IN THE SUPREME COURT OF IOWA
Supreme Court No. 22-0522

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DEREK MICHAEL WHITE,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR OSCEOLA COUNTY
THE HONORABLE SHAYNE L. MAYER, JUDGE

APPELLEE'S BRIEF

BRENNA BIRD
Attorney General of Iowa

GENEVIEVE REINKOESTER
SUSAN KRISKO
Assistant Attorneys General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-8894 (fax)
genevieve.reinkoester@ag.iowa.gov

NOLAN M. MCGOWAN
Osceola County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Statutes

State Rule

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Iowa Code Section 915.38(1)(a) is Not Unconstitutional Under Article I, Section 10 of the Iowa Constitution.

Authorities

Chapman v. California, 386 U.S. 18 (1967)
Crawford v. Washington, 541 U.S. 36 (2004)
Maryland v. Craig, 497 U.S. 836 (1990)
State Oil Co. v. Khan, 522 U.S. 3 (1997)
Sullivan v. Louisiana, 508 U.S. 275 (1993)
U.S. v. Gigante, 166 F.3d 75 (2d Cir. 1999)
U.S. v. Mabie, 663 F.3d 322 (8th Cir. 2011)
U.S. v. Pack, 65 M.J. 381 (C.A.A.F. 2007)
U.S. v. Yates, 438 F.3d 1307 (11th Cir. 2006)
Weaver v. Massachusetts, 137 S. Ct. 1899 (2017)
Com. v. Ludwig, 594 A.2d 281 (Pa. 1991)
In re J.C., 877 N.W.2d 447 (Iowa 2016)
Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)
People v. Fitzpatrick, 633 N.E.2d 685 (Ill. 1994)
People v. Jemison, 952 N.W.2d 394 (Mich. 2020)
State v. Biddle, 652 N.W.2d 191 (Iowa 2002)
State v. Jackson, 717 S.E.2d 35 (N.C. Ct. App. 2011)
State v. Jefferson, 574 N.W.2d 268 (Iowa 1997)
State v. Kennedy, 846 N.W.2d 517 (Iowa 2014)
State v. Rogerson, 855 N.W.2d 495 (Iowa 2014)
State v. Simmons, 714 N.W.2d 264 (Iowa 2006)
State v. Smith, 636 S.W.3d 576 (Mo. 2022)
State v. Strable, 313 N.W.2d 497 (Iowa 1981)
State v. Vogelsberg, 724 N.W.2d 649 (Wis. Ct. App. 2006)
Taft v. Iowa Dist. Court ex rel Linn Cty., 828 N.W.2d 309 (Iowa 2013)
N.C. Gen.Stat. § 15A–1225.1(b)

II. The District Court Rightfully Rejected Defendant's Proposed Civil Jury Instruction.

Authorities

Alcala v. Marriot Int'l, Inc., 880 N.W.2d 699 (Iowa 2016)
Smith v. Koslow, 757 N.W.2d 677 (2008)
State v. Edouard, 854 N.W.2d 421 (Iowa 2014)
State v. Hanes, 790 N.W.2d 545 (Iowa 2010)
State v. Kellogg, 542 N.W.2d 514 (Iowa 1996)
State v. Kraai, 969 N.W.2d 487 (Iowa 2022)
State v. Plain, 898 N.W.2d 801 (Iowa 2017)
Iowa Code § 668.3

III. The District Court Did Not Abuse Its Discretion When It Responded to the Jury's Question by Directing the Jury to Re-Read the Instructions Already Given.

Authorities

Everett v. State, 789 N.W.2d 151 (Iowa 2010)
State v. Dreessen, 305 N.W.2d 438 (Iowa 1981)
State v. Duncan, No. 17-0670, 2018 WL 1433632
(Iowa Ct. App. Mar. 21, 2018)
State v. Griffin, 323 N.W.2d 198 (Iowa 1982)
State v. Lee, 494 N.W.2d 706 (Iowa 1993)
State v. Porter, No. 12-0170, 2013 WL 2146543
(Iowa Ct. App. May 15, 2013)
State v. Reeves, 636 N.W.2d 22 (Iowa 2001)
State v. Thompson, 570 N.W.2d 765 (Iowa 1997)
State v. Williams, 341 N.W.2d 748 (Iowa 1983)
Vongchanh v. State, No. 03–1086, 2004 WL 1853921
(Iowa Ct. App. July 14, 2004)
Iowa Code § 726.6(1)(b)

IV. The Evidence Was Sufficient to Support Defendant's Conviction.

Authorities

State v. Biddle, 652 N.W.2d 191 (Iowa 2002)
State v. Crawford, 972 N.W.2d 189 (Iowa 2022)
State v. Hansen, 750 N.W.2d 111 (Iowa 2008)
State v. Harris, No. 18-2000, 2019 WL 4302131 (Iowa Ct. App. Sept. 11, 2019)
State v. Johnson, 528 N.W.2d 638 (Iowa 1995)
State v. Leckington, 713 N.W.2d 208 (Iowa 2006)
State v. Musser, 721 N.W.2d 758 (Iowa 2006)
State v. Thomas, 847 N.W.2d 438 (Iowa 2014)
Iowa Code § 726.3
Iowa R. App. P. 6.904(3)(p)

V. Defendant's Failure to File a Financial Affidavit Waives His Claim That He Does Not Have the Reasonably Ability to Pay Category B Restitution.

Authorities

State v. DeLong, 943 N.W.2d 600 (Iowa 2020)
State v. Myers, 653 N.W.2d 574 (Iowa 2002)
Iowa Code § 910.2A(1)
Iowa Code § 910.2A(2)(a)
Iowa Code § 910.2A(2)(b)

ROUTING STATEMENT

Defendant Derek Michael White ("Defendant") requests retention. But Defendant's assertion that "Sixth Amendment jurisprudence is unstable" is incorrect. App. Br. at 18. Existing caselaw is sufficient to respond to Defendant's arguments, so this case does not meet the criteria of Iowa Rule of Appellate Procedure 6.1101(2) for retention by the Supreme Court. Transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(2).

