceptions, the State can rely on them as alternative theories of admissibility in this appeal. *See DeVoss v. State*, 648 N.W.2d 56, 62 (Iowa 2002) ("Notwithstanding our error preservation requirement, we have consistently applied an exception to it. That exception applies to evidentiary rulings, whether the error claimed involved rulings admitting evidence or not admitting evidence.").

Recognizing problems with error preservation, Dessinger contends trial counsel was ineffective for failing to object. Def. Proof Br. at 52. Claims of ineffective assistance fall under an exception to the normal error preservation rules. *State v. Begey*, 672 N.W.2d 747, 749 (Iowa 2003). Because the failure to object could constitute deficient performance in certain cases, this Court should apply the ineffective-assistance framework when considering the defendant's hearsay challenge.

Standard of Review

"We review the defendant's hearsay claims for errors at law." *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006).

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant claiming ineffective assistance must prove both that counsel's performance was deficient, and that prejudice resulted. *Id.* at 687.

Under the first prong, the defendant must show counsel's representation fell below an objective standard of reasonableness. *Id.* at 687–88. The reviewing court must be highly deferential to counsel's performance, avoid judging in hindsight, and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. To prove the second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Before July 1, 2019, defendants could raise claims of ineffective assistance on direct appeal if they had "reasonable grounds to believe that the record is adequate to address the claim on direct appeal." Iowa Code § 814.7(2) (2017). "[I]f a defendant wishes to have an ineffective-assistance claim resolved on direct appeal, the defendant will be required to establish an adequate record to allow the appellate court to address the issue." *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010). "If, however, the court determines the claim cannot be addressed on appeal, the court must preserve it for a postconviction-

relief proceeding, regardless of the court's view of the potential viability of the claim." *Id.*

Discussion

Dessinger's hearsay challenge does not require granting her a new trial. First, the victim's demonstration of the abuse was admissible as a present sense impression or an excited utterance. Second, the father's statement to the police officer was admissible to explain the officer's subsequent conduct. Third, any error was non-prejudicially cumulative to the eyewitness's description of the abuse, the child's reaction to the abuse, and the defendant's inconsistent testimony.

Dessinger complains that the district court erroneously admitted D.A.J.'s out-of-court demonstration of how she grabbed him around the throat and strangled him. Def. Proof Br. at 53–59. This Court has found that a young child's demonstration can constitute hearsay if it intended to assert what the child had seen. *State v. Galvan*, 297 N.W.2d 344, 346 (Iowa 1980); *see also* Iowa R. Evid. 5.801(a)(2) (defining a hearsay "statement" to include "nonverbal conduct, if intended as an assertion").

However, a finding that D.A.J.'s demonstration constituted hearsay was only the first step in the analysis. Regardless of whether error was preserved or unpreserved, this Court must proceed to the next steps of the analysis. If error was preserved, the demonstration was admissible under established hearsay exceptions. If error was not preserved, counsel had no professional obligation to object to admissible hearsay.

A. The child's demonstration was admissible as a present sense impression.

The hearsay exception for a present sense impression permits "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." Iowa R. Evid. 5.803(1). "The underlying theory of this exception is that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." *Fratzke v. Meyer*, 398 N.W.2d 200, 205 (Iowa Ct. App. 1986) (citations omitted). The Court has noted that Professor McCormick "argues that the phrase 'immediately thereafter' should be 'interpreted to mean a time within which, under the conditions, it is unlikely that the declarant had an opportunity to form a purpose to misstate his observations. . . .'" *Id.* (quoting McCormick, *Evidence* § 298 at 710–11). The Court has

found that a time lapse of fifteen to twenty minutes was "substantially contemporaneous" to fall within the exception for present sense impressions. *Id.*

The record supports that D.A.J.'s demonstration was a present sense impression. Gully immediately reported Dessinger's abusive conduct to daycare director Jewett: "As soon as I noticed what was happening, I went and informed Cori about what was going on." Trial Tr. p. 72, line 20 – p. 73, line 3. Jewett then went to the preschool room and dismissed Dessinger, explaining that the safety of the children made it "important for [Dessinger] to be removed immediately." Trial Tr. p. 106, line 11 – p. 107, line 8. D.A.J. then demonstrated how Dessinger grabbed him by the neck. Trial Tr. p. 89, line 15 – p. 90, line 16, p. 112, line 1 – p. 113, line 15. Before Jewett even had time to attempt calling D.A.J.'s parents about the incident, his father arrived and heard D.A.J.'s description of the incident. Trial Tr. p. 113, line 19 – p. 114, line 10.

D.A.J.'s demonstration was sufficiently contemporaneous to constitute a present sense impression. Gully immediately reported the abuse to Jewett, Jewett acted to immediately remove Dessinger from the daycare, and D.A.J. gave his demonstration before Jewett

could even call his parents. The brief passage of time and D.A.J.'s tender age made it unlikely that he had time to fabricate the demonstration, so his nonverbal conduct was admissible as a present sense impression. Counsel had no professional obligation to object to admissible hearsay.

B. The child's demonstration was admissible as an excited utterance.

The hearsay exception for an excited utterance permits "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Iowa R. Evid. 5.803(2). "'The rationale behind the exception is that statements made under the stress of excitement are less likely to involve deception than if made upon reflection or deliberation.'" *State v. Harper*, 770 N.W.2d 316, 319 (Iowa 2009) (quoting *State v. Tejeda*, 677 N.W.2d 744, 753 (Iowa 2004)).

> In determining whether a statement qualifies as an excited utterance, the trial court should consider: "(1) the time lapse between the event and the statement, (2) the extent to which questioning elicited the statements that otherwise would not have been volunteered, (3) the age and condition of the declarant, (4) the characteristics of the event being described, and (5) the subject matter of the statement."

