IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. DEREK MICHAEL WHITE, Defendant-Appellant.	S.CT. NO. 22-0522

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

APPELLANT'S REPLY BRIEF AND ARGUMENT

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FINAL

CERTIFICATE OF SERVICE

On the 14th day of April, 2023, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Derek White, No. 6346954, Anamosa State Penitentiary, 406 North High Street, Anamosa, IA 52205.

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STATEMENT OF THE CASE

COMES NOW Defendant-Appellant Derek White, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's brief. While Appellant's brief adequately addresses the issues presented for review, a short reply is necessary to address error preservation.

ARGUMENT

I. Error is preserved under the Iowa Constitution by the issue being raised, argued, and decided below.

The issue of face-to-face confrontation under the Iowa Constitution was raised, argued, and decided. The State first raised the issue of face-to-face confrontation in its request for a protective order by quoting State v. Rogerson, 855 N.W.2d 495, 499 (Iowa 2014), "While there is a 'strong preference for face-to-face confrontation, the latter is not an absolute constitutional requirement.'" (Motion for Protective Order ¶9) (App. p. 17).

In written resistance, the defense argued the following:

> The [S]tate is requesting that the testimony of two nonvictim children be allowed to be presented via closed circuit television. Allowing such testimony in that way would violate the Sixth Amendment Confrontation Clause rights of the defender under the U.S. Constitution as well as violate his confrontation rights under Article I Section 10 of the Iowa Constitution.
>
> …
>
> The Court should follow an even stricter approach under Article I Section 10 of the Iowa Constitution. The court should follow the reasoning of the dissenters in Craig (J's. Scalia, Brennan, Marshall and Stevens) who reasoned:
>
> > "to confront" plainly means to encounter face to face, whatever else it may mean in addition. And we are not talking about the manner of arranging that face-to-face encounter, but about whether it shall occur at all. The "necessities of trial and the adversary process" are irrelevant here, since they cannot alter the constitutional text.
>
> Craig at 864. At the very least, Article I Section 10 requires in person, face-to-face testimony of nonvictim witnesses.

(Resistance to Protective Order pp. 1-3) (App. pp. 20-22).

At the hearing on the protective order, the State argued:

> You have my initial motion. You have the defendant's response. The defendant's response or

> resistance, of course, ignores all of Iowa law where these issues have actually been dealt with. *So the claim that this goes against the Iowa constitution, our supreme court has found that this is absolutely appropriate. It's appropriate whether someone is a victim or just a minor. That is case law as well as the statute. It talks about the fact that it is not something that is a violation of our constitution for confrontation rights.* Certainly the therapist that has been working with these two children knows them best. This is a unique situation in that not only are they testifying as witnesses to someone else's abuse or knowledge of something about that, they've been abused by this man. So the idea that we shouldn't allow them to do closed circuit TV because they also might have trauma as a result of testifying outside of his presence is just a nonstarter. We are trying to minimize the trauma. And sitting in a room in front of the person that you have nightmares about, that you have been removed from not once but twice and talking about that person that is also your father that you have very complicated feelings about because you also love him is certainly what this is about. And this is why this statute has been adopted here in Iowa. And there's nothing about [Defense Counsel's] resistance or questions, quite frankly, for cross-examination that should sway this court from allowing us to use closed circuit TV for these two children.

(Hearing 19:19-21) (emphasis added).

The defense responded:

> Well, the case law that I believe the State cited in its motion, those cases, those appellate cases, those

> were children that were victims of the abuse as far as I can remember reading that. But regardless, you know, the State's the one that's calling these children and witnesses. So they're the ones that are subjecting the children to the trauma. *Now, obviously the defendant still has a right to confrontation. The Iowa constitution generally is interpreted to grant more protection than the federal constitution.* In this case the trauma that's been testified about and the regression and the inability to communicate, that possibility exists even in the closed circuit television situation. So I'm not sure that the court can really make a determination that we're going to then impair the confrontation rights of the defendant when we don't know if this is really going to -- either this is really going to assist in any way. So anyway -- and in addition to the case law in the response that I cited. Thank you.

(Hearing 20:20-21:12) (emphasis added).

The district court took the matter under advisement. (Hearing 22:5-10). It later issued a written ruling that stated in relevant part:

> The Defense asserts the Supreme Court in Maryland meant to protect *victim* witnesses from further trauma by allowing *victim* witnesses to testify outside the presence of their accusers (emphasis added). Iowa Code 915.38 provides in relevant part that the court may "protect a minor…" but does not specifically say a minor *victim*. (Iowa 2021). Defense goes on to argue Iowa Code Section 915.38 is broader than the Supreme Court's ruling

in Maryland in that Iowa's statute does not require a finding by the court that "serious emotional distress such that the child cannot reasonably communicate." See Craig at 855. Defense counsel asks the court to follow a stricter approach than required by the Iowa Code.

The court having had an opportunity to review the relevant case law declines to adopt Defense counsel's stricter approach. First, Iowa Code Section 915.38 provides that the court may protect a *minor* witness and does not require the minor witness to be a victim, but even if it did, M.W. and J.W. are victims.