STATEMENT OF THE CASE

Nature of the Case

Defendant appeals his conviction and restitution order following a jury trial in which he was found guilty of one count of Neglect or Abuse of a Dependent Child, in violation of Iowa Code section 726.3, a class C felony; and two counts of Child Endangerment Resulting in Bodily Injury, in violation of Iowa Code sections 726.6(1)(a)–(b) and (7), a class D felony. On appeal, Defendant argues that Iowa Code section 914.38(1)(a) violates the Iowa Constitution, the district court erred when it denied a proposed jury instruction and when it responded to a jury question, that the evidence was not sufficient to sustain his conviction, and he does not have the reasonable ability to pay category B restitution.

Course of Proceedings

The State accepts Defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

Defendant and his three children, M.W, J.W., and S.W., lived with his girlfriend Donna Ceynar Reisdorfer, and her sons E. and two-year-old D.C. On May 5, 2020, Linda Diekevers—a family, safety, risk, and permanency worker for Southwest Iowa Family Access Center—made an unannounced visit to the home. Trial Tr. Vol. II at 27:9–28:25. Diekevers arrived around 10:00 a.m., but Defendant denied her access to D.C. and claimed "the children had woke up early, before 6:00 a.m., and they were just settling down for naps." Trial. Tr. Vol. II at 29:18. Diekevers "offered to just peek in the rooms and walk through the house and not wake up the children, and [Defendant] still said no." Trial Tr. Vol. II at 29:19–24.

Diekevers returned around 12:40 p.m. and found D.C. "seated at the table, and the other children were…watching TV…And I saw the bruises on [D.C.]'s face from a distance." Trial Tr. Vol. II at 30:2–14. "The closer I got, I saw more bruises of varying degrees. It was yellow and gray bruises as well as the red ones I had noticed from across the

room. No matter where I looked on his skin there was bruises, and it was a variety of bruises. It was all colors. There also appeared to be some marks of a distinct pattern on his cheek and on his ear as if pinched. But wherever I looked on his skin, wherever I could see his skin, I saw bruises, into his hairline. His face, neck was covered with injuries." Trial Tr. Vol. II at 30:15–25, 31:15–19, State's Ex. 8 (Photo of Bruises), State's Ex. 17 (Photo of Bruises), State's Ex. 19 (Photo of Bruises); Conf. App. 9, 18, 20. In her 15 years as a social worker, Diekevers had "never seen a child whose head was beat up so much." Trial Tr. Vol. II at 31:23–32:18.

Diekevers asked about D.C.'s extensive injuries and was told "[h]e just woke up like that." Trial Tr. Vol. II at 32:17–21. Diekevers asked questions "to try and understand what possibly could have happened. And I got various…inconsistent answers." Trial Tr. Vol. II at 33:6–10. Diekevers reported D.C.'s injuries to the abuse hotline and to DHS. Trial Tr. Vol. II at 32:22–33:5.

Based on Diekevers's report, Child Protective Worker Adrian Warnke—who was working with Defendant, Reisdorfer, and D.C., prior to this incident—went to the house to investigate. Trial Tr. Vol. II at 132:1–19. Warnke requested that Deputy Tyler Bos accompany

her to the house. Trial Tr. Vol. II at 71:7–21. At the home, they found Defendant, Reisdorfer, and Defendant's children in the house, and D.C. was upstairs in his bedroom, alone. Trial Tr. Vol. II at 72:5–23, 133:13–20. At first, Defendant and Reisdorfer would not allow Warnke upstairs to see D.C., but "they did eventually allow [her] upstairs to see him." Trial Tr. Vol. II at 134:11–20.

Warnke found D.C. in his room "curled up in a fetal position laying on the mattress." Trial Tr. Vol. II at 134:24–135:5. Warnke could see some discoloration on his face, but the room was dark, so she brought him downstairs to get a better look at his face. Trial Tr. Vol. II at 135:9–17. Once downstairs, Warnke could see more than "just different patterns of bruising…it was very evident there were linear marks on the side of his face. And he had a very distinctive bruising inside his inner ear…it was an immediate response to ask him to be seen by a medical professional[.]" Trial Tr. Vol. II at 136:2–15.

When Warnke and D.C. came downstairs, Deputy Bos could see "multiple injuries to [D.C.'s] face…It looked like his entire face had different discolorations, markings, bruisings." Trial Tr. Vol. II at 73:5–22. Deputy Bos thought the injuries to the right side of D.C.'s

face “looked like a belt mark.” Trial Tr. Vol. II at 73:17–74:15. After Bos and Warnke “observed the injuries, we thought it was best for him to go get checked out.” Trial Tr. Vol. II at 75:10–76:8. Warnke was “very” concerned for D.C.’s safety and believed he needed to be immediately removed from the home and taken to the hospital. Trial Tr. Vol. II at 136:16–137:8.

Nurse practitioner Nicholas Vust treated D.C. at the hospital in Sheldon. Trial Tr. Vol. II at 41:3–42:13. D.C. was there with Deputy Bos, Warnke, and his mother. Trial Tr. Vol. II at 46:7–47:1. Defendant was not there. Trial Tr. Vol. II at 47:2–6. While D.C. “was the right size for a 2-year-old, [] he did not walk like a 2-year-old should walk. He did not interact with us like a 2-year-old should interact. He liked to walk on his tiptoes which made us question what was going on. He tiptoed around. [] [H]e didn’t talk at all. He…did not like to be touched, screamed if anybody tried holding him, anything like that. He was just not a normal 2-year-old at the time.” Trial Tr. Vol. II at 47:18–48:10. These developmental delays can be a response to or symptom of child abuse. Trial Tr. Vol. II at 44:17–45:23.

Vust also noticed the extensive bruising of various colors and in various stages of healing on D.C.’s face. Trial Tr. Vol. II at 48:11–

49:10. The outside of D.C.'s ear and into the ear canal had a severe bruise. Trial Tr. Vol. II at 49:11–21, 52:25–53:9. "In order to get bruising down into the actual ear canal itself, it takes quite a bit of force or something very blunt with a lot of force behind it to cause that much bruising." Trial Tr. Vol. II at 54:1–11. There was also bruising on D.C.'s "shoulders, his back and then his ankles as well and his thighs." Trial Tr. Vol. II at 49:22–52:24, 64:10–25, State's Ex. 6 (Bruises on Back), State's Ex. 7 (Bruises on Ankle and Leg), State's Ex. 13 (Bruises on Arm), Ex. 14 (Bruises on Face and Shoulder); Conf. App. 7, 8, 14, 15.

