IN THE IOWA DISTRICT COURT FOR LEE SOUTH – KEOKUK COUNTY

STATE OF IOWA, **Plaintiff,** **vs.** **BENJAMIN G. TRANE,** **Defendant.**	**CRIMINAL NO. FECR009152** **BRIEF IN SUPPORT OF MR. TRANE'S MOTION FOR NEW TRIAL**

COMES NOW the Defendant, Benjamin G. Trane, and in support of his Motion for New Trial Pursuant to Iowa Rule of Criminal Procedure 2.24(2)(b) respectfully states to the court as follows.

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LEGAL STANDARD FOR MOTIONS FOR A NEW TRIAL

As it pertains to the issues raised in Mr. Trane's motion, Iowa Rule of Criminal Procedure 2.24(2)(b) provides:

> The court may grant a new trial for any or all of the following causes:
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> . . . .
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> (5) When the court has misdirected the jury in a material matter of law, or has erred in the decision of any question of law during the course of the trial, or when the prosecuting attorney has been guilty of prejudicial misconduct during the trial thereof before a jury.
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> (6) When the verdict is contrary to law or evidence.
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> (7) When the court has refused to properly instruct the jury.
>
> . . . .
>
> (9) When from any other cause the defendant has not received a fair and impartial trial.

Iowa R. Crim. P. 2.24(2)(b)(5)–(7), (9).

"In ruling upon motions for new trial, the district court has a broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties." Iowa R. App. P. 6.904(3)(c). However, when a motion for a new trial presents questions of law, the district court does not have discretion: "[T]he trial court's decision stands or falls on the correctness of its ruling on the legal question." *Ladeburg v. Ray*, 508 N.W.2d 694, 697 (Iowa 1993).

A combination of errors, or the "cumulative effect" of multiple errors, may prejudice the defendant's rights to such an extent that a new trial is required—even if those individual errors are non-reversible if considered in isolation. *State v. Carey*, 165 N.W.2d 27, 36 (Iowa 1969); *State v. Hardy*, 492 N.W.2d 230, 236 (Iowa Ct. App. 1992);

cf. Iowa Const. art. I, § 9 ("[N]o person shall be deprived of life, liberty, or property, without due process of law.").

ARGUMENT

I. Mr. Trane was denied a fair trial due to a failure to sever counts.

Mr. Trane was charged in a multi-count trial information, alleging he had committed multiple acts of sexual abuse against numerous individuals, while at the same time separately endangering child safety by separate acts. Trial counsel was ineffective in allowing the State to take all counts to trial in the same proceedings, and a severance of counts should have been sought. While the State may be authorized to include multiple counts involving multiple victims in a single trial information, this does not limit the court's discretion when it comes to severance. This is recognized in the Iowa Rules of Criminal Procedure:

> Multiple offenses. Two or more indictable public offenses which arise from the same transaction or occurrence or from two or more transactions or occurrences constituting ***parts of a common scheme or plan***, when alleged and prosecuted contemporaneously, shall be alleged and prosecuted as separate counts in a single complaint, information or indictment, ***unless, for good cause shown, the trial court in its discretion determines otherwise.***

Iowa R. Crim. P. 2.6(1) (emphasis added). The alleged existence of a "common scheme or plan" only indicates when charges should be joined in the charging document, with the court retaining full discretion to sever the charges when good cause exists to do so. *State v. Romer*, 832 N.W.2d 169, 183 (Iowa 2013) (quoting *State v. Elston*, 735 N.W.2d 196, 199 (Iowa 2007)).

This Rule vests the trial court with broad discretion. *State v. Dicks*, 473 N.W.2d 210, 214 (Iowa Ct. App. 1991). A court is empowered to exercise its discretion on any

ground or reason not clearly untenable or to an extent clearly unreasonable. *State v. Lopez*, 633 N.W.2d 774, 778 (Iowa 2001). A ground or reason is untenable only when it is not supported by substantial evidence or when it is based on an erroneous application of the law. *State v. Putman*, No. 12-0022, 2014 Iowa Sup. LEXIS 69, *13 (Iowa June 13, 2014).

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

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

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

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

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

State v. Bair, 362 N.W.2d 509, 512 (Iowa 1985) (citing *State v. Boyd*, 533 P.2d 795, 799 (Or. 1975)). "The test focuses in three ways on how the crimes are linked together: time, place, and the circumstances. Joinder must occur where 'the facts of each charge can be explained adequately only by drawing upon the facts of the other charge."' *Id*. (citing *Boyd*, 533 P.2d at 799).

Given that one of the charges is violation of Iowa Code §709.15(3)(a), it is important to emphasize that the question at hand is whether a "common scheme or plan" as set out in Iowa R. Crim. P. 2.6(1) has been sufficiently established, and not whether there is evidence of a "pattern or practice or scheme of conduct." *See State v. Oetken*, 613 N.W.2d 679, 688 (Iowa 2000) (citing *State v. Wright*, 191 N.W.2d 638, 641 (Iowa 1971)) ("A common scheme or plan requires more than the commission of two similar transgressions by a single person."); *cf. State v. Robinson*, 506 N.W.2d 769, 772 (Iowa 1993) (where question before the court was whether two acts constituted a single violation, error was found in applying the test for "same transaction or occurrence" under the old Rule 6(1), when it should have focused on the language "single scheme, plan, or conspiracy" in the statute defendant was charged with violating).