Id. (quoting *State v. Atwood*, 602 N.W.2d 775, 782 (Iowa 1999)).

The record supports that D.A.J.'s demonstration was an excited utterance. He was grabbed by the neck and pushed down by his daycare teacher (Trial Tr. p. 67, lines 6–23), which was a highly startling event for a 4-year-old child. He reacted to the abusive conduct with great excitement—he began repeatedly screaming "I'm sorry, I'm sorry, I'm sorry," his cries were so loud they could be heard from the office, and he was still whimpering and sitting by himself in the corner when Jewett arrived. Trial Tr. p. 68, line 16 – p. 69, line 8, p. 108, line 2 – p. 109, line 8. And his demonstration of being grabbed by the neck pertained directly to the startling event that caused his excitement. Trial Tr. p. 89, line 15 – p. 90, line 16, p. 112, line 1 – p. 113, line 15.

D.A.J.'s demonstration, made under the stress of the startling event, qualified as an excited utterance. He was abused by a trusted authority figure, he reacted with strong emotion, and within a short time reported what had caused his excited state. Because his nonverbal demonstration was admissible as an excited utterance, trial counsel had no obligation to object to the admissible hearsay.

C. The parents' brief report to police was non-hearsay offered to explain the officer's subsequent conduct.

Not all out-of-court statements are hearsay. Rather, the rule defines hearsay as an out-of-court statement that "[a] party offers into evidence to prove the truth of the matter asserted in the statement." Iowa R. Evid. 5.801(c). "When an out-of-court statement is offered, not to show the truth of the matter asserted but to explain responsive conduct, it is not regarded as hearsay." *State v. Mitchell*, 450 N.W.2d 828, 832 (Iowa 1990).

The report from D.A.J.'s parents to the police was not offered to prove the truth of the matter asserted. The parents told Officer Samuelson that "their child was at Tracey's Tots, goes there for daycare, and the child had been picked up and then put down." Trial Tr. p. 95, lines 12–17. The officer explained that "based on that report" he undertook an investigation that included examining the child for injuries, interviewing the daycare workers, and taking a statement from Dessinger. Trial Tr. p. 95, line 18 – p. 96, line 24.

The parents' report to Officer Samuelson was admissible for non-hearsay purposes. Questioning the adequacy of the police investigation is a common avenue of attack in criminal cases, so a

brief description of the parents' report helped explain why Officer Samuelson took certain investigative steps. And the vagueness of the parents' report—that D.A.J. "had been picked up and then put down"—shows that the State was not offering the statement to prove what happened to the child. If anything, the parents' brief report to the officer was harmlessly cumulative to the much more detailed in-court testimony from eyewitness Gully. Therefore, counsel had no obligation to object to the non-hearsay testimony, and objecting to the vague statement would not have changed the outcome of trial.

D. Any error was nonprejudicial.

For the unpreserved hearsay objections, Dessinger bears the burden to prove a reasonable likelihood of a different result. *See Strickland*, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). And even if he had preserved error with timely and specific objections, reversal is not required in cases of nonconstitutional error[1] unless it appears

[1] Dessinger erroneously invokes the standard for constitutional error, which requires proof beyond a reasonable doubt that the error was harmless. *See* Def. Proof Br. at 59–60 (citing *State v. Sowder*, 394 N.W.2d 368, 372 (Iowa 1986)). Although *Sowder* was a hearsay case, it cited *Chapman v. California*, 386 U.S. 18, 23–24 (1967),

"that the rights of the complaining party have been injuriously affected by the error or that he has suffered a miscarriage of justice." *State v. Henderson*, 696 N.W.2d 5, 12 (Iowa 2005); *see also* Iowa R. Evid. 5.103(a) ("A party may claim error in a ruling to admit or exclude evidence *only if the error affects a substantial right of the party* . . ." (emphasis added)). Admission of D.A.J.'s demonstration was nonprejudicial in light the detailed eyewitness testimony of the abuse, the child's reaction to the abuse, and Dessinger's inconsistent testimony.

First, D.A.J.'s demonstration was cumulative to Gully's unwavering testimony. Gully described watching Dessinger grab 4-year-old D.A.J. by the neck, squeeze, and shove him to the ground. Trial Tr. p. 67, line 6 – p. 68, line 1. She was "absolutely sure" about what she saw. Trial Tr. p. 68, lines 2–3. She had an "absolutely clear view of this incident." Trial Tr. p. 68, lines 4–6. There was no chance that it was an accident or that Dessinger only bumped into him or knocked him over. Trial Tr. p. 68, lines 7–12. Gully was "absolutely

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which fashioned a "harmless-constitutional-error rule." *Chapman*, 386 U.S. at 22. In more recent hearsay cases, the Iowa Supreme Court has applied the more lenient non-constitutional error standard. *See, e.g.*, *State v. Newell*, 710 N.W.2d 6, 19 (Iowa 2006) (citing Iowa R. Evid. 5.103(a)).

positive" that Dessinger grabbed D.A.J. by the neck and "choked" him. Trial Tr. p. 68, lines 13–15. She affirmed that there was no doubt in her mind and that she was not mistaken about the assault. Trial Tr. p. 72, lines 13–19. She could see "exactly what was going on" and "It was no accident." Trial Tr. p. 75, lines 11–13. Her view through the window was unobscured, she was not distracted by anything else, and she observed the assault "clearly." Trial Tr. p. 85, line 6 – p. 86, line 15. This unequivocal testimony established the intent of Dessinger's actions, so D.A.J.'s out-of-court demonstration was not essential to support the conviction.