Some of the bruising to D.C.'s face and ear was "linear." Trial Tr. Vol. II at 54:18–21. These injuries were consistent with a belt, "[a]nd that's what our concern was right away, is he had been hit across the face with a belt, because of the linear marks that run from side to side." Trial Tr. Vol. II at 68:1–18, 69:16–23.

Reisdorfer told Vust several different versions of what happened to D.C., none of which matched his severe injuries. Trial Tr. Vol. II at 55:12–25. The first version was that D.C. rolled out of bed. Trial Tr. Vol. II at 56:11–15. But D.C. slept on a mattress on the floor. Trial Tr. Vol. II at 56:16–57:3, 115:20–25, 126:1–18, State's Ex. 3

(D.C.'s Room), State's Ex. 4 (D.C.'s Room); App. 42, 43. The second was that D.C. "rolled out of bed and hit a toy which it still didn't match the description of the wounds on his face and the bruising on the face." Trial Tr. Vol. II at 57:4–58:11, 66:3–20. The third version was that D.C. "had rolled between the bed and the wall, but they didn't ever see it happening and that he got himself out. And at that point the story really didn't make any sense[.]" Trial Tr. Vol. II at 58:12–59:9. Vust's medical diagnosis was "alleged child abuse." Trial Tr. Vol. II at 60:17–23.

D.C.'s biological father—who did not live with him—visited with D.C. on April 30, 2020. Trial Tr. Vol. II at 93:23–94:10. On that day, D.C. did not have any bruises on his face. Trial Tr. Vol. II at 94:16–95:1, 95:20–24, State's Ex. 1 (D.C. Prior to Injuries), State's Ex. 2 (D.C. Prior to Injuries); App. 5, 6. After D.C. was taken to the hospital, Deputy Bos executed a search warrant at the house and found a belt owned by Defendant that "closely resemble[d]" the injuries to D.C.'s face. Trial Tr. Vol. II at 79:2–81:21.

Defendant's two young sons, J.W. and M.W., testified at trial. They both testified about living with Defendant, Reisdorfer, and D.C., and that they shared a room with D.C. Trial Tr. Vol. II at 113:5–22,

114:18–116:14, 124:20–126:18. They also both stated that Defendant was the disciplinarian in the house, and he would spank D.C. Trial Tr. Vol. II at 117:14–119:6, 127:1–19. They agreed that Reisdorfer "never spanks." Trial Tr. Vol. II at 119:2–6, 127:20–21.

J.W. recalled waking up one morning and seeing D.C. with "a lot of bruises on him," and he was told by his brother that D.C. "fell out his bed." Trial Tr. Vol. II at 116:21–117:13. J.W. stated that Defendant would spank D.C. with "his belt" and although he was not in the same room as Defendant and D.C., J.W. could hear D.C. crying and screaming because "[h]e screamed pretty loud." Trial Tr. Vol. II at 117:17–118:23.

M.W. testified that Defendant "was my bio dad and he was not safe." Trial Tr. Vol. II at 124:11–13. M.W. stated that when Defendant would punish D.C., Defendant was "mad," and D.C. was "crying out loud." Trial Tr. Vol. II at 127:11–19. One day, M.W. was downstairs and heard a big thump from their bedroom upstairs, and M.W. thought D.C. fell out of bed. Trial Tr. Vol. II at 127:22–128:19. D.C. then developed bruises, and M.W. assumed they were a result of the fall. Trial Tr. Vol. II at 128:4–19.

Dr. Suzanne Haney, a child abuse pediatrician, testified at trial. Dr. Haney examined D.C. on May 29, 2020. Trial Tr. Vol. III at 8:14–17. By this time, "all the bruises that I had reviewed from the images had resolved." Trial Tr. Vol. III at 9:25–10:6. Dr. Haney agreed with Vust that none of Reisdorfer's versions of events could explain D.C.'s injuries. Trial Tr. Vol. III at 11:8–15. Dr. Haney said the number of bruises, their location, and pattern "were very concerning." Trial Tr. Vol. III at 11:23–12:9. Dr. Haney stated that injuries to the ear are "much less likely to be an accident." Trial Tr. Vol. III at 12:10–22. There are "shown studies over time that ear bruises are very specific for abuse." Trial Tr. Vol. III at 12:23–13:4.

As for the linear injuries on D.C.'s face, Dr. Haney said the pattern is not "as common with an accident. Much more common with abuse." Trial Tr. Vol. III at 14:5–21, 16:8–17:4. Dr. Haney agreed a belt could have caused D.C.'s injuries. Trial Tr. Vol. III at 18:12–18.

ARGUMENT

I. Iowa Code Section 915.38(1)(a) is Not Unconstitutional Under Article I, Section 10 of the Iowa Constitution.

Preservation of Error

On appeal, Defendant makes a straightforward argument: Iowa Code section 915.38(1)(a) violates article I, section 10 of the Iowa

Constitution. App. Br. at 53–62. Defendant did not raise this issue in the district court, and the district court never ruled on it. 01-23-2022 Resistance at 3, 01-26-2022 Order; App. 22–30.

Defendant's resistance at the district court was two-pronged: 1) that the protections of *Maryland v. Craig*, 497 U.S. 836 (1990), only extend to minors who are the victim of the crime for which the defendant is on trial; since M.W. and J.W. were not the victims in this case, *Craig* did not permit them to testify by closed-circuit television; and 2) that "the language of Iowa's statute, section 915.38(1)(a), is not as conforming to the requirements of" *Craig* because the "statute does not require the court to find 'serious emotional distress such that the child cannot reasonably communicate.'" 01-23-2022 Resistance at 2, 01-24-2022 Hearing Tr. at 20:20–22:4; App. 21. The district court ruled on these two specific issues. 01-26-2022 Order at 5–6; App. 27–28.

Defendant does not renew these specific arguments on appeal. App. Br. at 53–61. Instead, he makes a broader argument "that article I, section 10 of the Iowa Constitution requires in-person, face-to-face testimony." App. Br. at 61–62. Defendant asserts that he preserved this argument in his written resistance when he asked the district

court to "follow an even stricter approach under Article I Section 10 of the Iowa constitution." 01-23-2022 Resistance at 3; App. 22. But Defendant clarified this argument by stating that "Article I Section 10 requires in person, face-to-face testimony of *nonvictim witnesses*." *Id.* (emphasis added); App. 22. Thus, it seems that Defendant tied his argument for a stricter approach under the Iowa Constitution to his argument that *Craig* does not permit non-victim child witnesses to testify by closed-circuit television. The district court certainly interpreted it that way. *See* 01-26-2022 Order at 5–6; App. 27–28.

