IN THE IOWA DISTRICT COURT FOR LEE (SOUTH) COUNTY

STATE OF IOWA, Plaintiff. v. BENJAMIN G. TRANE, Defendant.	NO. FECR009152 STATE'S BRIEF IN SUPPORT OF ITS RESISTANCE TO DEFENDANT'S MOTION FOR NEW TRIAL

COMES NOW, the State of Iowa, and in support of its Resistance to Defendant's Motion for New Trial respectfully states:

Introduction

A jury convicted defendant Benjamin G. Trane of assault with intent to commit sexual abuse; acting in a pattern, practice, or scheme to engage in sexual exploitation by a counselor or therapist; and child endangerment. Trane owned and operated a boarding school for troubled teens—Midwest Academy ("Midwest"). His victims were three Midwest students entrusted to his care. He committed the two sex crimes by coercing K—a 17 year old—to perform various sex acts. Trane committed child endangerment by keeping A and B, two twelve-year old boys, in Out of School Suspension ("OSS") for considerable time. In OSS, the boys had to sit in an eight by eight room without moving for twenty-four hours at a time and got little to eat.

Trane moves for a new trial on various grounds. He largely claims ineffective assistance of counsel. He also says the State denied him an expert witness and this Court abused its discretion by preventing him from impeaching K with allegedly false prior allegations of sexual abuse. But he fails to prove he is entitled to a new trial.

Issues Presented

1) Ineffective assistance is not among the reasons in Criminal Rule 2.24 that a court may award a new trial. Trane seeks a new trial under Rule 2.24 alleging he received ineffective assistance from counsel. Should this Court grant Trane a new trial due to alleged ineffective assistance of counsel?

2) To prove ineffective assistance of counsel, Trane must show attorney error and prejudice from that error. Prejudice occurs when a defendant proves a reasonable probability of a different outcome absent the error. Trane never tries to prove a different outcome likely from any alleged error committed by his counsel. Should this Court grant Trane relief on any of his ineffective-assistance claims?

3) Rule of Evidence 5.412 requires a defendant to make a 5.412 motion fourteen days before trial and include a written disclosure of the evidence to be offered. Trane moved the day before trial to admit evidence that K[redacted] had made prior false allegations of sexual abuse. His motion lacked a written disclosure of that evidence. Did this Court abuse its discretion by denying Trane's 5.412 motion?

Legal Standard

This Court has broad discretion in ruling upon a motion for new trial to determine whether "the verdict effectuates substantial justice between the parties." Iowa R. App. P. 6.904(3). Its legal decisions "stand[] or fall[] … on the[ir] correctness." *Ladeburg v. Ray*, 508 N.W.2d 694, 969 (Iowa 1993).

To demonstrate ineffective assistance of counsel, a defendant must prove "(1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in

prejudice." *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006) (citing *Strickland v. Washington*, 466 U.S. 688, 687–89 (1984)). The defendant must prove the facts underlying his claim by a preponderance of the evidence. *State v. Madsen*, 813 N.W.2d 714, 724 (Iowa 2012). To establish a breach of duty, the defendant is required to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. "[C]ounsel's performance is measured against the standard of a reasonably competent practitioner," *State v. Begey*, 672 N.W.2d 747, 749 (Iowa 2003), and there is a strong presumption of counsel's competence, *see Strickland*, 466 U.S. at 689. To prove prejudice, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial," *id.* at 687, meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

Argument

Trane seeks a new trial raising six grounds.[1] At least four grounds assert ineffective assistance: (1) counsel failed to file a motion to sever, (2) counsel did not object to improper vouching testimony, (3) counsel did not object to certain hearsay