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

The court should be hesitant to place an undue emphasis on judicial economy where the counterbalancing consideration is the fairness of the trial. *Dicks*, 473 N.W.2d at 214. The interests of judicial economy are subservient to a defendant's constitutional interests in a fair trial. *See State v. Owens*, 635 N.W.2d 478, 483 (Iowa 2001) (where potential for prejudice is great, the State is required to duplicate its efforts in separate trials); *State v. Belieu*, 288 N.W.2d 895, 902 (Iowa 1980) ("Considerations of judicial economy must give way when they have the effect of denying an accused a fair trial."); *Cf. State v. Winters*, 690 N.W.2d 903, 910 (Iowa 2005) (the convenience and economic benefits of a joint trial do not take precedence over a defendant's right to a speedy trial).

The prejudice discretionary severance seeks to prevent includes that which inherently attends evidence of a defendant's other crimes. *State v. Smith*, 576 N.W.2d 634, 637 (Iowa Ct. App. 1998). Unfair prejudice means "an undue tendency to suggest decisions on an improper basis, commonly though not necessarily, an emotional one." *Id*. (*quoting State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988)). "Unfair prejudice" may

occur because an insufficient effort was made to avoid the dangers of prejudice, or because the theory on which the evidence was offered was designed to elicit a response from the jurors not justified by the evidence. *Id*.

Evidence of sexual abuse or conduct with a minor is inherently prejudicial. *See State v. Castaneda*, 621 N.W.2d 435, 442-43 (Iowa 2001) (*quoting State v. Marvin*, 197 Iowa 443, 197 N.W. 315 (1924)) (Evidence of other sexual acts "...leave in the minds of the jurors the impression of the defendant's proneness to do such things, and the knowledge which the jury had received in relation to the acts of the defendant with another girl could not be erased by a mere direction on the part of the trial court.") The same is true regarding claims of the same children who are alleged to have been sexually abuses were also being malnourished and subjected to isolation. It is impossible for the jury to hear evidence going to one charge without that same evidence being used to find Trane committed the other. Where such inherent prejudice exists, and a severance of counts can remove or reduce such prejudice, it should be granted. *Cf. State v. Brown*, No. 3-013 / 02-0086, 2003 Iowa App. LEXIS 354, *9 (Iowa Ct. App. 2003) ("Because of the inherently prejudicial nature of evidence relating to gang membership and activity...we have substantial doubt concerning whether the district court was correct in denying Brown's motion to sever.")

The evidence the State presented in the joint trial created such a general sense of propensity that Trane was deprived of a fair trial. *See State v. Cox*, 781 N.W.2d 757, 772 (Iowa 2010) (admitting evidence of a defendant's sexual abuse of other victims based only on its value as general propensity evidence violates the due process clause of the Iowa Constitution.) There is nothing within the evidence for the child

endangerment claims which is necessary to proving the sexual assault or "pattern and practice" claims. Mr. Trane's constitutional rights to testify, present witnesses, and present a defense as guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, and these same rights under Article I, Sections 9 and 10 of the Iowa Constitution, were also prejudiced by all the alleged offenses having been tried together. *See Rock v. Arkansas*, 483 U.S. 44, 52-53, (1987) (Fifth and Sixth Amendment rights to testify and put on defense); *Faretta v. California*, 422 U.S. 806, 818, (1975) (Sixth and Fourteenth Amendment rights to call witnesses and put on defense); *State v. Clark*, 814 N.W.2d 551, 560 (Iowa 2012) (right to due process, fair trial, and present defense covered by Article I, Sections 9 and 10).

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

II. Mr. Trane was denied effective assistance of counsel when he was deprived of an expert at State expense.

After the criminal complaints had been filed in this case, Mr. Trane applied for and received the appointment of counsel at State expense. (9/8/2017 Order). As trial proceeded, Mr. Trane was advised that the State would not pay for an expert witness and, therefore, no request for an expert was ever put in place. Consequently, Mr. Trane was deprived of the opportunity to rebut the State's expert who discussed how alleged victims were groomed or how the OSS rooms were managed.

Long ago in *English v. Missildine*, the Iowa Supreme Court held that a defendant in Mr. Trane's circumstances has a right to employ an expert pursuant to the Sixth Amendment's guarantee to effective assistance of counsel, independent of any statutory right. 311 N.W.2d 292, 294 (Iowa 1981) ("[T]he Constitution independently mandates judicial recognition of an indigent's right to necessary investigative services."). This right has been recognized time and time again by Iowa's appellate courts. *See, e.g.*, *State v. Dahl*, 874 N.W.2d 348, 352 (Iowa 2016). Any position to the contrary was clearly erroneous and therefore Mr. Trane was deprived of the right to offer expert testimony in contrast to the State's expert testimony. He was prejudiced by the lack of an expert witness. A new trial is now required. Iowa R. Crim. P. 2.24(2)(b)(7).

