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IN THE SUPREME COURT OF IOWA
Supreme Court No. 22–0390

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KARI SCHWARTZ,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BUCHANAN COUNTY
THE HON. JOHN BAUERCAMPER, JUDGE

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Was the evidence sufficient to support this conviction for sexual exploitation by a school employee?

<u>Authorities</u>

State v. Crawford, 972 N.W.2d 189 (Iowa 2022)
State v. Gay, 526 N.W.2d 294 (Iowa 1995)
State v. Hennings, 791 N.W.2d 828 (Iowa 2010)
State v. Jorgensen, 758 N.W.2d 830 (Iowa 2008)
State v. Sanford, 814 N.W.2d 611 (Iowa 2012)
State v. Wickes, 910 N.W.2d 554 (Iowa 2018)

II. Did the trial court err in overruling an objection to a jury instruction that defined sexual conduct?

<u>Authorities</u>

Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
Rivera v. Woodward Res. Ctr., 865 N.W.2d 887 (Iowa 2015)
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Stringer v. State, 522 N.W.2d 797 (Iowa 1994)
Thavenet v. Davis, 589 N.W.2d 233 (Iowa 1999)
Iowa Code § 709.15(3)(a)(2)

III. Did the trial court err in excluding evidence about the outcome of another fact-finder's investigation into allegations against the defendant, before the victim had reported inappropriately sexual touching?

Authorities

In re Estate of Herm, 284 N.W.2d 191 (Iowa 1979)
State v. Alberts, 722 N.W.2d 402 (Iowa 2006)
State v. Huston, 825 N.W.2d 531 (Iowa 2013)
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IV. Does it violate *Alleyne* to apply the ineligibility clause of section 907.3 at sentencing, if the jury was not asked to find that the defendant was a mandatory reporter or that the victim was under the age of 18?

Authorities

Alleyne v. United States, 570 U.S. 99 (2013)
Blakely v. Washington, 542 U.S. 296 (2004)
Neder v. United States, 527 U.S. 1 (1999)
United States v. Carr, 761 F.3d 1068 (9th Cir. 2014)
United States v. Confredo, 528 F.3d 143 (2d Cir. 2008)
United States v. Fincher, 929 F.3d 501 (7th Cir. 2019)
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United States v. King, 773 F.3d 48 (5th Cir. 2014)
United States v. Leanos, 827 F.3d 1167 (8th Cir. 2016)
United States v. Peña, 55 F.4th 367 (2d Cir. 2022)
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State v. Pettinger, No. 19–1309, 2021 WL 210757
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State v. Taggart, 430 N.W.2d 423 (Iowa 1988)
Iowa Code § 907.3

ROUTING STATEMENT

Schwartz requests retention. *See* Def's Br. at 12. But this appeal only raises issues that can be resolved by applying established legal principles, so it should be transferred to the Iowa Court of Appeals. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This is Kari Schwartz's direct appeal from her conviction for sexual exploitation by a school employee, a Class D felony, in violation of Iowa Code section 709.15(3)(a) (2009). A jury heard testimony from A.S., who testified that Schwartz was her teacher in Fall 2009. During the first few weeks of the semester, Schwartz pursued an intensifying relationship with A.S.—including personal conversations, close hugs, and intimate messages. It culminated in an incident where Schwartz followed A.S. into a stairwell, hugged her, and reached into her pants to touch her "above the clitoris area." A.S. reported everything but the sexual touching in 2009. Schwartz left that school, before the school completed any investigation. Years later, A.S. decided to report that incident of sexual touching to police (and to Schwartz's new school). The jury found Schwartz guilty. The sentencing court imposed a five-year indeterminate sentence, a ten-year special sentence, and a fine.

In this direct appeal, Schwartz raises four challenges:

(1) The evidence was insufficient to support conviction for a pattern, a practice, or a scheme of conduct to engage in sexual conduct with A.S., under section 709.15(3)(a)(1).

(2) The trial court erred by overruling her objection to the inclusion of "hugging" in the non-exhaustive definition of "sexual conduct" in Jury Instruction 16.

(3) The trial court erred in excluding evidence of the findings of an investigation into Schwartz's conduct, years before A.S. reported the incident of sexual touching.

(4) Her sentence was imposed in violation of *Alleyne v. United States*, 570 U.S. 99 (2013), because the jury did not find the facts that made her ineligible for a deferred judgment or suspended sentence under section 907.3.

Statement of Facts

In August 2009, Schwartz was an art teacher at Independence High School in Independence, Iowa. A.S. was starting her senior year. She was 17 years old. *See* TrialTr.V2 21:12–32:19. A.S. enrolled in one of Schwartz's art classes. There were "roughly twenty" students. *See* TrialTr.V2 35:7–36:1. But Schwartz took a special interest in A.S.:

> So at first it seemed like a very normal teacher-student relationship, very interested in what I was doing, helpful. She started spending more time at my table with the three peers that were at my table and myself.
>
> [. . .]
>
> So she would spend time at our table starting working with artwork and stuff, but then sometimes these conversations would get to a point where they were very personal on her end.