[1] Trane's motion for new trial arguably raises more grounds for new trial than the six raised in his supporting brief. But his new-trial motion cites neither legal authority nor the record. Because Trane has failed to develop any claim but those raised in his brief, the State cannot respond to them. *See Baker v. City of Iowa City*, 750 N.W.2d 93, 102 (Iowa 2008) (declining to consider an issue unsupported by citation to authority because the Court would "be 'obliged to assume a partisan role and undertake the appellant's research and advocacy'") (quoting *Inghram v. Dairyland Mut. Ins. Co.*, 215 N.W2d 239, 240 (Iowa 1974)); *see also Feld v. Borkowski*, 790 N.W.2d 72, 83 (Iowa 2010) ("Judges are not advocates who reach out to decide questions ….") (Appel, J., concurring in part and dissenting in part).

statements "regarding A.H.," and (4) counsel failed to object to jury instructions 31 and 33. He also says the State refused to pay for an expert witness. Last, he claims that this Court abused its discretion by denying his motion under Rule of Evidence 5.412 to allow him to offer evidence to prove K[redacted] had previously made false allegations of sexual abuse. All of his claims lack merit; this Court should reject them.

I. Trane's ineffective-assistance claims fail because a motion for new trial is not the proper vehicle to litigate such claims.

Trane moved under Rule of Criminal procedure 2.24(2)(b) for new trial. Def.'s Br. at 2. But Rule 2.24 does not list ineffective assistance as a ground upon which a new trial may be granted. The only subsections that arguably could allow awarding a new trial based on ineffective assistance are 2.24(2)(b)(6) and (9). Subsection six allows granting a new trial when "the verdict is contrary to law or evidence," while subsection nine allows a new trial when "from any other cause the defendant has not received a fair and impartial trial." Iowa R. Crim. P. 2.24(2)(b)(6), (9). Neither subsection permits granting a new trial due to ineffective assistance.

Beginning with subsection six, a verdict contrary to evidence means one "contrary to the weight of the evidence." *State v. Klinger*, No.10–1041, 2011 WL 2420706, at *1–2 (Iowa Ct. App. June 15, 2011) (quoting *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998)). A weight challenge plainly does not authorize a new trial for ineffective assistance of counsel. A verdict contrary to law "means contrary to principles of law as applied to facts or issues which the jury was called upon to try." *State v. Still*, 208 N.W.2d 887, 890 (Iowa 1973) (citation omitted). Here, the jury was not "called upon to try" whether Trane received ineffective assistance. So much for subsection six.

Turning to subsection nine, ineffective assistance does not implicate whether Trane received "a fair and impartial trial." Iowa R. Crim. P. 2.24(2)(b)(9). This subsection contemplates impermissible bias by the court or jury, or analogous circumstances. *See, e.g.*, *State v. Silva*, No. 17–0802, 2018 WL 1858294, at *1 (Iowa Ct. App. Apr. 18, 2018); *State v. Christensen*, No. 17–0085, 2018 WL 1865353, at *2 (Iowa Ct. App. Apr. 18, 2018). But receiving ineffective assistance does not render the trial unfair or partial toward either party.

True, Iowa appellate courts have considered ineffective assistance claims raised in motions for new trial. *See State v. Burnett*, No.11–0361, 2012 WL 836656, at *6 (Iowa Ct. App. Mar. 14, 2012). But the State is unaware of a case in which an Iowa appellate court has ruled, over the State's argument to the contrary, that a new trial motion is an appropriate procedural vehicle to raise an ineffective-assistance-of-counsel claim. *See State v. Jacobs*, No. 01-0826, 2002 WL 1428785, at *1 (Iowa Ct. App. July 3, 2002) (preserving for PCR claims of ineffective assistance raised in a motion for new trial that the trial court refused to hear after it determined that "allegations of ineffective assistance of counsel would more properly be dealt with on appeal or … in [PCR] proceedings"). Enforcing Rule 2.24 as written would cause Trane no prejudice. Indeed, the Iowa Legislature has given him an avenue to raise his ineffective-assistance claims: post-conviction relief under Iowa Code chapter 822. He can also raise these claims on appeal.