III. Trial court erred in denying Mr. Trane's motion under 5.412 for timeliness.

On Monday, December 11, 2017, Mr. Trane's trial counsel was able to depose K[redacted], the minor complaining witness alleging Mr. Trane had committed sexual abuse against her while she attended Midwest Academy. During the deposition, Mr. Trane learned details of prior instances where K[redacted] had accused other persons of sexual abuse, including both her adoptive parents and foster parents, long prior to her attending Midwest Academy. As trial counsel explained,

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

(Trial Transcript Vol. 2 [TT2] 236:21-237:13.) Immediately following the deposition, trial counsel filed a Motion pursuant to Iowa Rule of Evidence 5.412, seeking court authorization to "introduce testimony through both cross-examination and through the complaining witness' adoptive mother as to the falsity of those allegations." (5.412 Motion 12/11/2017.)

The trial court heard arguments regarding Mr. Trane's motion on the second morning of trial. (TT1 8:4-7, TT2 234:1-9.) At this time, trial counsel outlined her understanding as to what K[redacted].'s adoptive mother would testify to regarding the falsity of the prior allegations. (TT2 235:11-236:14.) The State's resistance to the Motion was primarily based on claims of the Motion being untimely and procedurally deficient. In its Order, the trial court denied the Motion finding it "untimely, and even if timely, the information would not show that the statements are false, based on a preponderance of the evidence." (Order 12/17/17.)

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

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

State v. Baker, 679 N.W.2d 7, 10 (Iowa 2004). Though such evidence would ultimately not be covered under Rule 5.412, it has also been recognized "that a claim of sexual conduct (or misconduct) by the complaining witness [must] be shown to be false before

it is admissible at trial", thus the procedural requirements of Rule 5.412 generally apply. *State v. Alberts*, 722 N.W.2d 402, 409 n.3 (Iowa 2006)).

Procedurally, Rule 5.412 typically requires a motion to offer such evidence be filed "at least 14 days before trial unless the court determines that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence" with an offer of proof filed alongside the motion describing the evidence to be offered and the purpose it is offered for. Iowa R. Evid. 5.412(c)(1). While it does not appear that Iowa courts have interpreted what is considered "newly discovered" evidence under Rule 5.412(c)(1), the plain language of the Rule suggests evidence is newly discovered if, though existing more than 14 days before trial, was not known until after this time. *See Grissom v. State*, 572 N.W.2d 183, 184 (Iowa Ct. App. 1997) ("Acts or events occurring subsequent to trial do not generally qualify as newly discovered evidence.") Due diligence is simply, "The diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." BLACK'S LAW DICTIONARY 208 (3rd Pocket Ed. 2006).

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

Following the actual charge being filed on August 18, 2017, more than a month passed before the State began to provide any of the information in its possession to Mr.

Trane. This is evidenced by the discovery agreement entered by the parties on October 27, 2017, which asserted "[t]he discovery in this case Is voluminous and contains the identifying information of hundreds of persons." (Discovery Agreement 10/27/17.) The purpose of agreeing to keep discovery confidential was to allow Mr. Trane to obtain discovery without undue delay. That did not happen, with the State continuing to delay disclosure of large amounts of information, as shown in the Motion for Extraordinary Discovery Expense, filed November 16, 2017: "The State advises that there is approximately 5-6 TB [terabytes] of documentary evidence to provide pursuant to the discovery agreement[.]" (Motion Discovery Expense 11/16/17.) This shows how, less than a month before trial, the State was refusing to provide an incredible amount of information until Mr. Trane's court appointed counsel took one an uncommon expense by paying for and giving the State a hard drive on which to produce the information. (Motion Discovery Expense 11/16/17.)

Mr. Trane has a right to speedy trial pursuant to Article I, Section 10 of the Iowa Constitution. *State v. Taylor*, 881 N.W.2d 72, 76 (Iowa 2016). It is also protected by the Sixth Amendment of the United States Constitution. *State v. Orte*, 541 N.W.2d 895, 898 (Iowa Ct. App. 1995). As the Iowa Supreme Court has recognized, "[D]efendants do not forfeit their speedy trial rights by pursuing discovery of State's evidence." *State v. Winters*, 690 N.W.2d 903, 909 (Iowa 2005). The State's months-long delay in disclosing a tremendous amount of discovery to which Trane was constitutionally and procedurally entitled to timely receive cannot be used the State to accuse Mr. Trane of a lack of diligence. *See Harrington v. State*, 659 N.W.2d 509, 512 (Iowa 2003) (State's failure to

disclose police reports containing information regarding another suspect prevented defendant from discovering evidence even in exercise of due diligence).

Mr. Trane's trial counsel filed the Rule 5.412 Motion at the earliest possible time. While no written offer of proof was included, this defect was not prejudicial to the State, as the State was well aware of the claims at issue from having attended K.[redacted]'s deposition, and from the verbal statement made by trial counsel on December 13, 2017. Given these circumstances, there was no procedural defect on which to base a denial.