Second, D.A.J.'s emotional response corroborated that he was assaulted. After being choked, Gully heard the 4-year-old begin crying and screaming "I'm sorry, I'm sorry, I'm sorry" over and over. Trial Tr. p. 68, line 18 – p. 69, line 5. Likewise, Jewett could hear crying all the way in the office. Trial Tr. p. 108, lines 2–12. And when Jewett got to the preschool room, D.A.J. was whimpering by himself in the corner, which was a change from his normal high-spirited attitude. Trial Tr. p. 108, line 13 – p. 109, line 8. Because D.A.J.'s screaming apology and loud crying was not consistent with an

accidental bump, the jury would rely on his reaction to corroborate Gully's testimony even without his out-of-court demonstration.

Third, Dessinger presented unpersuasive, contradictory testimony:

- Dessinger gave an equivocal explanation about what happened to D.A.J. She could only say that he "might have" fallen over or that "it's possible" she knocked him over, but she could not remember. Trial Tr. p. 156, lines 16–19, p. 166, lines 11–14.
- Dessinger's poor attitude revealed her mindset during the incident. She was having a "hard day" and seemed overwhelmed. Trial Tr. p. 65, line 20 – p. 66, line 2. When she was confronted on the playground about not stopping a preschooler from climbing on the fence, Dessinger responded that "she didn't care what they were doing because she was quitting after today." Trial Tr. p. 64, line 17 – p. 65, line 4. The assault against D.A.J. occurred just 15 minutes later. Trial Tr. p. 66, line 17 – p. 67, line 5.
- Dessinger was inconsistent about being frustrated. Although she admitted that she was frustrated on the playground by the child who would not listen, she insisted that she was not frustrated by

D.A.J. and the other children ignoring her inside. Trial Tr. p. 151, line 18 – p. 152, line 6, p. 168, line 23 – p. 169, line 18.

- Dessinger contradicted other evidence about where she was standing. Gully used a photograph to explain where Dessinger was standing when she assaulted D.A.J. Trial Tr. p. 69, line 11 – p. 72, line 7, State's Ex. 1 (photo); App. 15. Dessinger, however, claimed she never stood in that place at any point "throughout the whole day." Trial Tr. p. 163, line 24 – p. 164, line 9.
- Dessinger gave inconsistent testimony about D.A.J.'s reaction to the abuse. Gully and Jewett described D.A.J. crying and screaming after the assault. Trial Tr. p. 68, line 18 – p. 69, line, p. 108, line 2 – p. 109, line 8. But Dessinger denied hearing any screaming or yelling and said D.A.J. "appeared to be fine." Trial Tr. p. 158, lines 1–10.
- Dessinger did not present a plausible theory why other witnesses would lie. She suggested Gully "could have" been mistaken about what she saw. Trial Tr. p. 161, line 24 – p. 162, line 4. However, Gully was unflinching when testifying, "It was no accident." Trial Tr. p. 75, lines 11–13.

The jury was free to rely on the inconsistency of Dessinger's testimony to disbelieve her story and credit Gully's consistent and unequivocal testimony.

Dessinger does not deserve a new trial. Based on the strength of the evidence, there is no reasonable probability of a different result had counsel objected to D.A.J.'s demonstration. And even if the Court finds error was preserved, D.A.J.'s demonstration was harmlessly cumulative to other convincing proof of guilt. Therefore, this Court should affirm Dessinger's convictions regardless of whether error was preserved.

II. Dessinger Failed to Preserve Her Confrontation Challenge, and Trial Counsel Did Not Have to Object Because the Young Victim's Demonstration to Daycare Teachers Was Nontestimonial.

Preservation of Error

Dessinger did not preserve a confrontation challenge because she did not raise such an objection at trial. Although the defense made hearsay objections to some of D.A.J.'s out-of-court statements, those objections never addressed the Confrontation Clause. A hearsay objection does not preserve a confrontation argument. *See, e.g.*, *State v. Schaer*, 757 N.W.2d 630, 634–35 (Iowa 2008) (finding the defendant's hearsay objection at trial "did not renew a

confrontation objection" raised in a motion in limine); *State v. Tangie*, 616 N.W.2d 564, 568–69 (Iowa 2000) (finding the defendant's hearsay objection at trial failed to preserve her Confrontation Clause argument); *State v. Nelson*, 329 N.W.2d 643, 645–46 (Iowa 1983) ("An objection in trial court based on hearsay does not preserve an issue of a constitutional right of confrontation for an appellate court."); *State v. Farni*, 325 N.W.2d 107, 109 (Iowa 1982) ("The objection that the question 'calls for hearsay' is too broad to raise the issue of constitutional right of confrontation.").

Likewise, Dessinger's motion in limine did not preserve the confrontation challenge. She points out that her pretrial motion raised "not only hearsay limitations but also Confrontation Clause protections." Def. Proof Br. at 63 (citing Motion in Limine 9/27/2018; App. 10). But the district court's ruling on the motion in limine only mentioned the hearsay objection. *See* Trial Tr. p. 10, lines 19–24 ("It appears that the limine portion relates to hearsay evidence from persons who may not have direct, firsthand knowledge of the events in this case. Obviously, hearsay will not be accepted by the court unless there is an applicable exception to the hearsay rule."). Thus, Dessinger did not fulfill the second essential element of error

preservation because she never secured a district court ruling on the Confrontation Clause. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised *and decided by the district court* before we will decide them on appeal." (emphasis added)).

Finally, Dessinger's case does not present "unique circumstances" that justify ignoring established principles of error preservation. In the same motion she raised confrontation, she also sought to make D.A.J. unavailable at trial by alleging he was not competent to testify. *See* MIL & Motion on Competency (9/27/2018); App. 8. And although D.A.J. testified at an offer of proof to establish his competence, toward the end of that examination he had essentially shut down. *See* Trial Tr. p. 38, line 11 – p. 39, line 2 (on re-cross examination, noting that D.A.J. was "losing [his] concentration" and instructing him not to blow into the microphone). Because Dessinger was fighting to exclude D.A.J.'s in-court testimony, she should have anticipated that her actions might succeed in suppressing his testimony. Therefore, she should have made confrontation objections in addition to her hearsay objections.