This Court should deny Trane's ineffective-assistance claims because Rule 2.24 does not allow him to raise them now. Trane should use the correct procedural

vehicle—post-conviction relief—to present these claims and build any relevant record. This Court should not allow him to morph his sentencing hearing into a PCR trial.

II. Trane failed to prove breach or prejudice from his counsel's not moving to sever the sex related counts from the child endangerment count.

Trane says that his 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." Def.'s Br. at 3. He appears to concede that the State could join the charges in the charging document, *id.* at 3, but because the charges involved sexually abusing a teen and endangering children, he believes there was good cause to sever as prejudice from joinder overwhelmed the State's interest in judicial economy, *id.* at 3–8.

A. A motion to sever was futile. His counsel breached no duty.

Trane is right that the State properly joined these charges in one trial information. Because the crimes arose from multiple "transactions or occurrences constituting parts of a common scheme or plan," it had to charge them in a single trial information. Iowa R. Crim. P. 2.6(1). Considering the relevant factors of "intent, modus operandi, and the temporal and geographic proximity of the crimes" confirms joinder was proper. *State v. Romer*, 832 N.W.2d 169, 181 (Iowa 2013) (quoting *State v. Elston,* 735 N.W.2d 196, 198 (Iowa 2007)).

The sexual abuse and child endangerment occurred in close temporal and geographic proximity. A[redacted] and K[redacted] attended Midwest at the same time. Trial Tr. Vol. II, p.281, ln.6–12; Trial Tr. Vol. III, p.160, ln.18–20. A[redacted]'s time in OSS spanned his entire time at Midwest while K[redacted] was groomed or abused much of the time she was there, rendering the events close in time. *See Elston*, 735 N.W.2d at 197, 199 (20 month

scheme did not defeat joinder). And the crimes all occurred at Midwest. Intent and modus operandi also supported joinder. Trane used his position of trust and power to dominate and harm these three students. *See Elston*, 735 N.W.2d at 199 (reasoning defendant's intent to victimize children to satisfy his sexual desires showed similar intent supporting joinder of two sex-related charges). Thus, joinder was proper.

Trane counters that good cause existed to sever the charges. Def.'s Br. at 6–8. Good cause arises when prejudice from joinder outweighs the State's interest in judicial economy. *Elston*, 735 N.W.2d at 199 (citing *State v. Oetken*, 613 N.W.2d 679, 689 (Iowa 2000)). He is mistaken.

First, the state had a strong interest in judicial economy. Trane's trial lasted eight days and spanned more than 2,400 transcript pages. Many witnesses testified to background matters that applied to all charges or had pertinent information proving multiple counts. K[redacted] R[redacted], Cheyenne Jerred, Elizabeth Webster, Joe Lestina, Jennifer Richardson, and Thomas Pearson all fit that description. *E.g.*, Trial Tr. Vol. III, p.170, ln.3–21; p.179, ln.10–23; p.285, ln.6 to p.288, ln.24; Trial Tr. Vol. V, p.8, ln.19 to p.9, ln.17; p.18, ln.13 to p.19, ln.4. Plus, almost every witness explained Midwest, its rules and culture, and Trane's position of authority—circumstances enabling his crimes.

Second, Trane suffered no prejudice. This Court instructed the jury "[y]ou must determine whether the defendant is guilty or not guilty separately on each count." Jury Instr. No. 13. This instruction insured that the jury would consider each charge independently. *State v. Owens*, 635 N.W.2d 478, 483 (Iowa 2001) ("[W]e presume the jury follows the instruction[s]…."). And all the charges involved harming children, so

juror sympathy on a child-victim charge would not taint the others. *Cf. Elston*, 735 N.W.2d at 197 (eighteen counts of sexual exploitation of a minor and one count of indecent contact with a child tried together); *State v. Geier*, 484 N.W.2d 167, 172–73 (Iowa 1992) (finding no abuse of discretion in a bench trial when the court denied a motion to sever assault-with-intent-to-commit-sexual-abuse and indecent-exposure charges from theft charge).