As to the merits of the issue, Mr. Trane had the burden "to make a threshold showing to the trial judge outside the presence of the jury that (1) the complaining witness made the statements and (2) the statements are false, based on a preponderance of the evidence." *Alberts*, 722 N.W.2d at 409. A full hearing should have been held so Trane could have submitted evidence as to the falsity of the accusations. This can be seen in *Alberts*, where given the importance of the accuser's credibility in *Alberts*, the Iowa Supreme Court found "the trial court abused its discretion by excluding evidence of the skinny-dipping incident without first giving Alberts the opportunity to prove at a 5.412(c) hearing that R.M. made a prior false claim of sexual misconduct." *Id*. at 413. *See also Millam*, 745 N.W.2d a 724 ("Our reasoning in *Alberts* is equally applicable to the present case. We conclude that the possibility that this evidence would have impugned J.S.'s credibility is 'sufficient to undermine confidence in the outcome.'") The failure to allow Mr. Trane to present the evidence available to support his Motion was erroneous.

Such a hearing could have been held without disrupting the trial to a significant degree. Trane's primary witness was available to testify by telephone. This testimony

could have been arranged to occur outside the presence of the jury, allowing the trial court to way it directly, instead of from a simple offer of proof. K.[redacted] was set to testify the following day. Again, the court could have taken her testimony on this issue outside of the jury's presence, and weigh it against Trane's evidence. Additionally, both parties indicated it had documents available which would support their respective positions. The court should have allowed the evidence to be presented prior to making its Ruling. To do otherwise deprived Mr. Trane of his right to present a defense without the benefit of an evidentiary hearing.

There is no question that K.[redacted]'s credibility was a critical issue at trial. Evidence of prior false allegations against other persons would have been strong evidence discrediting K.[redacted]'s claims. Mr. Trane has a constitutional right to prepare and present a defense. *See Gilmore v. Taylor*, 508 U.S. 333, 343 (1993) (*quoting Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (in the context of exclusion of evidence, "We have previously stated that 'the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."'"); *State v. Fox*, 491 N.W.2d 527, 531 (Iowa 1992) 531 ("[A] defendant should have a meaningful opportunity, at least on par with that of the prosecution, to present a case….") (emphasis added) (citation omitted); *State v. Mahoney*, 515 N.W.2d 47, 50 (Iowa 1994) (stating a defendant is required to be given "a meaningful opportunity to present a complete defense"). It is simply wrong to use this right as leverage against Mr. Trane asserting his right to a speedy trial, particularly when the State's failure to timely disclose discovery was a direct cause of Trane's inability to investigate an available defense. Mr. Trane's conviction must be reversed,

with a new trial being ordered, with a Rule 5.412 ordered to be held prior to such new trial.

IV. Improper vouching testimony was admitted regarding victim's credibility.

It is impermissible for an expert to comment on a witness' credibility. *State v. Myers*, 382 N.W.2d 91, 97 (Iowa 1986). The line between "opinion which would be truly helpful to the jury and that which merely conveys a conclusion concerning defendant's legal guilt" is "fine but essential." *Id*. at 98.

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

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

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

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

Recent Iowa decisions reaffirm this "well-settled Iowa law" prohibiting expert evidence about a victim's credibility. *State v. Dudley*, 856 N.W.2d 668 (Iowa 2014); *State v. Brown*, 856 N.W.2d 685 (Iowa 2014); *State v. Jaquez*, 856 N.W.2d 663 (Iowa 2014). In these cases, the Iowa Supreme Court has stated:

> …we continue to hold expert testimony ***is not admissible merely to bolster credibility***. Our system of justice vests the jury with the function of evaluating a witness's credibility. The reason for not

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

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

A review of decisions on this issue shows the distinction between proper testimony and vouching. *See Myers*, 382 N.W.2d at 97-98 (testimony regarding statistics on lack of fabrication and who expert believes children "improperly suggest[ed] the complainant was telling the truth and, consequently, the defendant was guilty."); *State v. Brotherton*, 384 N.W.2d 375, 378 (Iowa 1986) (opinion negating child's ability to fantasize sexual activity "indirectly opined on the truthfulness of the complaining witness"); *State v. Tracy*, 482 N.W.2d 675, 678 (Iowa 1992) (testimony about small number of children who make false allegations concerned the truthfulness of minor's testimony); *Dudley*, 856 N.W.2d at 676 (statement that social worker recommended minor attend therapy and avoid accused indirectly vouched for credibility); *Brown*, 856 N.W.2d at 689 (statement that disclosure was significant and warranted investigation indirectly conveyed the accusation was true); *Jaquez*, 856 N.W.2d at 665 (opinion that

child's demeanor was consistent with a child who had been traumatized vouched for credibility).