Based on Defendant's written resistance, the arguments he made at the January 24, 2022 hearing, and the district court's order, the State believes Defendant failed to make the broad argument he now makes on appeal at the district court. *See* 01-23-2022 Resistance at 2, 01-24-2022 Hearing Tr. at 20:20–22:4; App. 21. But even if he arguably raised this argument, there's no question the district court failed to rule on it. 01-26-2022 Order; App. 23–30. As such, it is not preserved for appeal. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (internal citations omitted) ("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…When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal."); *see also Taft v. Iowa Dist. Court ex rel Linn Cty.*, 828 N.W.2d 309, 322 (Iowa 2013) (citing *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002) ("Even issues implicating constitutional rights must be presented to and ruled upon by the district court in order to preserve error for appeal.").

Standard of Review

Defendant claims Iowa Code section 915.38(1)(a) violates the Iowa Constitution, so review is de novo. *State v. Jefferson*, 574 N.W.2d 268, 271 (Iowa 1997) (internal citations omitted).

Merits

A. Iowa Code section 915.38(1)(a) is not unconstitutional.

As stated above, Defendant's only claim on appeal is that article I, section 10 of the Iowa Constitution always requires face-to-face confrontation, so section 915.38(1)(a) is unconstitutional. Defendant does not assert a violation of his Sixth Amendment rights. App. Br. at 30, fn. 2. Defendant also does not argue that if section 915.38(1)(a) is constitutional, that the district court erred when it permitted M.W.

and J.W. to testify via closed-circuit television. *See State v. Jackson*, 717 S.E.2d 35, 39 (N.C. Ct. App. 2011) ("Defendant does not contend that the individualized findings set out in N.C. Gen.Stat. § 15A–1225.1(b) fail to satisfy *Craig*'s requirements. Nor does he dispute that the trial court held a hearing, made the statutory findings, and found C.G. competent to testify. Rather, Defendant argues that *Craig*'s authorization of the CCTV procedure cannot survive *Crawford v. Washington*[.]"). Nor could he likely do so here, where the evidence at the hearing overwhelmingly established the serious emotion distress, trauma, and regression M.W. and J.W. would suffer if they were required to testify in the presence of Defendant—the father that neglected and abused them. 01-24-2022 Hearing Tr. at 6:10–19:4.

While Defendant makes no claim under the Sixth Amendment, most of his argument revolves around his assertion that "Sixth Amendment jurisprudence is a mess." App. Br. at 53. But this assertion is, at best, overstated. First, Defendant cites to no court—state or federal—that has declined to follow *Craig* or ruled that *Craig* did not survive *Crawford v. Washington*, 541 U.S. 36 (2004). Curiously, Defendant fails to cite cases from the supreme courts of

Illinois and Pennsylvania that held as unconstitutional statutes similar to 915.38(1)(a) under their state constitutions. *See People v. Fitzpatrick*, 633 N.E.2d 685 (Ill. 1994); *Com. v. Ludwig*, 594 A.2d 281 (Pa. 1991). Perhaps this is because the confrontation clauses in the Illinois and Pennsylvania constitutions are materially different from both the federal and Iowa confrontation clauses—which are "identical." *State v. Kennedy*, 846 N.W.2d 517, 522 (Iowa 2014). Unlike the federal and Iowa constitutions, both the Illinois and Pennsylvania constitutions state that "the accused shall have the right *** *to meet the witnesses face to face*." *Fitzpatrick*, 633 N.E.2d at 687 (emphasis in original); *see also Ludwig*, 594 A.2d at 283 (same). It is this difference in the language of the states' constitutions with the federal constitution that led Illinois and Pennsylvania to deviate from *Craig*.

Second, the majority in *Crawford* never mentioned or cited *Craig*, nor did they disavow it. *See*, *generally*, 541 U.S. 36. Considering Justice Scalia's vehement dissent in *Craig*, if he believed *Crawford* overruled, undermined, or abrogated *Craig*, it seems unlikely he would have been reticent about saying so. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative

alone to overrule one of its precedents."). While a handful of courts have discussed the viability of *Craig* post *Crawford*, the United States Supreme Court has had nearly 20 years to clarify whether they intended *Crawford* to overrule or abrogate *Craig*. *See State v. Smith*, 636 S.W.3d 576, 587 (Mo. 2022) (discussing viability of *Craig*, but stating, "[n]evertheless, *Crawford* did not overrule *Craig*….[so] Missouri courts should certainly continue to apply *Craig* to the facts it decided[.]"); *see also People v. Jemison*, 952 N.W.2d 394, 400 (Mich. 2020) (holding same). They have not done so. This silence speaks volumes. *State v. Vogelsberg*, 724 N.W.2d 649, 654 (Wis. Ct. App. 2006) ("Had the Supreme Court intended to overrule *Craig*, it would have done so explicitly. The majority opinion in *Crawford* does not discuss *Craig* or even mention it in passing.").

Recognizing the "enduring reliance on *Craig* in other jurisdictions[,]" the North Carolina Court of Appeals "join[ed] the weight of authority" and determined that *Crawford* did not overrule or undermine *Craig*, and the two precedents can "co-exist." *Jackson*, 717 S.E.2d at 39–40. The North Carolina Court of Appeals stated that the defendant in *Jackson* failed to "recognize that the face-to-face aspect of confrontation at trial was not at issue in *Crawford*, or that

the Court did not hold that such was required in every case." *Id.* at 40; *see also U.S. v. Pack*, 65 M.J. 381, 384 (C.A.A.F. 2007) ("It is important to recognize that *Crawford* did not hold that face-to-face confrontation is required in every case. Rather, it held that the Confrontation Clause required cross-examination and unavailability before testimonial hearsay could be admitted into evidence."). "Where '*Crawford* and *Craig* address distinct confrontation questions,' we may not consider language in a vacuum apart from the distinct contexts in which is appears." *Jackson*, 717 S.E.2d at 40 (quoting *Vogelsberg*, 724 N.W.2d at 654).