Third, Trane's trial counsel may well have had strategic reasons to try the counts together. Perhaps, for example, she thought trying the counts together would allow Trane to put on the maximum amount of evidence about the benefits of Midwest and how it helped troubled children, making him appear sympathetic.

Because a motion to sever lacked merit and strategic reasons could have backed the decision not to file one, Trane cannot prove breach.

B. Even if Trane's counsel breached a duty by not moving to sever, Trane cannot show prejudice.

In his brief, Trane conflates the prejudice in the good cause showing under Rule 2.6 with *Strickland* prejudice needed to prove ineffective assistance. They are not the same. Prejudice under Rule 2.6 deals with harm to defendant from trying counts together, while *Strickland* prejudice requires him to prove that his trial outcome would likely have been different had his counsel moved to sever the counts. *Compare Elston*, 735 N.W.2d at 200, *with Strickland*, 466 U.S. at 694. Trane did not even try to argue he suffered *Strickland* prejudice. *See* Def.'s Br. at 3–8. That failure sinks this claim.

III. Trane cannot prove breach or prejudice from his counsel's not objecting to testimony offered by Dr. Slater and A[redacted]'s mom as vouching.

"Expert testimony in child sexual abuse cases can be very beneficial to assist the jury in understanding some of the seemingly unusual behavior child victims tend to display." *State v. Dudley*, 856 N.W.2d 668, 675 (Iowa 2014) (citation omitted). In child sexual abuse cases, experts may "express opinions on matters that explain relevant mental and psychological symptoms present in sexually abuse children" but may not "directly or indirectly render an opinion on the credibility or truthfulness of a witness." *Id.* at 676 (citations omitted). Here, Trane says that testimony by Dr. Slater and A[redacted]'s mom vouched for credibility. Def.'s Br. at 15–21. He is wrong.

A. Neither Dr. Slater nor A[redacted]'s mom vouched for any victim, and counsel had tactical reasons not to object.

Trane says his counsel should have objected to certain testimony by Dr. Slater. He targets her references to the Boston Marathon bombing and Olympic coaches as crossing the line. Def.'s Br. at 17, 18 (citing Trial Tr. Vol. IV, p.206, ln.25 to p.207, ln.17; p.209, ln.7–17; p.212, ln.24 to p.213, ln.6). But these references merely illustrated the psychological phenomena the doctor explained.

Dr. Slater used the Boston Marathon bombing to explain how after traumatic events people sometimes engage in counterintuitive behaviors. Trial Tr. Vol. IV, p.206, ln.19 to p.207, ln.24. She said that after the Boston Marathon bombing people tried to return to normal life, not act hysterical. She then explained that sexual abuse victims act that way too. *Id.* at p.206, ln.19 to p.207, ln.24. So while people expect sexual abuse victims to flee perpetrators in fear, sometimes they act counterintuitively. This

counterintuitive victim behavior tends to happen when the abuse comes from trusted adults like parents, doctors, or Olympic coaches. p.209, ln.4–17.

Dr. Slater also used the Olympic coach idea to illustrate the concept of parent grooming. She explained that parents can be groomed by perpetrators. The doctor said that perpetrators with high social status create trust in parents that in turn allows them access to children. *Id.* at p.212, ln.8 to p.213, ln.6. This process is known as grooming parents. Dr. Slater used an Olympic level coach as an example. *Id.*

These examples did not vouch for K[redacted]s credibility. Instead, they followed *Dudley*'s guidance by only explaining concepts, not testifying about credibility. 856 N.W.2d at 676. That Dr. Slater had never evaluated or had any substantial interaction with any of the victims buttresses the conclusion she did not vouch for their credibility. Trial Tr. Vol. IV, p.240, ln.15 to p.241, ln.16.