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

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

(TT4 206:25-207:17.) The bombing of the Boston Marathon was an act of terrorism, with the act, the aftermath, and the manhunt observed live around the world. CNN Library, *Boston Marathon Terror Attack Fast Facts* (https://www.cnn.com/2013/06/03/us/boston-marathon-terror-attack-fast-facts/index.html, accessed April 24, 2018). There is no disputing the fact a bomb was set off in a public square resulting in injuries to hundreds of people. *Id*. Salter's testimony relies on this widely known event to show that the alleged acts of sexual abuse by Mr. Trane should be similarly obvious. It asserts Mr. Trane's alleged victims are credible because their attempts at normalcy are just another version of "Boston Strong," with their courage being shown in the face of Mr. Trane's

alleged abuse. It also charges that should the jury find otherwise, they are simply utilizing a double standard against the victims of a different kind of "terrorism."

This is not the only place in Salter's testimony where she seeks to tie Mr. Trane to criminal acts known through nationally publicized news story. During her testimony, Salter makes clear references to convicted pedophile Larry Nassar, former USA Gymnastics and Michigan State University doctor, who abused over 100 women and girls over twenty years. Maggie Astor, *Gymnastics Doctor Who Abused Patients Gets 60 Years for Child Pornography*, N.Y. Times, December 7, 2017 (https://www.nytimes.com/2017/12/07/sports/larry-nassar-sentence-gymnastics.html, accessed April 24, 2018). The following testimony by Salter is clear reference to the Nassar case, which was being highly publicized at the same time as Mr. Trane's trial:

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

(TT4 209:7-17; emphasis added.)

> So the most successful sex offenders are those who have considerable social skills or high status, such as an Olympic level coach. ***If I think you could get my child to the Olympics***, then you've got very high status with me. I'm not going to question the amount of time you spend alone with my child.

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

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

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

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

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

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

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

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

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

Iowa R. Evid. 5.701. While the fact A.[redacted] refused to speak may be based on his mother's perceptions, this testimony went beyond that to opine as to his reasoning for not speaking, something unknown to her. As it relates something said to her by one of A.[redacted]'s doctors, it also intrudes into an area involving "scientific, technical, or other specialized knowledge." In fact, the reference to Dr. Stiles is separately inadmissible as

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

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

The above testimony was highly objectionable and should have been excluded. The failure of trial counsel to object was ineffective assistance, and given the prejudicial impact of the testimony, a new trial must be granted. *State v. Pitsenbarger*, No. 14–0060, 2015 WL 1815989, *9 (Iowa Ct. App. April 22, 2015) (trial counsel has a duty to object to improper vouching testimony).

V. The State impermissibly elicited hearsay testimony regarding A[redacted]. in lieu of his testimony at trial.

From the outset of this case, it was anticipated that A[redacted]. would testify at trial. He was listed in the minutes of testimony, and trial counsel filed an intent to depose A[redacted]., as he appeared on the State's witness list. Consistent with the minutes, it was

anticipated that A.[redacted] would testify to his recollections of Midwest Academy, his conduct and daily interactions at Midwest Academy, his experience in the out-of-school suspension room, and the effects being at MWA had on him. This is consistent with the anticipated testimony of an alleged victim in a child-endangerment case.

However, as trial drew near, it became clear that A.[redacted] would not testify and, therefore, Mr. Trane would be denied his right to face A.[redacted] and cross-examine him as the constitution otherwise guarantees. *See State v. Wagner*, 410 N.W.2d 207, 213 (Iowa 1987). Instead, the State attempted to shoeshorn A.[redacted]'s out-of-court statements and recollections into other witness' testimony at trial, specifically, A.[redacted].'s mother and DHS caseworker Jennifer Richardson. This tactic of using prejudicial and prohibited hearsay denied Mr. Trane a fair trial because he was not able to cross-examine A.[redacted] as to any of these statements. *State v. Farni*, 325 N.W.2d 107, 108 (Iowa 1982). Mr. Trane acknowledges that trial counsel did not object to any of these hearsay statements, and therefore, his claim must be analyzed using an ineffective assistance of counsel rubric. *See State v. Farrar*, No. 10–1039, 2011 WL 2480999, at *2 (Iowa Ct. App. 2011).

During trial, A.[redacted]'s mother and Ms. Richardson testified at length regarding A.[redacted].'s observations, recollections, and statements. For example, during the mother's testimony, she described with particularity the details of the out-of-school-suspension rooms (OSS), which of course she only witnessed on one occasion:

> What was your understanding of what was supposed to be happening when he was in OSS?
>
> A. While in OSS, like I said, they were supposed to be in there for twenty-four hours. They were to sit in structure for nineteen hours. That's where they are—if I remember right, that's where they sit on the concrete floor with their legs straight out and their hands in their lap. They could have their mattress and a blanket that they could

> keep up to their chest level at night when it was bedtime. The overhead lights would stay on, the fluorescent lights.
>
> If he sat in structure for nineteen hours, then he was able to get a chair, to sit in a chair. Then at hour twenty-three, he was to write a 1,000-word essay reflecting on what took him to the OSS room. Then on hour twenty-four, if he complied with all the rules, he would be taken out.
>
> However, if you broke structure one time in that nineteen-hour period, your time started over.