Third, most of the cases relied on by Defendant in his brief contemplate under which circumstances to apply the *Craig* test, and there is some disagreement about whether *Craig* should be read narrowly and cabined to the specific facts of that case or should be applied more broadly. Some courts—including Iowa—have determined that *Craig* should be read more broadly and have applied it to situations where the State wishes a witness of any age to testify by two-way closed-circuit television. *See State v. Rogerson*, 855 N.W.2d 495, 498–506 (Iowa 2014); *U.S. v. Yates*, 438 F.3d 1307, 1313–314 (11th Cir. 2006); *Smith*, 636 S.W.3d at 582–87. The Second

Circuit has crafted its own test for this situation. *U.S. v. Gigante*, 166 F.3d 75, 79–82 (2d Cir. 1999). But in this debate, there is no question *Craig* remains good law—courts merely differ on whether it should be cabined to its specific facts.

Finally, the Iowa Supreme Court has recently rejected requests to apply a different standard to confrontation clause issues under the Iowa Constitution. *See In re J.C.*, 877 N.W.2d 447 (Iowa 2016); *Kennedy*, 846 N.W.2d at 522. The Supreme Court should continue to do so. Defendant's interpretation of article I, section 10's right of confrontation is absolute and provides for no exceptions—which is not in keeping with jurisprudence recognizing that trial rights are not absolute. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (recognizing the right to a public trial is not absolute); *U.S. v. Mabie*, 663 F.3d 322, 329 (8th Cir. 2011) ("While a defendant's right to self-representation is a highly valued right, it is not absolute," and it may be terminated if a defendant "deliberately engages in serious and obstructionist misconduct." (internal quotation marks and citations omitted)).

Defendant's entire argument rests on the faulty premise that *Craig*'s holding is erroneous. Defendant bases this argument on a

small minority of concurrences and dissents that have expressed a tension with *Crawford* and *Craig*. But these concurrences and dissents run contrary to the majority of courts that have found the two cases govern related, but different concepts, and can co-exist. And even courts that have expressed a tension between *Craig* and *Crawford* recognize that *Craig* still applies to situations where a minor testifies against a defendant via one-way closed-circuit television—exactly the situation here. At Defendant's trial, "[b]oth purposes of the confrontation clause, cross-examination and observation of the demeanor of the witness" by the trier of fact were served. *State v. Strable*, 313 N.W.2d 497, 501 (Iowa 1981). Defendant's claim should be rejected.

B. Harmless Error

Here, any error in admitting J.W. and M.W.'s testimony was harmless. Constitutional error may be deemed harmless if the beneficiary of the error can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967); *see also State v. Simmons*, 714 N.W.2d 264, 275–76 (Iowa 2006).

This is a two-step process: First, the Court "consider[s] all the evidence the jury actually considered[.]" *Simmons*, 714 N.W.2d at 275 (internal quotation omitted). Second, it "weigh[s] the probative force of that evidence against the erroneously admitted evidence." *Id.* (internal citation omitted). "The inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Id.* (internal citation omitted). "Harmless-error review looks…to the basis on which the jury *actually rested* its verdict." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (internal quotation marks and citation omitted) (emphasis in original).

As will be explained more fully *infra*, the case against Defendant was strong and persuasive. Although M.W. and J.W. provided evidence of Defendant's abusive disciplinarian actions, other evidence established that D.C. was struck with a belt that was owned by Defendant, and Defendant was the only person with the means and opportunity to inflict these injuries on D.C. As such, if there was any error in admitting the testimony, such error would be harmless beyond a reasonable doubt.

II. The District Court Rightfully Rejected Defendant's Proposed Civil Jury Instruction.

Preservation of Error

Defendant preserved the argument he makes on appeal when he requested that the model civil jury instruction on "bad result/injury is not negligence" be given to the jury, and the district court denied his request. Trial Tr. Vol. II at 22:5–23:22.

Standard of Review

Generally, the Court reviews challenges to jury instructions for correction of errors at law. *State v. Hanes*, 790 N.W.2d 545, 548 (Iowa 2010); *see also Alcala v. Marriot Int'l, Inc.*, 880 N.W.2d 699, 707–08 (Iowa 2016). But "Iowa law permits—but does not require—cautionary instructions that mitigate the danger of unfair prejudice." *State v. Plain*, 898 N.W.2d 801, 816 (Iowa 2017) (internal citations omitted). "Cautionary instructions include instructions that recommend a course of action to the jury or that limit the jury's consideration of certain facts." *Id.* (internal citation omitted). Here, Defendant's intent in requesting the disputed instruction was to limit the jury's consideration of certain facts, so review should be for an abuse of discretion.

Merits

Defendant claims the district court erred by denying his request to give model civil jury instruction 700.8, which states, "The mere fact an accident occurred or a party was injured does not mean a party was [negligent] [at fault]." Defendant's argument conflates injury with a criminal act and negligence with guilt.

Under Iowa law, the district court is generally required to give instructions that are requested by a party, so long as they correctly state the law, materially apply to the case, and are not otherwise embodied in other instructions. *State v. Edouard*, 854 N.W.2d 421, 465 (Iowa 2014) (Appel, J., concurring) (*overruled on other grounds by Alcala*, 880 N.W.2d 699 (Iowa 2016)); *see also State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996) ("As long as a requested instruction correctly states the law, has application to the case, and is not stated elsewhere in the instructions, the court must give the requested instruction."). But when the requested instruction is cautionary, its denial only "constitutes an abuse of discretion if the district court's decision rested on clearly untenable or unreasonable grounds[.]" *Plain*, 898 N.W.2d at 817 (internal citations omitted).

First, this proposed instruction does not correctly state the law because negligence was not an element of any of the charged offenses. *See* Jury Instrs. 20, 21, 22; App. 49–51. Injecting the idea of negligence into this trial risked confusing the issues and misleading the jury.

Second, Defendant relies on *Smith v. Koslow*, 757 N.W.2d 677, 681 (2008), to assert the instruction was appropriate here. But *Smith* held "that the submission of the 'bad result/injury is not negligence' instruction to a jury *in a standard medical malpractice action* would not normally constitute prejudicial error." *Id.* at 681 (emphasis added). In a standard medical malpractice action, the jury knows the defendant provided specific care to the plaintiff, and they know the plaintiff suffered an injury. So, although this instruction "tends to state an obvious proposition," it can be helpful in a medical malpractice action where "the jury might improperly use a bad medical result to find negligence," especially when the jury "might reach an improper conclusion that doctors guarantee good results or can be found negligent merely because of a bad result." *Id.* at 681 (internal citations and quotation marks omitted).