Trane also complains that Dr. Slater "provid[ed] extensive narratives about her personal interactions with sex offenders." Def.'s Br. at 19. But the doctor offered these anecdotes to illustrate the concepts she testified about, such as risky offender behaviors and access to victims. Trial Tr. Vol. IV, p.209, ln.24 to p.212, ln.7; p.226, ln.13 to p.229, ln.4. She never said Trane was a perpetrator. In fact, she said she had never met him. *Id.* at p.241, ln.9–10. The doctor could use anecdotes to illustrate various concepts.

Turning to the testimony from A[redacted]'s mother, Trane says she offered lay-opinion testimony when she explained that she has tried to talk to A[redacted] "about Midwest Academy" but A[redacted] "won't talk to anyone." Def.'s Br. at 20 (citing p.307, ln.20 to p.308,

ln.7). Trane also objects that A[redacted]'s mom relayed that A[redacted]'s counselor said she "should not push [A[redacted]] to try to talk about [Midwest]." *Id.* None of that testimony is opinion. *See* Iowa R. Evid. 5.701. It just conveys that A[redacted] would not talk about Midwest without offering an opinion on why.

Trane also complains that testimony by A[redacted]'s mother that A[redacted]'s counselor said A[redacted] would talk about Midwest when ready was offered to prove that "A[redacted] would not talk about being abused by [] Trane." Def.'s Br. at 21. But that testimony did not say Trane abused A[redacted]. Trial Tr. Vol. II, p.307, ln.20 to p.308, ln.7. Plus, the State alleged that Trane endangered A[redacted], not abused him. So the State had no reason to prove Trane abused A[redacted].

Strategic reasons justified counsel's not objecting. None of this testimony could have been excluded as vouching. Even if it could, objecting would have only highlighted the testimony. Trane's counsel might have viewed highlighting the evidence as worse than admitting it without fanfare. Such a tactical decision is not a breach of duty.

B. Trane cannot prove prejudice.

Trane again fails to try to prove *Strickland* prejudice. His entire discussion of prejudice is: "The failure of trial counsel to object was ineffective assistance, and given the prejudicial impact of the testimony, a new trial must be granted." Def.'s Br. at 21 (citation omitted). That conclusory claim does not show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Trane cannot make that showing because the State offered strong evidence of guilt. This Court should reject his claim.

IV. Trane can prove neither breach nor prejudice from his counsel's not objecting to testimony by A[redacted]'s mom and DHS social worker Jennifer Richardson as impermissible hearsay statements of AH.

Trane thinks his counsel should have objected to testimony by A[redacted]'s mom and DHS social work Jennifer Richardson as impermissible hearsay statements by A[redacted]. Def.'s Br. at 21–27. His claim fails.

A. A[redacted]'s mother did not offer hearsay statements of A[redacted]. Even if she had, Trane cannot prove prejudice.

Trane thinks that A[redacted]'s mother offered hearsay statements of A[redacted] about Midwest's OSS rooms; A[redacted]'s weight loss and transition home; an incident of sexual behavior by students at Midwest, (the "Pride Family" incident); and A[redacted]'s decision not to meet with the prosecutor a month before trial. Def.'s Br. at 21–24 (citing Trial Tr. Vol. II, p.294, ln.1 to p.295, ln.1; 306, ln.1 to p.308, ln.17; p.309, ln.7 to p.310, ln.10). But none of the testimony by A[redacted]'s mom conveys anything A[redacted] said.

Instead, her testimony relayed her own perceptions or what Midwest employee Gary Lachapelle told her. A[redacted]'s mother saw the OSS rooms and had the OSS policies described to her by A[redacted]'s Lachapelle. Trial Tr. Vol. II, p.287, ln.13–20; p.288, ln.8–16; p.292, ln.12–13; p.298, ln.9–19. Lachapelle contacted A[redacted]'s mom when A[redacted] was put in OSS. *Id.* at p.293, ln.8–15; p.295, ln.2 to p.296, ln.12. A[redacted]'s mother personally observed her son's weight when he left for Midwest and when he returned home. She also experienced his behavior when he returned home. Lachapelle called A[redacted]'s mom to tell her about sexual experimentation by boys in the "Pride Family." *Id.* at p.301, ln.3 to p.302, ln.7. And A[redacted]'s mom explained A[redacted]'s actions in refusing to talk with the prosecutor a month before trial. *Id.* at p.308, ln.8 to p.310, ln.10.