(TT2 294:1–295:1.) This is A[redacted]'s descriptions, funneled through [redacted]' appearance at trial. She similarly described the "Pride Family" incident with particular detail, which occurred in April 2015. (TT2 301:11–303:5). She described A[redacted]'s weight loss, and his transition back home, including details about his mental health treatment. (TT2 306:1–308:17.) [redacted] was even allowed to testify about A[redacted].'s decision *not* to testify—with extensive discussion about what statements A[redacted]. made out of court.

> Q. Would [A[redacted]] ever get out of the car to come talk to us?
>
> A. No. We had actually sat in the car already for thirty minutes before because we arrived early. I tried to talk him into coming in for thirty minutes, and he refused.
>
> So I eventually came in to meet you and the DCI agent to let you know what was going on. [A[redacted]] at that point-- We were in there, I don't know, maybe ten or fifteen minutes. [A[redacted]] at that point got out of the car--
>
> Q. We could see him through the window?
>
> A. Yes, yes. There was a big glass window, and we could see right there. He got out of the car and took off walking. So I chased after him. The DCI agent was behind me. [A[redacted]] just walked around the big city block right there saying he was not going to go in. There was no way in heck he was going to talk about this, and there was no way we could make him.
>
> Q. ***He wasn't using the word "heck" though, was he?***

A. No. He was using quite a bit of profanity.

Q. Okay.

(TT2 309:7–310:10; emphasis added.)

A.[redacted]'s mother was not the only witness who testified to prejudicial hearsay statements. Ms. Richardson testified for A.[redacted] and his statements made during the course of DHS interviews. The prosecutor's questions did not expressly request statements made by A.[redacted]; however, the lines of questioning made clear the content of those statements:

Q. And that's the first time you had ever met [A.[redacted]]? A. Yes.

Q. So he talked quite a bit to you about his experience at the academy?

A. He did.

Q. When you were done interviewing [A.[redacted]], did you have any concerns?

A. I did. He had been there May 28th, and this was March 25th, so May 28th of 2014 to March 25th of 2015, and he said he thought he had been in OSS for 180 days, not straight, but overall. So it was very concerning.

Q. And this was ***based just on the information that these kids would give you***?

A. This was only based on what information they provided.

Q. And what you observed from them as well? A. Yes.

Q. Was [A.[redacted]] hungry too?

A. ***I remember he said that he's always hungry in OSS.*** I'm assuming we fed him. That doesn't stand out as much as [B.[redacted]].

(TT5 263:6–264:7; emphasis added.) Richardson continued:

> Q. After this report of sexual behavior, did you pull [A[redacted]] out and speak to him again?
>
> A. Yes. [A[redacted]] was interviewed the second time on April 15th of 2015.
>
> Q. So previous to April 23rd, you had spoken to [A.[redacted]]? A. Yes.
>
> Q. All right. ***So based on those discussions, you're back out to the academy on April 23rd; correct***?
>
> A. Yes.
>
> Q. Why?
>
> A. Because we wanted to see the area where the supervision--the concern was for supervision of these children. The sexual abuse--the sexual acting out happened at night, and so the children had described where they were sleeping at and where they were at within the academy, so we wanted to see the location.

(TT5 265:23–266:18; emphasis added.)

Hearsay must be excluded at trial, unless admitted as an exception or exclusion under the hearsay rule or some other provision. *State v. Harper*, 770 N.W.2d 316, 319 (Iowa 2009). The admission of hearsay can be incredibly damaging—the introduction of hearsay evidence is presumed prejudicial to the nonoffering party, *see State v. Elliott*, 806 N.W.2d 660, 667 (Iowa 2011), and improper evidence can also deny the defendant a fair trial, *see State v. Sullivan*, 679 N.W.2d 19, 30 (Iowa 2004). The statements elicited by the prosecutor regarding A[redacted]'s medical treatment, his school records, statements regarding his treatment at Midwest Academy and about his failure to testify were all hearsay and elicited in a manner that violated Mr. Trane's right to a fair trial.

As noted, many of the statements elicited from A.[redacted]'s mother and the DHS caseworker were done through impermissible inference. The Iowa Supreme Court addressed this very issue only months ago in *State v. Huser*, 894 N.W.2d 472, 497–500

(Iowa 2017). In *Huser*, a pretrial court order had ruled certain statements inadmissible at trial. *Id.* at 484. However, at trial, prosecutors asked a witness a series of questions the Court deemed were "designed to elicit testimony" that was otherwise precluded by the trial court's ruling. *Id.* at 493. The Court concluded the State "was attempting to circumvent the ruling...by giving rise to an inference" as to the inadmissible statements. *Id.* at 497. "We recognize that the form of the question did not literally require the jury to infer the subject matter.... But the use of the 'don't tell me what he said' questioning directly after [the witness] testified about the...meeting was designed to encourage the jury to make the connection." *Id.*

The Court came down strongly against this type of prosecutorial questioning. *Id.* at 500 (noting that it does not "sanction or encourage the hide-the-ball approach of the State in this case"). Prosecutors are

> not permitted by means of the insinuation or innuendo of incompetent and improper questions to plant in the minds of the jurors a prejudicial belief in the existence of evidence which is otherwise not admissible and thereby prevent the defendant from having a fair trial.