Recognizing her shortcomings with error preservation, Dessinger raises the alternative argument that counsel was ineffective for failing to raise and secure a ruling on the Confrontation Clause. Def. Proof Br. at 65. Claims of ineffective assistance fall under an exception to the normal error preservation rules. *Begey*, 672 N.W.2d at 749. Because the failure to object could constitute deficient performance in certain cases, this Court should apply the ineffective-assistance framework when considering Dessinger's confrontation challenge.

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *Straw*, 709 N.W.2d at 133. If the defendant had preserved her confrontation challenge, review would be de novo. *Newell*, 710 N.W.2d at 23.

Discussion

Trial counsel had no duty to raise a confrontation objection to D.A.J.'s nontestimonial out-of-court demonstration. First, the 4-year-old's excited and contemporaneous demonstration to daycare workers was not the equivalent of testimony. Second, even if the demonstration was testimonial, the current record is not sufficient to

determine whether the child was unavailable for in-person testimony. Finally, any error was nonprejudicial because independent evidence proved Dessinger's guilt.

A. The 4-year-old's excited demonstration to daycare teachers was nontestimonial.

Trial counsel had no professional obligation to raise a confrontation objection. D.A.J.'s young age, the lack of law enforcement presence, and the circumstances of his demonstration weighed against it being the equivalent of testimony. Because the case law does not support a finding that D.A.J.'s out-of-court demonstration was testimonial, trial counsel cannot be faulted for failing to raise a challenge that had no merit.

The text of the Confrontation Clause focuses on "'witnesses' against the accused—in other words, those who 'bear testimony.'" *Crawford v. Washington*, 541 U.S. 36, 51 (2004). "'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* But "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . ." *Id.* at 68.

Although *Crawford* did not provide "a comprehensive definition of 'testimonial,'" it "indicated that, at a minimum, there were four types of evidence that met the definition of testimonial: grand jury testimony, preliminary hearing testimony, former trial testimony, and statements resulting from police interrogations." *State v. Shipley*, 757 N.W.2d 228, 235 (Iowa 2008) (citing *Crawford*, 541 U.S. at 68).

> In addition to these four categories of evidence, the Supreme Court provided three "formulations" to aid courts in determining whether other types of statements are testimonial. The first formulation involved ex parte in-court testimony or its functional equivalent where the declarant would reasonably expect the statements to be used at trial and where the defendant was unable to cross-examine the declarant. The second formulation involved formalized testimonial materials such as confessions and depositions. The third and most open-ended formulation included statements made under circumstances that would lead witnesses to objectively believe the statements might be used at trial.

Id. (citing *Crawford*, 541 U.S. at 51–52).

At the time of Dessinger's trial, competent counsel would have faced a steep burden to overcome the holding in *Ohio v. Clark*, 135 S. Ct. 2173 (2015). In *Clark*, a 3-year-old child, L.P., told his daycare

teachers that the defendant had abused him. *Id.* at 2177–78. The Court considered "all of the relevant circumstances" and concluded the child's out-of-court statements were nontestimonial. First, the Court advised that statements made to people other than law enforcement officers are "much less likely to be testimonial than statements to law enforcement officers." *Id.* at 2181. Next, the Court recognized that the child's statement "occurred in the context of an ongoing emergency involving suspected child abuse." *Id.* It noted that "the informal setting of a preschool lunchroom and classroom" was nothing like a "formalized station-house interview" or a "police interrogation." *Id.* Also, the child's age "fortifie[d]" the conclusion because "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause." *Id.* at 2182. Finally, the Court reemphasized "the fact that L.P. was speaking to his teachers remains highly relevant." *Id.* It concluded, "Here, the answer is clear: L.P.'s statements to his teachers were not testimonial." *Id.* at 2183.

Competent counsel also would have been aware of *In re J.C.*, 877 N.W.2d 447 (Iowa 2016). In *J.C.*, the 4-year-old sexual-abuse victim, A.W., made statements to a forensic interviewer and a doctor at a CPC. *Id.* at 449–50. The Court applied *Clark* and decided the

child's statements to the doctor were nontestimonial. *Id.* at 454. First, the Court noted that "A.W. is a very young child . . ." *Id.* at 456. Next, the Court recognized that "A.W.'s statements were made to a physician, with no law enforcement representative in the room or even observing the encounter remotely." *Id.* at 456–57. Also, the Court found it "obvious that A.W.'s purpose was not to make a statement to Dr. Harre that could be used to prosecute J.C." *Id.* at 457. It noted the informal setting in a doctor's office, where the statement was not recorded. *Id.* Finally, it found law enforcement's role in arranging the doctor's visit was "attenuated." *Id.* The Court concluded the child's statements to the doctor were nontestimonial based on "the totality of circumstances under the primary-purpose test, *as well as* the additional points emphasized by the Supreme Court in *Clark*." *Id.* at 458.

D.A.J.'s out-of-court demonstration shared many of the same characteristics as the statements found to be nontestimonial in *Clark* and *J.C.* First, like the 3-year-old in *Clark* and the 4-year-old in *J.C.*, D.A.J. was just 4 years old—an age that "'will rarely, if ever, implicate the Confrontation Clause.'" *J.C.*, 877 N.W.2d at 456 (quoting *Clark*, 135 S. Ct. at 2182). Second, like the daycare classroom in *Clark* or the

doctor's office in *J.C.*, D.A.J. gave his demonstration of Dessinger's abuse in the informal setting of the daycare classroom. Third, like the daycare teacher in *Clark* and the doctor in *J.C.*, D.A.J. made his statements daycare workers who were not law enforcement officers or working at the behest of law enforcement. Applying the totality of the circumstances as defined in *Clark* and *J.C.*, D.A.J.'s statements were not made with the primary purpose of substituting in-court testimony.