That same concern did not exist here—nor likely would it in any criminal trial. In a tort action, part of the jury's function is to weigh and apportion fault between the parties by applying a preponderance of the evidence standard. *See* Iowa Code § 668.3 (Comparative Fault). This is different than a criminal trial where the entire purpose is to determine whether a criminal act even occurred, and if so, who committed it. The trial takes place because the defendant denies his or her involvement, and it is solely the State's burden to prove otherwise beyond a reasonable doubt. It was not unreasonable or untenable for the district court to refuse to import a tort concept into a criminal trial.

And here, "the instruction was entirely unnecessary[,]" because the idea was already embodied in multiple instructions. *Smith*, 757 N.W.2d at 683 (Hecht, J. dissenting). The jury was instructed that Defendant's not guilty plea "is a complete denial of the charges and places the burden on the State to prove guilt beyond a reasonable doubt." Jury Instr. No. 3; App. 45. Defendant "is presumed innocent and not guilty. This presumption of innocence requires you to put aside all suspicion which might arise from the arrest, charge, or the present situation of the defendant." Jury Instr. No. 4; App. 46. "The

burden is on the State to prove [Defendant] guilty beyond a reasonable doubt." Jury Instruction No. 8; App. 47. "To commit a crime a person must intend to do an act which is against the law. While it is not necessary that a person knows the act is against the law, it is necessary that the person was aware he was doing the act and he did it voluntarily, not by mistake or accident." Jury Instr. No. 16; App. 48. These instructions more accurately describe the law in this case and were sufficient to alert the jury about how it should weigh evidence and what it was required to find.

Finally, even if the district court abused its discretion, Defendant has suffered no prejudice. *See State v. Kraai*, 969 N.W.2d 487, 496 (Iowa 2022) (internal citations omitted) ("Error in giving or refusing to give a jury instruction does not warrant reversal unless it results in prejudice to the complaining party."). Here, Defendant's proposed instruction only addressed whether D.C. accidentally obtained his injuries or whether they were inflicted on him. But it had no bearing on, if the injuries were inflicted, who was the culprit. The evidence that D.C.'s injuries were inflicted was overwhelming. *See id.* at 497. D.C.'s injuries were multiple and severe. Trial Tr. Vol. II at 31:23–32:18, 49:11–53:9, 64:10–25, 136:2–15, State's Ex. 6 (Bruises

on Back), State's Ex. 7 (Bruises on Ankle and Leg), State's Ex. 8 (Photo of Bruises), State's Ex. 13 (Bruises on Arm), Ex. 14 (Bruises on Face and Shoulder), State's Ex. 17 (Photo of Bruises), State's Ex. 19 (Photo of Bruises); App. 7–9, 14, 15, 18, 20. Experts testified that these injuries could not be explained by a fall, and the linear injuries to his face and ear were likely inflicted by a belt. Trial Tr. Vol. II at 68:1–18, 69:16–23, Vol. III at 18:1–18. Not even Defendant disputes the sufficiency of the evidence on this element. *See* App. Br. at 77–84 (disputing the sufficiency of the evidence for custody and identity). Thus, the evidence clearly established that someone inflicted these injuries on D.C., so here, giving the proposed instruction would have made no difference.

III. The District Court Did Not Abuse Its Discretion When It Responded to the Jury's Question by Directing the Jury to Re-Read the Instructions Already Given.

Preservation of Error

Defendant is renewing the request he made in the district court, which was overruled. Trial Tr. Vol. III at 87:3–92:10. Error was preserved.

Standard of Review

"[T]he trial court has discretion whether, and to what extent, a jury inquiry should be answered." *See State v. Griffin*, 323 N.W.2d 198, 201 (Iowa 1982). Thus, review is for abuse of discretion.

Merits

During deliberations, the jury sent a note that said, "Does the act in count III, element 3 have to be the defendant doing the act or could him not bringing the child in be counted as cruelty?" Trial Tr. Vol. III at 87:10–19. The jury instruction for count III, element three read: "The defendant intentionally committed an act or series of acts which used unreasonable force, torture, or cruelty that resulted in physical injury to D.C." Jury Instr. No. 22; App. 51. When initially asked about the defense's position, trial counsel stated, "I think it clearly contemplates the defendant committing an act or series of acts." Trial Tr. Vol. III at 88:16–25. But trial counsel asked the district court to issue a supplemental instruction that "inaction does not qualify. It must be action." Trial Tr. Vol. III at 90:22–91:11. The State responded that the instruction "clearly" stated the law, and "the jury is not asking a new question. They're not asking a question that indicates they're confused because of a lack of content in the

instruction. The jury instruction should remain what it is." Trial Tr. Vol. III at 91:13–21.

The district court indicated it read the instruction, and the "last portion, or series of acts which use reasonable force, torture, or cruelty to mean that it was an act, not a failure to act that's being implied by the question. So my position is that I will give an in-writing response to the jury that says…they need to reread the instructions and that there will not be a further instruction on count III." Trial Tr. Vol. III at 89:12–90:5.

Determining how to respond to a jury question is firmly committed to the district court's discretion, and here, the court's response was clearly permissible. *See, e.g.*, *Everett v. State*, 789 N.W.2d 151, 160 (Iowa 2010) ("[T]he court's response to the jury to reread the instructions, which included a correct statement of the law . . . was an appropriate response and would not have resulted in confusion prejudicial to the defendant."); *Vongchanh v. State*, No. 03–1086, 2004 WL 1853921, at *2 (Iowa Ct. App. July 14, 2004) (finding no valid objection could have been raised to answer directing the jury to re-read "the instructions defining first-degree murder, defining joint criminal conduct, defining participation in a crime,

defining 'aiding and abetting,' explaining specific intent, and explaining the effect of multiple prosecution theories").