Id. at 497 (*quoting State v. Carey*, 165 N.W.2d 27, 32 (Iowa 1969)). The Court recognized that a mistrial may be appropriate in such a case, especially when the defendant argues that the "hearsay bell" clanged by the State "could not be unrung." *Id.* at 497–98. The Court cited precedent where it had granted a mistrial when improper evidence came into the record and a curative instruction would have been insufficient. *Id.* at 498 (*citing State v. Oppedal*, 232 N.W.2d 517, 519 (Iowa 1975)). In another case, the Court granted a mistrial when the State created innuendo, through questioning, that

the defendant was responsible for the unavailability of certain witnesses. *Id.* (*citing Carey*, 165 N.W.2d at 31–32).

The same holds true in this case. The State knew that A.[redacted]. would not testify; however, the State needed information from A.[redacted]. to support its case. As a result, the prosecutor would not ask witnesses ***what*** A.[redacted]. said, only asked what the witness did or said ***as a result of those statements***. Yet the resulting conduct made perfectly clear what A[redacted] had stated. This is unfair and prejudicial. Trial counsel's failure to object to these hearsay statements was in error, and prejudiced Mr. Trane because otherwise those statements would not have led the jury to convict him. A new trial is therefore necessary.

VI. Jury Instructions 31 and 33 were erroneous and must now result in a new trial.

When the jury is improperly instructed, a new trial must be granted. *See* Iowa R. Crim. P. 2.24(2)(b)(7). As to Count III, child endangerment, the jury in this case was instructed that it could render a guilty verdict on ***one*** charge of child endangerment based on evidence related to *two* alleged victims, without an accompanying special interrogatory. This was fundamentally flawed.

Generally, "Iowa law requires a court to give a requested jury instruction if it correctly states the applicable law and is not embodied in other instructions. The verb 'required' is mandatory and leaves no room for trial court discretion." *Alcala v. Marriott Intern., Inc.*, 880 N.W.2d 699, 707 (Iowa 2016) (citations omitted).

Although Iowa courts do not require perfect jury instructions, an instruction cannot not confuse or mislead the jury. *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 902 (Iowa 2015); *Anderson v. Webster City Comm. Sch. Dist.*, 620 N.W.2d 263, 268

(Iowa 2000). Prejudice results when the trial court's instruction confuses or misleads the jury. *Anderson v. Webster City Comm. Sch. Dist.*, 620 N.W.2d 263, 268 (Iowa 2000).

Here, Instruction 31 stated:

> Under Count III of the Trial Information, the State must prove all of the following elements of Child Endangerment:
>
> 1. On or about September 18, 2014, and January 31, 2016 the defendant was the person having custody or control of ***B.[redacted] and/or A.[redacted]***.
> 2. ***B.[redacted] and/or A.[redacted]*** were under the age of fourteen years.
> 3. The defendant knowingly acted in a manner that he was creating a substantial risk to ***B.[redacted] and/or A.[redacted]***'s physical or mental or emotional health or safety.
>
> If the State has proved all of the elements, the defendant is guilty of Child Endangerment. If the State has failed to prove any one of the elements, the defendant is not guilty of Child Endangerment.

(Emphasis added). Instruction 33 clarified the State's burden as to the defendant's mental state in creating "a substantial risk[ ] to ***B.[redacted] and/or A.[redacted]***'s" health or safety.

At trial, the State presented evidence of child endangerment as to both B.[redacted] and A.[redacted]. However, that evidence was clearly inadequate to charge Mr. Trane with two independent charges of child endangerment. Instead, the State funneled all of the allegations into one mega-charge of child endangerment; and asked the jury to decide which one stuck. However, the problem is that ***either*** one victim should have been in the instruction, ***or*** a special interrogatory should have been used. Multiple victims cannot be used to sustain a single child endangerment conviction.

These instructions were erroneous because a conviction under §726.6 (Iowa's child-endangerment statute) is tied to one particular victim. If the evidence were sufficient as to B.[redacted]. ***and*** A.[redacted], then the State should have brought two separate

charges. If the evidence were sufficient as to B.[redacted] ***or*** A.[redacted], then the State should have brought one charge, as it did, and selected one alleged victim to which the evidence should show endangerment. The State's middle-of-the-road approach, without the use of a special interrogatory, effectively allowed it to bring prior-bad-acts evidence against Mr. Trane (as to B.[redacted] ***or*** A.[redacted]), and resulted in a general verdict. A new trial is therefore required.[1]

The Iowa Supreme Court dealt with a similar issue in *State v. Ross*, 845 N.W.2d 692 (Iowa 2014). In that case, the defendant challenged his conviction under section 708.6 (intimidation with a dangerous weapon) because the word "victim" was used in the instruction, rather than naming each particular victim. *Id.* at 698. The Court rejected that argument, but only after analyzing §708.6, the statute under which Ross was convicted. *Id.* "To determine the validity of Ross's claim, we must first decide what act the general assembly criminalized under Iowa Code section 708.6." *Id.* Because that statute does not necessarily criminalize an act on a particular person, "but rather an assault calculated to imperil the safety of the people in the assembly," the instruction properly stated that the broad term "victim" could be used to describe multiple people. *Id.* at 699 ("Although it would have been better for the court to use 'the people' rather than 'the victim' in element three, the instruction properly states the law.").