The circumstances of D.A.J.'s demonstration differ greatly from *State v. Bentley*, 739 N.W.2d 296 (Iowa 2007). In *Bentley*, the Court found the 10-year-old victim's forensic CPC interview was testimonial based on "[t]he extensive involvement of a police officer in the interview." *Id.* at 299. The Court relied on factors such as "that the interview served an investigative function for the State," that the officer's "involvement in the interview was not limited to mere observation," and that the interview's setting bore "[i]ndicia of formality." *Id.* at 299–300. Unlike *Bentley*, the police had no role in arranging D.A.J.'s demonstration—it occurred in the daycare prompted by daycare employees. Also, unlike the 10-year-old in *Bentley*, D.A.J. was just 4 years old, meaning he lacked any

comprehension of the criminal justice process. *See J.C.*, 877 N.W.2d at 458 ("A.W. was considerably younger than the ten-year-old victim in *Bentley*—an important consideration according to the *Clark* Court."). Therefore, competent counsel would recognize that *Bentley* was easily distinguishable.

Additionally, the nature of D.A.J.'s demonstration supports that it was nontestimonial. The *Clark* Court explained that statements falling under a recognized hearsay exception are less likely to be testimonial. *See Clark*, 135 S. Ct. at 2180 ("[I]n determining whether a statement is testimonial, 'standard rules of hearsay, designed to identify some statements as reliable, will be relevant.'" (quoting *Michigan v. Bryant*, 562 U.S. 344, 358–59 (2011))). As explained above in subsections I(A) and I(B) of this brief (pp. 23–26), D.A.J.'s excited demonstration just minutes after the abuse was admissible under the established hearsay exceptions for present sense impressions and excited utterances. Because the demonstration was made in close proximity to and under the stress of the exciting event, the 4-year-old's reenactment was not intended to be a substitute for in-court testimony.

Finally, this Court should decline to reach Dessinger's unnecessary request for a "different result" under the Iowa Constitution. She proposes the Court should "squarely address" whether "statements by young children are per se nontestimonial . . ." Def. Proof Br. at 71. But D.A.J.'s young age was just one of several important factors proving his out-of-court demonstration was nontestimonial, so the Court should save the "per se nontestimonial" question for another case.

Under the current record and controlling case law, competent counsel was not constitutionally obligated to raise a confrontation objection. All of the relevant circumstances—including D.A.J.'s young age, the informality of setting, the absence of law enforcement, and his excited emotional state—proved that his out-of-court demonstration was not made with the primary purpose of replacing in-court testimony. Accordingly, this Court should find the record adequate to reject Dessinger's ineffective assistance complaint.

B. Even if the demonstration was testimonial, the current record does not establish that the child was available to testify at trial.

Even if D.A.J.'s demonstration were testimonial, the current record does not prove counsel was incompetent regarding the other

prongs of the *Crawford* analysis. *See Crawford*, 541 U.S. at 68 ("Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."). First, Dessinger assumes too much when asserting D.A.J. was available to testify at trial. Second, the record demonstrates that Dessinger had the prior opportunity to cross examine D.A.J. in a discovery deposition. At most, the Court should preserve Dessinger's ineffective assistance claim for further development in a subsequent postconviction relief proceeding.

The current record does not prove whether D.A.J. was available to testify at trial. Dessinger emphasizes that D.A.J. testified in a proffer regarding his competence as a witness. Def. Proof Br. at 71. But the record also suggests D.A.J. essentially shut down during that proffer. He endured nearly 30 pages of interrogation by the court, the prosecutor, and defense counsel with multiple round of cross, redirect, and re-cross examination. *See generally* Trial Tr. p. 18, line 4 – p. 45, line 14. Toward the end, he struggled to maintain focus and had to be reminded not to blow into the microphone. Trial Tr. p. 38, lines 13–25. And although the prosecutor's opening statement

reflected an intent to present D.A.J.'s testimony at trial (Trial Tr. p. 52, lines 23–25), the State's case ended with an off-the-record sidebar discussion, and the State rested without calling D.A.J. Trial Tr. p. 125, line 21 – p. 128, line 25. This course of events suggests D.A.J.'s emotional state or willingness to testify deteriorated before he could testify for the jury. The ambiguity of the existing record requires further development to determine why D.A.J. did not testify.

Next, the record refutes Dessinger's assertion that she did not have an adequate prior opportunity to cross examine D.A.J. Dessinger, through the assistance of counsel, examined D.A.J. in a pretrial deposition. *See* Attachment to Resistance (10/1/2018) (D.A.J. depo.); App. 8–25. During that deposition, D.A.J. answered approximately 160 questions as counsel explored what the child remembered about the abusive incident, the course of the investigation, and whether he was telling the truth. This deposition satisfied Dessinger's prior opportunity to question the victim under oath even if it was not a perfect representation of how the cross examination might have proceeded at trial. *See State v. Tompkins*, 859 N.W.2d 631, 640 (Iowa 2015) ("'[T]he Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not

cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" (quoting *United States v. Owens*, 484 U.S. 554, 559 (1988))).