First, none of the testimony based on the observations of A[redacted]'s mom is hearsay. Second, everything that Lachapelle told A[redacted]'s mom was admissible as statements by a party opponent. Lachapelle worked at Midwest and called A[redacted]'s mom in that capacity to discuss A[redacted]. Trane owned and operated Midwest, making Lachapelle his employee. Statements by Lachapelle made in his capacity as Trane's employee are non-hearsay. Iowa R. Evid. 801(d)(2)(D). Objecting could not have kept those statements out. Because Trane's counsel had no duty to raise meritless objections, this part of his claim fails. *State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999).

Even if Trane's counsel breached a duty, he suffered no prejudice. Almost all this evidence came in via other sources. Trane elicited testimony about A[redacted]'s conduct in OSS and the OSS rules. Trial Tr. Vol. II, p.322, ln.25 to p.323, ln.17; Trial Tr. Vol. VII, p.238, ln.5 to p.241, ln.7. The State offered photos showing A[redacted]s weight loss at Midwest. DHS workers testified about the "Pride Family" sexual experimentation and the subsequent investigation. Trial Tr. Vol. V, p.265, ln.14–122. And it was clear A[redacted] would not talk about Midwest because he did not testify. Moreover, Trane makes no attempt to prove the outcome of his trial would likely have been different had this testimony been excluded. *See Strickland*, 466 U.S at 694.

B. Richardson did not offer hearsay testimony of A[redacted]. Even if she had, Trane cannot prove prejudice.

Trane complains that Richardson testified that A[redacted] told her about his experience in OSS, specifically, how often he was in OSS and the "Pride Family" sexual incident. Def.'s Br. at 24–25 (citing Trial Tr. Vol. V, p.263, ln. 6 to p.266, ln.18). But this testimony was not offered to prove its truth. Rather it explained DHS's subsequent acts

of investigating OSS and the "Pride Family" incident. That investigation led A[redacted]'s parents to remove him from Midwest and ultimately to the child endangerment charge. Trial Tr. Vol. II, p.303, ln.20 to p.305, ln.16. So explaining the DHS investigation to the jury was necessary. Because A[redacted]'s statements were offered for a non-hearsay purpose, any objection would have failed. Counsel had no duty to raise meritless issues.

Even if this testimony was hearsay, other evidence duplicated it preventing prejudice. As explained, A[redacted]'s mother described the "Pride Family" incident as explained to her by Lachapelle. And no one disputed that A[redacted] spent almost half his time at Midwest in OSS. Indeed, Trane admitted as much. Trial Tr. Vol. V, p.281, ln.17–25; Trial Tr. Vol. VII, p.252, ln.16 to p.253, ln.23. Thus, Trane cannot prove prejudice.

V. Trane did not receive ineffective assistance from his counsel's not objecting to the child endangerment instructions.

Trane complains that this Court mis-instructed the jury by using the format "B.V. and/or A.H." in the jury instructions on the child endangerment charge. Def.'s Br. at 27–31. Because his counsel raised no objection to the jury instructions, he must bring his claim as ineffective assistance. Trial Tr. Vol. VIII, p.88, ln.6–8. He cannot prove prejudice.

Trane makes no effort to prove *Strickland* prejudice. *See* Def.'s Br. at 27–31. He asserts he suffered prejudice because "[t]he jury was permitted to consider whether [he] created a substantial risk to B[redacted] *or* A[redacted]'s wellbeing, despite the fact that only one charge had been brought." Def.'s Br. at 31. But this does not show that had the jury been instructed as Trane suggests the outcome at trial would likely have been different. *See Strickland*, 466 U.S. at 694.