---

[1]Mr. Trane acknowledges that trial counsel did not object to the language contained in Instructions 31 or 33. (Trial Tr. Vol. VIII, 88:5–8). Even if error were not properly preserved, this court may nevertheless grant a new trial if trial counsel was ineffective in failing to identify the erroneous instruction. *See State v. Ondayog*, 722 N.W.2d 778, 785 (Iowa 2006) ("Failure to recognize an erroneous jury instruction and preserve error breaches an essential duty."); *see also State v. Tjernagel*, 2017 WL 108291 (Iowa Ct. App. 2017) (reversing and remanding for a new trial on a claim of ineffective assistance of trial counsel when new counsel was substituted for posttrial proceedings).

The opposite is true here—the charged child-endangerment statute criminalizes an act against one particular victim. It prohibits a person from "knowingly act[ing] in a manner that creates a substantial risk to ***a child*** or ***minor***'s physical, mental or emotional health or safety." Iowa Code §726.6(1)(*a*) (emphasis added). This is not ambiguous; the State may not present a variety of evidence, relating to multiple alleged victims, in the hope of meeting its burden on one charge. Because the statute is unambiguous, this court need not look any further. *See State v. Richardson*, 890 N.W.2d 609, 616 (Iowa 2017). The statute does not use the term "children" or "the children." If that were the case, the State could charge two counts of child endangerment. *See, e.g.*, *State v. Millsap*, 704 N.W.2d 426, 435 (Iowa 2005) (upholding a consecutive sentence for two counts of child endangerment because "the existence of two victims is clearly a circumstance of the crime").

It is not surprising that the Uniform Iowa Criminal Jury Instructions require the name of one alleged victim in a charge of child endangerment. If that were not the case, the statute would be charging the defendant's conduct generally; not the conduct ***as it relates to the condition of a child's wellbeing***, as highlighted by element three:

> 1. On or about the _____ day of _____, 20___, the defendant was the [{parent} {guardian} {person having custody or control} of *(name)* {or a member of the household in which (name) resided}].
>
> 2. *(Name)* was [under the age of fourteen years] [a mentally or physically handicapped minor under the age of eighteen].
>
> 3. The defendant acted with knowledge that [he] [she] was creating a substantial risk to *(name)*'s [physical] [mental] [emotional] health or safety.
>
> 4. The defendant's act resulted in serious injury to *(name)*.*

Iowa State Bar Ass'n, Iowa Criminal Jury Instructions 2610.1 (updated through June 2017) (emphases added); *see State v. Hickman*, 576 N.W.2d 364, 368–69 (Iowa 1998). Courts are generally "slow to disapprove of the uniform jury instructions." *Ambrose*, 861 N.W.2d at 559; *State v. Weaver*, 405 N.W.2d 852, 855 (Iowa 1987).

Trial counsel should have identified that Instructions 31 and 33, as submitted to the jury, would result in a general verdict. "[T]he failure to recognize an erroneous instruction and preserve error breaches an essential duty." *Ondayog*, 722 N.W.2d at 785.

Submission of the flawed marshalling instruction also resulted in prejudice to Mr. Trane. The jury was permitted to consider whether Mr. Trane created a substantial risk to B[redacted]. *or* A[redacted]'s wellbeing, despite the fact that only one charge had been brought. For the reasons outlined above, there were many flaws with the evidence produced by the State regarding A.[redacted]. When it is impossible to tell whether the jury relied on invalid or supported claims to reach its verdict, prejudice exists and the verdict cannot stand. *Schlitter*, 881 N.W.2d at 391; *State v. Tyler*, 873 N.W.2d 741, 753–54 (Iowa 2016); *see State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006) ("When a general verdict does not reveal the basis for a guilty verdict, reversal is required."). Mr. Trane's judgment of conviction on Count III, child endangerment, must be vacated and a new trial granted. Iowa R. Crim. P. 2.24(2)(b)(7).

CONCLUSION

Mr. Trane respectfully requests this Court to grant his Motion for New Trial and grant any other relief in favor of him that this Court deems appropriate.

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

By: /s/ Alfredo Parrish
Alfredo Parrish AT0006051
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: aparrish@parrishlaw.com
ATTORNEY FOR DEFENDANT

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was **electronically filed** on EDMS on April 26, 2018. Subject to the exceptions cited therein, Iowa Court Rule 16.315 provides that this electronic filing, once electronically posted to the registered case party's EDMS account, constitutes service for purposes of the Iowa Court Rules.

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/s/ Michael Boal

Denise Timmins
Attorney General's Office
Hoover State Office Building
1305 East Walnut Street, Floor 2
Des Moines, Iowa 50319
515-281-5536
515-281-8894 (Fax)
denise.timmins@iowa.gov
ATTORNEY FOR PLAINTIFF

Benjamin Trane
DEFENDANT