Defendant argues the jury's question "indicated it believed that [Defendant] not 'bringing the child in' could constitute an act of cruelty." App. Br. at 74. But this is reading too much into the question, and it fails to consider that the marshalling instruction answers it plainly. At the district court, even trial counsel said that the language in instruction 22, "clearly contemplates the defendant committing an act or series of acts." Trial Tr. Vol. III at 88:16–17, Jury Instr. No. 22; App. 51. This clear reading is further buttressed by the fact that "intentionally" appears before "committed." Jury Instr. No. 22; App. 51.

While the jury may have expressed some initial confusion, confusion may typically be dispelled by directing jurors to re-read the instructions. *See, e.g.*, *State v. Williams*, 341 N.W.2d 748, 752 (Iowa 1983) (citing *State v. Dreessen*, 305 N.W.2d 438, 440–41 (Iowa 1981)) ("What the court said was not improper; its innocuous response properly told the jurors they should review the instructions and their verdict must be unanimous. In similar cases, we have found no prejudice."); *State v. Duncan*, No. 17-0670, 2018 WL 1433632, at

*2 (Iowa Ct. App. Mar. 21, 2018) ("Rather than point out two of the principles for the jury to consider, the court properly told the jury to re-read all of the instructions on this subject. The court could properly tell the jury to review the instructions.").

State v. Porter, No. 12-0170, 2013 WL 2146543, at *6 (Iowa Ct. App. May 15, 2013), is directly on point. There, the jury sent a note asking for a definition of the phrase "extreme indifference to human life." *Id.* at *5. The district court did not answer that specific question and instead "directed the jury to reread the instructions in their entirety." *Id.* On appeal, the defendant claimed this response was error because "the jury was confused by the phrase and was left to flounder as to the meaning of a term that was an essential element of first-degree murder." *Id.* at *6 (internal quotation marks omitted). Following established case law, the court of appeals rejected this claim because "'words used in a jury instruction need not be defined if they are of ordinary usage and are generally understood.'" *Id.* (quoting *State v. Thompson*, 570 N.W.2d 765, 768 (Iowa 1997)).

The same is true here. Element three of instruction 22 needed no further explanation. That instruction is wholly consistent with Iowa law on the subject. *See State v. Reeves*, 636 N.W.2d 22, 24–26

(Iowa 2001) (collecting cases). It correctly and unambiguously stated this law, and its meaning was plain. *See* Iowa Code § 726.6(1)(b). The district court did not abuse its discretion when it declined to elaborate further, and instead directed the jurors to re-read the instructions.

Finally, "a conviction should not be reversed for claimed errors in jury instructions unless there is a reasonable basis for finding that the jury was confused or that the instructions, when viewed as a whole, were so contradictory that the jury may have followed the wrong one." *See State v. Lee*, 494 N.W.2d 706, 707 (Iowa 1993). As explained above, there was no such risk here. Defendant's claim fails.

IV. The Evidence Was Sufficient to Support Defendant's Conviction.

Preservation of Error

The State cannot contest error preservation. *State v. Crawford*, 972 N.W.2d 189, 195–202 (Iowa 2022).

Standard of Review

"Challenges to the sufficiency of the evidence are reviewed for correction of errors at law." *State v. Hansen*, 750 N.W.2d 111, 112 (Iowa 2008).

Merits

"The district court's findings of guilt are binding on appeal if supported by substantial evidence. Evidence is substantial if it would convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt." *Id.* The evidence is viewed in the light more favorable to the State, including legitimate inferences and presumptions that can fairly and reasonably be deduced from the record. *Biddle*, 652 N.W.2d at 197. Evidence is not insubstantial merely because the evidence could support contrary inferences or because the verdict rests on weighing the credibility of conflicting witness testimony. *Id.* "Direct and circumstantial evidence are equally probative." Iowa R. App. P. 6.904(3)(p); *see also State v. Thomas*, 847 N.W.2d 438, 447 (Iowa 2014). When considering a sufficiency claim, "[i]t is not the province of the court…to resolve conflicts in the evidence, to pass upon the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence; such matters are for the jury." *State v. Musser*, 721 N.W.2d 758, 761 (Iowa 2006).

A. The evidence was sufficient to show Defendant had custody of D.C.

In count one, Defendant was charged under Iowa Code section 726.3, neglect of a dependant person. In element one of this count,

the jury was marshalled to find whether Defendant "was the parent or person having custody of [D.C.]" per the requirements of section 726.3. *See* Iowa Code § 726.3; Jury Instr. No. 20; App. 49. Custody was defined as "not limited to legal custody. It means to be in charge of an individual and to hold the responsibility to care for that individual. Custody not only means power of oversight but also a responsibility for the care of an individual." Jury Instr. No. 23; App. 52.

In *State v. Johnson*, the Iowa Supreme Court found that "custody" for purposes of Iowa Code section 726.3, meant "the care and control of another[,]" and held that the statute is "applicable to all situations in which one individual may be charged with the care and control of another." 528 N.W.2d 638, 641–42 (Iowa 1995). In *State v. Leckington*, the Supreme Court found this element was established when the defendant, at the behest of her young son, picked up and drove an intoxicated friend of her son to their house. 713 N.W.2d 208, 213 (Iowa 2006). The Supreme Court found that when "one chooses to move someone in a helpless condition, they not only take charge of that person, but they also assume responsibility for that person[.]" *Id.* at 216.

The evidence at trial showed that Defendant was in a romantic relationship with D.C.'s mother, Reisdorfer, and he and his three children cohabitated with them. Trial Tr. Vol. II at 34:13–35:12, 114:18–24, 125:16–126:10. This was a long-standing relationship, and DHS "was involved due to issues between [Defendant], Reisdorfer, and [D.C.] prior" to the incident on May 5, 2020. Trial Tr. Vol. II at 132:6–16. Defendant's children shared a bedroom with D.C., and they testified at trial that Defendant was the disciplinarian in the house. Trial Tr. Vol. II at 116:8–20, 117:14–119:6, 127:1–21. J.W. even considered himself as one of Reisdorfer's kids. Trial Tr. Vol. II at 113:5–22.