Dessinger adds an extra element that the Confrontation Clause does not require. She contends "counsel did not have a similar motive to cross-examine the witness" during the discovery deposition. Def. Proof Br. at 72. However, the "similar motive" element comes from the hearsay exception for former testimony. *See* Iowa R. Evid. 5.804(b)(1)(B) (admitting former testimony "offered against a party who had . . . an opportunity and *similar motive* to develop it by direct, cross-, or redirect examination" (emphasis added)). In contrast, the Confrontation Clause does not require a "similar motive." *See, e.g.*, *United States v. Hargrove*, 382 F. App'x 765, 778 (10th Cir. 2010) ("*Crawford* requires only that the defendant have an opportunity to cross-examine the adverse witness at the prior proceeding—it does not require that the defendant have a similar motive at the prior proceeding. The prior motive requirement comes from the Federal Rules of Evidence, not the Confrontation Clause."); *Samayoa v. Ayers*, 649 F. Supp. 2d 1102, 1145 (S.D. Cal. 2009) ("'[S]imilar motive' is a state evidentiary requirement, and not a

requirement under the Confrontation Clause. The Supreme Court has refrained from conducting any similar motive inquiry in their Sixth Amendment cases."); *Petit v. State*, 92 So. 3d 906, 913 (Fla. Dist. Ct. App. 2012) ("[T]he rules of evidence for Florida and the Florida common law may require that prior testimony only be admitted if there is similarity of motive to develop testimony, but that is a separate analysis from *Crawford* and the Confrontation Clause."); *State v. Neyland*, 12 N.E.3d 1112, 1146 (Ohio 2014) ("*Crawford* did not state whether the Confrontation Clause requires a defendant to have had both an opportunity and a similar motive to cross-examine."). Because Dessinger's argument erroneously incorporates the "similar motive" element, trial counsel had no obligation to raise the issue.

Even if Dessinger could prove D.A.J.'s demonstration was testimonial, the current record still falls short of proving the remaining steps from *Crawford*. The current record hints that the 4-year-old crumbled under the pressure of testifying a second time at trial, making his in-court testimony unavailable. But the current record does establish that Dessinger had a prior opportunity to cross examine D.A.J. during a pretrial deposition. Consequently, this Court

should affirm her conviction and, at most, preserve her ineffective assistance claim for further development in PCR.

C. Dessinger fails to prove a reasonable probability of a different result.

Even if Dessinger could establish the breach-of-duty prong, this Court can still reject her ineffective assistance claim for failure to prove prejudice. *See Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."). For the same reasons detailed above in section I(D) of this brief (pp. 28–33), Dessinger cannot demonstrate a reasonable probability of a different verdict. Dametria Gully gave unwavering testimony that Dessinger intentionally "choked" D.A.J., his extreme emotion response corroborated Gully's testimony, and Dessinger's inconsistent testimony all proved her guilt independent of the out-of-court demonstration. Therefore, this Court should find the current record sufficient to reject her ineffective assistance claim.

III. The Current Record Fails to Establish Ineffective Assistance Because Counsel May Have Strategically Declined to Object to Nonprejudicial Testimony that the Officer Believed the Allegations Enough to File a Charge.

Preservation of Error

Dessinger raises her vouching challenge as a claim of ineffective assistance, which falls under an exception to the normal error preservation rules. *Begey*, 672 N.W.2d at 749.

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *Straw*, 709 N.W.2d at 133.

Discussion

The current record fails to prove Dessinger's ineffective-assistance allegations related to vouching. First, trial counsel could have strategically withheld an objection because he wanted to present the same sort of vouching testimony. Second, the supposed vouching—that the charging officer found the charge credible—was so obvious that there is no reasonable probability it affected the jury's verdict. Therefore, this Court should affirm Dessinger's conviction.

A. Counsel may have strategically withheld an objection so he could solicit the same type of testimony.

The current record is not sufficient to determine trial counsel's motives, but he may have been following a sound strategy by withholding any objection. Dessinger's ineffective assistance claim relies on case law the disallows a witness from commenting on the credibility of another witnesses. Def. Proof Br. at 74–76 (citing *State v. Myers*, 382 N.W.2d 91 (Iowa 1986) and other similar cases). But trial counsel employed the same strategy by offering the results of the DHS report and Dessinger's comments on other witnesses' testimony. Therefore, this Court should, at most, preserve this claim for further development in PCR so counsel can explain his trial strategy. *See, e.g.*, *State v. Ritenour*, No. 15-0038, 2016 WL 3269551, at *8 (Iowa Ct. App. June 15, 2016) (opting to preserve a police-officer vouching claim for PCR and explaining, "we also entertain the possibility that counsel's failure to object could have been strategic. Counsel might have believed the statements about credibility were better addressed through cross-examination and through Ritenour's own testimony.").

Trial counsel's improper offering of a DHS opinion suggests a strategic choice to rely on vouching evidence. After declining to raise

a vouching objection during Officer Samuelson's testimony, counsel cross examined daycare director Jewett about the results of the DHS investigation. He secured her testimony that DHS declined to investigate her report because "There wasn't enough evidence." Trial Tr. p. 114, lines 17–20. This Court has found it crosses the line to offer the results of a DHS investigation in a criminal prosecution to prove whether the child was abused. *See State v. Huston*, 825 N.W.2d 531, 537–38 (Iowa 2013) (concluding testimony concerning "[w]hether or not the abuse report was deemed founded is irrelevant" and cautioning against "a real danger the jury will be unfairly influenced by that agency finding, which gives the 'imprimatur' of a purportedly unbiased state agency"). If Dessinger's trial counsel had raised a vouching objection to Officer Samuelson's testimony, he risked losing the opportunity to present the favorable results in the DHS report.

Additionally, counsel's questioning of Dessinger reflects a strategy to permit witnesses to comment on other witnesses' testimony. The following exchanges, for example, asked Dessinger to comment directly on whether other witnesses had told the truth:

- "**Q.** Okay. You heard earlier Ms. Jewett say far less than that? **A.** Yes. **Q.** You don't agree with that? **A.** No." Trial Tr. p. 135, line 19 – p. 136, line 2.
- "**Q.** Now, you heard from Ms. Gully earlier that she told you to get him down or asked or something. Was that accurate? **A.** Yes." Trial Tr. p. 144, lines 2–5.
- "**Q.** So you don't agree with the other -- with other witnesses who are saying they heard him screaming and yelling? **A.** No." Trial Tr. p. 158, lines 1–4.
- "**Q.** Okay. You heard the allegations, that you choked a kid. Is that true? **A.** No." Trial Tr. p. 161, lines 2–8.