Trane suggests that "[w]hen it is impossible to tell whether the jury relied on invalid or supported claims to reach its verdict, prejudice" results. Def.'s Br. at 31. But the cases he cites do not stand for the proposition that a defendant challenging instructional error via ineffective assistance need not prove *Strickland* prejudice. *See State v. Schlitter*, 881 N.W.2d 380, 384, 390–92 (Iowa 2016) (conducting a prejudice analysis on ineffective-assistance claim when counsel did not challenge the sufficiency of the evidence to support "all four alternative means of committing the crime of child endangerment" submitted to the jury); *State v. Tyler*, 873 N.W.2d 741 (Iowa 2016) (decided on direct review); *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006) (same). Instead, the law requires proving prejudice on a claim of ineffective assistance related to instructional error. *E.g.*, *State v. Thorndike*, 860 N.W.2d. 316, 321 (Iowa 2015) (collecting cases).

Here, Trane cannot prove prejudice because sufficient evidence supported child endangerment verdicts for the acts committed against A[redacted] and B[redacted]. Trane only contested whether the State proved that he "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." Jury Instr. No. 31; *see also* Trial Tr. Vol. VIII, p.191, ln.12–13. That meant the State had to show Trane had "a conscious awareness" of an articulable risk "of danger to a child's physical health or safety." *Id.* Nos. 33, 34.

Beginning with A[redacted], the evidence showed he was in OSS at least 163 days of his 323 days at Midwest. Trial Tr. Vol. V, p.281, ln.17–25. A[redacted] had to sit in structure in the OSS room for 24 hours. Trial Tr. Vol. II, p.294, ln.1 to p.295, ln.1. If he broke the OSS

rules—including by moving out of structure—the OSS clock restarted. *Id.* During OSS, A engaged in behavior showing he could not handle those rules, including by trying to strangle himself with his shirt. *Id.* at p.322, ln.25 to p.323, ln.7; p.327, ln.11–16. He was fed a peanut butter and jelly sandwich for two meals and a lunchmeat sandwich for the other, along with fruit. *Id.* at p.295, ln.9–15; Trial Tr. Vol. VII, p.241, ln.15–20. A lost 30 pounds at Midwest. Trial Tr. Vol. II, p.306, ln.1–8. The State also showed that Trane knew about the conditions in OSS, how often A was there, and of his difficulty following the rules. Trial Tr. Vol. V, p.273, ln.21 to p.274, ln.5; Trial Tr. Vol. VII, p.252, ln.16 to p.261, ln.2. This allowed the jury to conclude that Trane knew he created a risk to A because no one would keep a child inside an eight by eight room for months due to the risk to the child's health. Moreover, Trane's knowledge A lost considerable weight showed he knew A faced a risk of malnourishment.

Turning to B he spent 133 of 210 days in OSS. Trial Tr. Vol. V, p.280, ln.21 to p.281, ln.8. The same OSS rules applied. When B first arrived, he was put in OSS yelling and screaming, hit his head on the door, could not follow the rules, and then urinated on the floor. Trial Tr. Vol. VIII, p.5, ln.17 to p.9, ln.17. Trane knew this. Trial Tr. Vol. V, p.273, ln.21 to p.274, ln.5. Employees at Midwest did not believe OSS or Midwest in general were a good fit for B within two months of his arrival. Trial Tr. Vol. III, p.137, ln.5–14; Trial Tr. Vol. VII, p.247, ln.2–12; Trial Tr. Vol. VIII, p.5, ln.4–13; p.39, ln.17–18. Yet they kept him at Midwest four more months, with much of the time in OSS. Trial Tr. Vol. VIII, p.39, ln.2–23. Trane knew this too. *Id.* Moreover, B lost 26 pounds while at Midwest. Trial Tr. Vol. V, p.277, ln.10–18. And the day B left Midwest

he went to the hospital for malnourishment. Trial Tr. Vol. III, p.139, ln.22 to p.141, ln.21. This evidence shows Trane knew of the substantial risk he created to B[redacted] for the same reasons as A[redacted].