Diekevers testified that when she made the unannounced visit to the home, Defendant would not allow her access to D.C., claiming he had been up with the children since 6:00 a.m., and they were "just settling down for naps." Trial Tr. Vol. II at 29:1–12. When Diekevers offered to "just peek in the rooms and walk through the house and not wake up the children, [] [Defendant] still said no." Trial Tr. Vol. II at 29:19–24. When Warnke arrived at the house, both Defendant and Reisdorfer initially denied her access to D.C. Trial Tr. Vol. II at 134:11–20. Also, about a week before May 5, Reisdorfer left D.C. in

the care of Defendant because she drove her older son to North Dakota to stay with his grandmother. Trial Tr. Vol. II at 152:5–153:5. Defendant asserts that the testimony D.C. "remained in the home" when Reisdorfer drove to North Carolina does "not indicate who took care of D.C." App. Br. at 81. But the evidence at trial showed Defendant was the only other adult who lived in the home and was the only person there to care for D.C. in Reisdorfer's absence. Trial Tr. Vol. II at 93:23–94:10, 151:2–24, 154:21–155:13.

This evidence established that Defendant and his family lived with Reisdorfer and D.C., that Reisdorfer sometimes left D.C. in the sole care of Defendant, that Defendant was the disciplinarian and often spanked D.C., that Defendant's relationship with D.C. was already being supervised by DHS, and when childcare workers and law enforcement arrived at the house, Defendant dictated their access to D.C. This was more than sufficient to establish Defendant had custody of D.C. for the purposes of section 726.3. *See State v. Harris*, No. 18-2000, 2019 WL 4302131, at *1 (Iowa Ct. App. Sept. 11, 2019) (finding custody when the evidence showed the victim "had lived in Harris's home for almost a year, and Harris admitted that he looked

after [the victim], and gave [the victim] food and water when his wife was at work.").

B. The evidence was sufficient to show Defendant was the person who harmed D.C.

Defendant also claims the evidence was not sufficient to show that he was the person who harmed D.C. Both M.W. and J.W. testified that Defendant often spanked D.C. with a belt in rooms where Defendant and D.C. were alone and could not be observed. Trial Tr. Vol. II at 117:17–118:23, 127:11–19. There was also testimony that a belt was used to inflict the injuries to D.C.'s face, and a search warrant revealed a belt of Defendant's that matched the injuries. Trial Tr. Vol. II at 68:1–18, 69:16–23, 73:17–74:15, 79:2–81:21, 117:17–118:23, Vol. III at 18:12–18. M.W. and J.W. also testified that Reisdorfer never spanked them or D.C. Trial Tr. Vol. II at 119:2–6, 127:20–21. And while Reisdorfer was legally married and D.C.'s biological father had visitation rights with D.C., neither man lived in the home with Defendant, Reisdorfer, and the kids. Trial Tr. Vol. II at 93:23–94:10, 151:2–24, 154:21–155:13. And D.C.'s father testified that on April 30, 2020, he visited with D.C. and no bruises appeared on his face at the time. Trial Tr. Vol. II at 94:16–95:1, 95:20–24, State's Ex. 1 (D.C. Prior to Injuries), State's Ex. 2 (D.C. Prior to

Injuries); Conf. App. 5, 6. This evidence showed Defendant was the only person with the motive, means, and opportunity and was sufficient to show he was the person who inflicted the severe injuries to D.C.'s face and body.

V. Defendant's Failure to File a Financial Affidavit Waives His Claim That He Does Not Have the Reasonably Ability to Pay Category B Restitution.

Preservation of Error

Because the district court ordered category B restitution in the sentencing order, the State agrees error is preserved. However, under Iowa Code section 910.2A(2)(b), Defendant has waived this claim. As the district court noted at sentencing, Defendant did not file an affidavit of financial status. Sent. Tr. at 20:9–21:9. Section 910.2A(2)(b) required Defendant to "furnish the prosecuting attorney and sentencing court with a completed financial affidavit. Failure to furnish a completed financial affidavit waives any claim regarding the offender's reasonable ability to pay." Iowa Code § 910.2A(2)(b) (2020). Thus, Defendant has waived his right to assert he does not have the reasonable ability to pay category B restitution.

Standard of Review

Review is for legal error, and the appellate court's sole task is to "determine whether the court's findings lack substantial evidentiary

support, or whether the court has not properly applied the law." *State v. DeLong*, 943 N.W.2d 600, 604 (Iowa 2020) (internal citation and quotation marks omitted).

Merits

Under section 910.2A, Defendant "is presumed to have the reasonable ability to make restitution payments for the full amount of category 'B' restitution" and can only rebut that presumption by "affirmatively prov[ing] by a preponderance of the evidence that [he] is unable to reasonably make payments toward the full amount of category 'B' restitution." Iowa Code § 910.2A(1) & (2)(a). Defendant does not mention this standard in his brief and does not try to rebut the presumption of his reasonable ability to make payments toward the amount; nor did he do this at the district court. Because it is Defendant's burden to rebut this presumption and he failed to do so, his claim automatically fails. *See State v. Myers*, 653 N.W.2d 574, 578–79 (Iowa 2002) ("We conclude Myers failed to prove, or even assert, that there was a reasonable probability that, 'but for counsel's error[], [s]he would not have pleaded guilty and would have insisted on going to trial.' Her right to compulsory process cannot be claimed in a vacuum.").

Here, before determining Defendant had the reasonable ability to pay up to $10,000 of category B restitution, the district court appropriately considered Defendant's ability to work, employability, his education, and outstanding debt. Sent. Tr. at 21:13–24:21. While trial counsel asked "the court in light of the circumstances and the amount find [Defendant] not have the reasonable ability to pay or at least limit it to a certain smaller figure," Defendant presented no evidence and made no argument that he was unable to make payments toward this restitution. Sent. Tr. at 23:16–19. As such, Defendant has failed to rebut the statutory presumption of his reasonable ability to pay.

CONCLUSION

For all the reasons stated above, the State respectfully requests that this Court affirm Defendant's conviction and sentence.

REQUEST FOR NONORAL SUBMISSION

The State requests that this case be submitted without oral argument.

Respectfully submitted,

BRENNA BIRD
Attorney General of Iowa

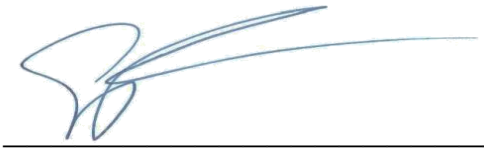
GENEVIEVE REINKOESTER
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
genevieve.reinkoester@ag.iowa.gov

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:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **7,937** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: March 15, 2023



GENEVIEVE REINKOESTER
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
genevieve.reinkoester@ag.iowa.gov