These questions would be improper if the prosecutor had asked them. *See State v. Graves*, 668 N.W.2d 860, 871–73 (Iowa 2003) (concluding it is improper for a prosecutor to ask the defendant whether another witness lied, and explaining "a defendant who is asked whether another person lied is commenting directly on the other person's credibility"). Equally, defense counsel's questions seeking the defendant's opinion about the credibility of other witnesses' testimony were improper. If trial counsel had objected to Officer Samuelson's testimony as vouching, he would have alerted the

prosecutor to raise the same objection in response to similar questions from the defense.

The ambiguity of the current record calls for further development in a postconviction relief action. Even assuming the prosecutor asked improper questions of the officer, trial counsel could reasonably forgo a vouching objection so he could offer the same sort of evidence. Counsel indicated such an intent by soliciting improper testimony concerning the outcome of the DHS investigation as well as the defendant's opinions about the credibility of other witnesses. Because the current record is not sufficient to judge counsel's strategic choices, this Court should affirm Dessinger's conviction and, at most, preserve her ineffective assistance challenge.

B. The charging officer's belief that the charge was credible was so obvious that it did not affect the jury's verdict.

The current record discloses no reasonable probability of a different result had counsel objected to Officer Samuelson's testimony. First, Dessinger exaggerates by calling the officer an "expert." Second, the officer never gave a direct opinion about any witness's credibility. Finally, the charging officer's belief that the

charge was credible was so obvious that it did not affect the jury's verdict.

Dessinger embellishes when asserting "[t]he officer was represented as an expert." Def. Proof Br. at 79. The officer gave a short summary of his background in law enforcement, including his work as a canine trainer, his years bouncing between several small-town police departments, his graduation from the academy, and that he was current on training. Trial Tr. p. 93, line 17 – p. 94, line 20. But he never purported to have any specific training or experience in detecting when someone is telling the truth. Nothing about his testimony would have persuaded the jury to assign any special weight to his testimony, unlike the true experts in other vouching cases whose opinions could have been mistaken as the product of scientific methods. *See State v. Dudley*, 856 N.W.2d 668, 673 (Iowa 2015) (a board certified psychologist who provided therapeutic treatment to the victim); *State v. Brown*, 856 N.W.2d 685, 687 (Iowa 2014) (a doctor at the Child Protection Response Center); *State v. Jaquez*, 856 N.W.2d 663, 664 (Iowa 2014) (a forensic interviewer at the Child Protection Center); *State v. Tjernagel*, No. 15-1519, 2017 WL 108291, at *2 (Iowa Ct. App. Jan 11, 2017) ("a child sexual abuse expert"). In

short, there was little risk of the jury attaching a "scientific certainty stamp of approval" to Officer Samuelson's testimony. *See Dudley*, 856 N.W.2d at 677.

Next, Officer Samuelson never commented directly on another witness's credibility. Dessinger misplaces reliance on a police-officer case with more direct and detailed opinions. Def. Proof Br. at 80, 83 (quoting *State v. Paulsen*, No. 10-1287, 2011 WL 3925699 (Iowa Ct. App. Sept. 8, 2011)). In *Paulsen*, the officer testified the victim "was impaired by what had happen[ed] to her, face would turn red, was embarrassed . . ." *Paulsen*, 2011 WL 3925669, at *8. And the officer testified the defendant "gave me the impression of not being completely honest" based on the officer's training on body language, explaining, "His feet kept tapping the whole time on the chair. He had a difficult time making eye contact. His ears were red. He would start and stop sentences. He would pause to collect his thoughts during it . . ." *Id.* In contrast to *Paulsen*, Officer Samuelson's challenged testimony that he "believed there was a credible allegation" lacked any detail or directness about why he held that belief. Therefore, it was less likely to overpower the jurors' own

credibility findings developed after observing the witnesses testify at trial.

Finally, Dessinger complains of vouching on facts that were already obvious to the jury. She agrees that "normally an officer's mere act of commencing a criminal charge would not necessarily cross the line . . ." Def. Proof Br. at 82. The testimony she quotes established that Officer Samuelson believed the allegations were credible, so he charged Dessinger with a crime. *See* Def. Proof Br. at 79–78. Because police should not file charges without a good faith belief that the person committed a crime, it already would have been obvious to the jury that Officer Samuelson believed the allegations against Dessinger.

Rather than relying on Officer Samuelson's belief, the jury would have based its verdict on credibility assessments it drew during trial. It heard testimony directly from witnesses Gully and Jewett as well as Dessinger's own testimony. For the same reasons detailed above in subsection I(D) of this brief (pp. 28–33), the strength of the evidence refutes any reasonable probability of a different result. Gully gave unwavering testimony that Dessinger intentionally "choked" D.A.J., the 4-year-old's extreme emotional reaction

corroborated that testimony, and Dessinger's contradictory testimony reflected her consciousness of guilt. Accordingly, this Court should reject her ineffective assistance claim and affirm her conviction.

IV. Dessinger's Restitution Challenge Is Premature Because the District Court Has Not Yet Entered a Final Order Setting the Amount of Court Costs and Jail Fees.

Preservation of Error

"[E]rrors in sentencing may be challenged on direct appeal even in the absence of an objection in the district court." *State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010).

Standard of Review

"We review restitution orders for correction of errors at law." *State v. Albright*, 925 N.W.2d 144, 158 (Iowa 2019).

Discussion

Dessinger's restitution challenge is premature. The district court has never entered a final order setting the amount of restitution for court costs and jail fees, so it was not yet required to consider her reasonable ability to pay those expenses. Consequently, this Court should decline to interfere with the not-yet-complete restitution proceedings.