The testimony presented by Haidar indicates both M.W. and J.W. are victims of physical child abuse perpetrated by Defendant. However, Defendant is not charged in the instant offense with abuse of M.W. and J.W. Defense counsel did not argue the minor witnesses must be victims charged in the instant offense.[1] Both the presented argument and the hypothetical posed herein are not requirements of Iowa Code Section 915.38.

Second, the Iowa Supreme Court has upheld the constitutionality of Iowa Code Section 915.38. The court is required to make a finding that the children would suffer such serious emotional distress that they would not be reasonably able to communicate. See Craig, 497 U.S. at 858, 110 S. Ct. at 3170, 111 L.Ed.2d at 686-87. Iowa Code Section 915.38(1) "preserves the defendant's basic right to confrontation while protecting the minor victims from the trauma which often results from testifying in the defendant's physical presence. *If this trauma impairs or handicaps a child's ability to*

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1 Defense counsel did, indeed, make this argument. (Resistance to protective order p. 2) (App. p. 21).

> *communicat*e, protective measures must be adopted." State v. Rupe, 534 N.W.2d at 444 (emphasis added).

(Ruling on Protective Order pp. 5-6) (App. pp. 27-28) (emphasis in original).

The record quoted above demonstrates that the issues raised on appeal were raised, argued, and ruled upon below. The Court should reject the State's error preservation argument.

II. White's challenge to his reasonable ability to pay is not waived.

The district court's decision to place White under oath rather than requiring a financial affidavit under penalty of perjury should suffice under Iowa Code Section 910.2A(2)(b). After imposing a prison sentence, the district court turned to reasonable ability to pay:

> THE COURT . . . Also there may be what's characterized as category B restitution. And that restitution is for things like the court reporter's time, the court costs, and your court-appointed attorney fees for [Defense Counsel's] time. I do not see that you have filed an affidavit of financial status, but I would note that you have 30 days from

> today's date, the date the judgment entry will be filed in which to request a hearing on your ability to repay those court costs. I don't have an idea of what those court costs are at this point. The clerk will certify the costs in the file, and then you are certainly free to request a hearing on your reasonable ability to pay those costs. I am prepared, if the parties wish, to conduct a reasonable ability to pay hearing at this time. Otherwise I will leave it to the defendant to file that. [Defense Counsel], how do you wish to proceed with regards to category B restitution?
>
> [DEFENSE COUNSEL]: I guess I would ask that the court address it today.
>
> THE COURT: In order to do that I'm going to ask permission to place your client under oath. Is that acceptable to you?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: Mr. White, I'm going to do that right now so we can take care of this piece of the sentencing with regards to category B restitution. So I'm going to ask that you raise your right hand.

(Sentencing 20:9-21:9).

The financial affidavit for a determination of reasonable ability pay requires a defendant's date of birth, outstanding court obligations, total restitution in the instant case, highest level of education, employment status and pay, any other

sources of income, monthly expenses, dependents, unpaid judgments, garnishments, assets, any other outstanding debts, any anticipated inheritances or gifts, and any personal circumstances that will affect the ability to pay. The document must be signed under penalty of perjury.

Placing White under oath to question him was the equivalent of signing a financial affidavit under oath. The district court was aware of White's date of birth from the PSI. (PSI p. 1) (Conf. App. p. 24). Defense counsel estimated attorney's fees at $15,000, and the district court acknowledged there would be court costs and filing fees. (Sentencing 21:13-22:2). The district court questioned White about his current employment and prospects after prison. (Sentencing 22:1-18). The district court asked White about any other outstanding court or other debts; White explained his child support obligations. (Sentencing 22:19-23:12). The court confirmed he has his GED. (Sentencing 22:13-15). Placing White under oath for questioning should suffice.

Furthermore, White rebutted the presumption that he had the ability to pay by pointing out that he was uncertain if what would happen "down the road" regarding employment and by advising the court of his child support obligations. (Sentencing 22:4-23:12). Defense counsel also asked, "[I]n light of the circumstances and the amount find he not have the reasonable ability to pay or at least limit it to a certain smaller figure." (Sentencing 23:13-19).

Additionally, a recent report highlights the problems with the reasonable ability to pay procedure in Iowa. Marea Beeman, et. al., At What Cost? Findings from an Examination into the Imposition of Public Defense System Fees, NLADA (July 2022), at 49-61, https://www.nlada.org/sites/default/files/NLADA_At_What_Cost.pdf. The variability in the practice of determining the ability to pay without guidelines for the courts is particularly harmful, as can be seen in the instant case. Id. at 58-59.

Finally, the State did not object to the district court placing White under oath rather than requiring a financial affidavit, nor did it take a position on White's reasonable ability to pay. (Sentencing 23:20-22). Any argument the State raises on appeal regarding error preservation should therefore be deemed waived.

In conclusion, the Court should find that error is not waived. If the Court should find that a financial affidavit is required, the case should be remanded for a new hearing at which White can present a financial affidavit in support of his claim that he doesn't have the reasonable ability to pay.

CONCLUSION

For all of the reasons discussed above and, in the Brief and Argument, Defendant-Appellant Derek White respectfully requests this Court reverse and remand this case to the Osceola County District Court for a new trial, or in the alternative, dismissal of the charges.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $2.00, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

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) because:

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 1,979 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: *4/14/23*

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