The State offered evidence to convict Trane of endangering A[redacted] and B[redacted], so any instructional error caused no prejudice.

VI. Trane has not shown he was denied an expert.

Trane claims that "[a]s trial proceeded, [he] was advised that the State would not pay for an expert witness." Def.'s Br. at 8. But he offers no support for this claim. The State is not aware of any request by Trane for an expert or that it denied such a request. Because Trane cannot show he requested an expert or the State refused him one, his claim fails.

To the extent Trane says he received ineffective assistance from his counsel's failure to request an expert, *see* Def.'s Mot. New Trial (3/26/2018) at 5, he proves neither breach nor prejudice. First, any decision to call or not call an expert is a virtually unchallengeable strategic decision. *See Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001) ("[S]trategic decisions made after thorough investigation of law and facts … are virtually unchallengeable.") (internal quotation marks and citation omitted); *Heaton v. State*, 420 N.W.2d 429, 432 (Iowa 1988) ("We believe that the question of whether or not to call an expert witness is a matter of trial strategy."). Second, Trane does not identify what expert he would have called, what the expert's testimony would have been, or even what allegations or theories such testimony would have attacked. Trane therefore failed to prove his claim. This Court should deny it.

VII. This Court committed no abuse of discretion by denying Trane's motion under 5.412 because it was untimely and he failed to make the perquisite showing required by that rule.

A day before trial, Trane filed a motion to admit "evidence of prior false allegations of sexual abuse by" K[redacted] Def.'s 5.412 Mot. (12/11/2017) at 1. This Court denied it because Trane filed it out of time and failed to prove K[redacted]'s prior allegation false by preponderating evidence. Order Denying 5.412 Mot. (12/17/2017) at 3–4. That ruling was correct.

Iowa Rule of Evidence 5.412 requires a defendant accused of sexual abuse who "intends to offer under rule 5.412(*b*)" "evidence of specific instances of a victim's sexual behavior" to "file a motion to offer the evidence at least 14 days before trial" and file a written offer of proof accompanying the motion. Iowa R. Evid. 5.412(b), (c). This rule applies when a defendant seeks to offer evidence of prior false allegations of sexual abuse. *State v. Alberts*, 722 N.W.2d 402, 409 n.3 (Iowa 2006). Here, Trane waited until the day before trial to move to admit such evidence. Def.'s 5.412 Mot. (12/11/2017). And his motion lacked a written offer of proof. Because Trane failed to comply with Rule 5.412's procedural requirements, this Court committed no abuse of discretion by denying the motion.

Trane's claim that the State "slow-play[ed]" discovery cannot cure these deficiencies. Def.'s Br. at 11. Trane said he filed his motion late because he only deposed K[redacted] the day before trial. But the State explained that it provided the information that K[redacted] testified to in her deposition in its discovery materials. Trial Tr. Vol. II, p.240, ln.4–11. Trane never disputed this account of discovery. *See id.* at p.235–41. Thus,

Trane could have moved under Rule 5.412 sooner than the day before trial. *Id.* Indeed, had Trane really not known about K[redacted]s prior allegations of sexual abuse, he could have tried to argue good cause for his late filing. *See* Iowa R. Evid. 5.412(c)(1)(A). Yet he made no such argument.

In any event, this Court heard Trane's offer of proof. Trial Tr. Vol. II, p.235–38. His trial counsel confirmed the witness contradicting K[redacted]'s prior allegations would testify in accord with the offer of proof. *Id.* at p.238, ln.8–14. This Court then rejected Trane's claim on the merits because he failed to prove by a preponderance of evidence that K[redacted]'s prior claims were false. Order Denying 5.412 Mot. (12/17/2017) at 4; Trial Tr. Vol. II, p.237, ln.14–19; *see also Alberts*, 722 N.W.2d at 409. Trane has not shown that this Court abused its discretion. This Court should reject his claim.

Conclusion

For the foregoing reasons, this Court should deny Trane's motion for new trial.

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