The restitution statute "creates two categories of restitution." *Albright*, 925 N.W.2d at 159. The first category includes victim

restitution as well as fines, penalties, and surcharges, and "[t]he court is required to order restitution for the items in this first category regardless of the offender's reasonable ability to pay." *Id.* (citing Iowa Code § 910.2(1)). The second category includes court costs, crime victim assistance reimbursement, and court-appointed attorney fees, and "[t]he court can only order restitution for items in this second category to the extent the offender has the reasonable ability to pay." *Id.* The court assessed a $625 fine and a $218.75 surcharge against Dessinger (Judgment at 1; App. 19), and those "first category" amounts are due regardless of her reasonable ability to pay.

Unlike the "first category" expenses assessed in Dessinger's judgment, the district court did not assess amounts for all "second category" expenses dependent on her reasonable ability to pay. Although the judgment assessed "$0.00" for attorney fees, it did not assess any specific amounts for court costs or jail fees. *See* Judgment at 2; App. 20. Thus, the district court has not imposed a total amount of "second category" expenses that take into account Dessinger's reasonable ability to pay.

Dessinger's reasonable-ability-to-pay challenge is premature because the district court has not issued a final restitution order

setting the amount of "second category" expenses. Before sentencing, the clerk of court is required to prepare a statement of court-appointed attorney fees and court costs, including correctional fees. *Albright*, 925 N.W.2d at 159 (quoting Iowa Code § 910.3). Although the court is supposed to set the amount of restitution at the time of sentencing, it can enter a "temporary order" if it cannot determine the full amount of restitution at that time. *Id.* at 160. "A plan of restitution is not complete until the court issues the final restitution order." *Id.* (citing *State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999)). "Restitution orders entered by the court prior to the final order are not appealable as final orders or enforceable against the offender." *Id.* at 161. Temporary orders are not enforceable or appealable because the court is not required to make a reasonable-ability-to-pay determination until it "has all the items of restitution before it." *Id.* "Once the court has all the items of restitution before it, then and only then shall the court make an assessment as to the offender's reasonable ability to pay." *Id.* at 162. "[A]ny temporary, permanent, or supplemental order regarding restitution is not appealable or enforceable until the court files its final order of restitution." *Id.*

The Court of Appeals should follow *Albright*'s plain language. In many recent cases, the Court of Appeals has found the Supreme Court "implicitly rejected" the argument that a restitution claim is not ripe until a final restitution order is issued. *See, e.g.*, *State v. Rawls*, No. 18-0882, 2019 WL 2145722, at *2 (Iowa Ct. App. May 15, 2019). But the district court has never assessed amounts for all "second category" expenses, so it cannot yet issue a final restitution order determining Dessinger's reasonable ability to pay the not-yet-calculated court costs and jail fees. Therefore, this Court should follow *Albright*'s plain language and hold that Dessinger's incomplete or temporary restitution order is not a final, appealable order.

The Court of Appeals should resist the urge to correct a problem that Dessinger must address to the district court. Rather than pointing to any complete restitution order in the district court record, Dessinger cites amounts she pulls from the docket report and Iowa Courts Online. Def. Proof Br. at 88. Although the clerk may have entered those amounts in the computer, they are unenforceable because the court has never ordered specific amounts. Likewise, this direct appeal is not the proper vehicle to challenge any jail fees that have not yet been assessed because Dessinger has not yet served her

jail sentence. Instead, she should address her concerns over future amounts to the district court by requesting a section 910.7 hearing. *See* Iowa Code § 910.7 ("At any time during the period of probation, parole, or incarceration, the offender or the office or individual who prepared the offender's restitution plan may petition the court on any matter related to the plan of restitution or restitution plan of payment and the court shall grant a hearing if on the face of the petition it appears that a hearing is warranted.").

Dessinger does not have an appealable restitution order. Although the district court has imposed certain "first category" expenses, it has never assessed a final amount for all of her "second category" expenses like court costs and jail fees. Consequently, it has not entered a final restitution order and is not yet required to determine Dessinger's reasonable ability to pay. Her challenge is not ripe until the district court issues a final restitution order, so this Court should decline to interfere with the incomplete restitution proceedings.

V. Dessinger Can Raise Her Ineffective Assistance Claims in Her Direct Appeal Taken Before July 1, 2019.

This Court does not need to address Dessinger's scattershot of constitutional challenges to Senate File 589. That legislation requires

criminal defendants to raise their ineffective assistance allegations in a postconviction relief action. Iowa Code § 814.7 ("An ineffective assistance of counsel claim in a criminal case shall be determined by filing an application for postconviction relief pursuant to chapter 822. The claim need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for postconviction relief purposes, and the claim shall not be decided on direct appeal from the criminal proceedings." (amended by 2019 Iowa Acts ch. 140, § 31)). However, the Supreme Court has determined the 2019 legislation does not apply retroactively to appeals pending before the July 1 effective date. *State v. Macke*, 933 N.W.2d 226, 230–36 (Iowa 2019). Dessinger filed her appeal before July 1, 2019. *See* Notice of Appeal (12/10/2018); App. 23. Therefore, this Court should not address her constitutional challenges to the new legislation that does not apply in her case. *See Macke*, 933 N.W.2d at 236 ("Because we hold Senate File 589's amendments to Iowa Code sections 814.6 and 814.7 do not govern this appeal, we do not reach Macke's constitutional claim that retroactive application of those laws would violate state and federal due process.").

CONCLUSION

The Court should affirm Shanna Dessinger's conviction and sentence.

REQUEST FOR NONORAL SUBMISSION

This misdemeanor appeal can be resolved with the application of familiar principles of law, so oral argument is not necessary.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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