> [. . .]
>
> It seemed like there was an extra amount of time spent at our table, specifically in my corner, so to say, a lot of that time.

See TrialTr.V2 38:7–40:17. Those stories were about intimate details of Schwartz's personal life. *See id.* Schwartz also interacted with A.S. outside of class—either A.S. would come to the art room, or Schwartz would find A.S. in another teacher's room and "start talking to [her]." *See* TrialTr.V2 40:18–41:4. A.S. "felt really compelled that she trusted [her] and it really made [her] feel good." *See* TrialTr.V2 41:5–42:2.

Schwartz made comments about A.S.'s body: "she would call me beautiful and [say] how pretty I was." *See* TrialTr.V2 43:12–44:18. And A.S. said Schwartz also initiated "constant physical contact of some sort almost every time" they interacted—"she either wanted a hug or she had to touch me in some way." *See* TrialTr.V2 43:1–11.

> **STATE**: Now, can you tell us more about those hugs? Can you describe the nature of hugs that you received from the defendant?
>
> **A.S.**: So they weren't, like, your side hug. It was, like, a full-on chest-to-chest type hug. Like, I would describe it as a bear hug, like, full body, full strength, like, very intimate and close.
>
> **STATE**: Would she hold onto your hugs? Would she take longer than just a regular hug from a person?
>
> **A.S.**: I do remember describing in my head, like, wow, this is taking a long time. . . .

TrialTr.V2 46:4–16; *accord* TrialTr.V2 139:6–140:11.

In late September, Schwartz overheard A.S. inviting classmates to pick pumpkins with her family, that coming Sunday. Schwartz invited herself along, and she showed up. During that outing, Schwartz sent some text messages to A.S. that made A.S. uncomfortable.

> . . . [W]e were sitting idle in the field and we were sitting on some buckets, and I remember her sitting two, three feet away from me and receiving a text message from her that said, "Love ya." And I didn't respond. She sent another one asking me if I wanted to go rollerblading or go to her house sometime.
>
> [. . .]
>
> That was actually probably the — one of the bigger alarms that I received because, like, this is a very unsolicited, out-of-the-blue comment of love towards me.
>
> [. . .]
>
> . . . I responded back with a change of subject.

TrialTr.V2 49:16–50:23. One of A.S.'s friends wanted to take pictures. Schwartz joined in. Someone took a picture of "Schwartz and A.S. in a very intimate hug." *See* TrialTr.V2 50:24–51:11; State's Ex. 3; C-App. 11. A.S. stated that the hug in that photo was the same kind of hug that Schwartz would typically give her. *See* TrialTr.V2 60:9–61:11.

That night, Schwartz sent more text messages to A.S., including a text message that said "that she loved [A.S.] and that it was worth the world to her." *See* TrialTr.V2 51:12–24.

Sometime during the next day, Schwartz sent A.S. an e-mail.

> Monday rolls around; go to class, everything's normal. . . . [B]ut there was an e-mail that came through in the afternoon during school hours from her school e-mail that was to me; I received it after school and I read it. It talked about a lot of personal in-depth things, a lot of infatuation about me, how she isn't supposed to love students but she loved me. I had eventually taken this email and I printed it off and I took it to bed and I read it over and over and over and over because —
>
> [. . .]
>
> So I was reading it over and over because I was really confused. I was, like, what is going on here. This is a teacher that I'm trusting; she seems to be crossing into this wanting to be in a romantic-type partner by the comments she's making towards me and I was very uncomfortable.

TrialTr.V2 51:25–52:25. On Tuesday morning, A.S. took that e-mail to another teacher (Rachel Hurley) and asked her to read it, because A.S. was "not sure how to take this." *See* TrialTr.V2 53:12:25. Hurley said she would take it to the principal. *See* TrialTr.V2 71:21–72:21. Hurley did so. *See* TrialTr.V3 10:21–12:2.

That e-mail from Schwartz included these phrases:

> Dear [A], Sweetie [A], I wish i could fix all your hurts. If only it were so easy as to kiss it and say its all better. . . . So I am probably not suppose to love my students, but I do you. . . . If you have a bad night call me I can come get you we can do something, or we can just talk, or we can just say nothing at all and I will just be by your side. By the way, you give the best hugs ever, like you mean it. Or maybe its just your pipes being so strong!

State's Ex. 6; C-App. 13; TrialTr.V2 65:10–68:3. A.S. sent a reply, on Monday evening. She felt "compelled that [she] had to respond back" because Schwartz was her teacher. *See* TrialTr.V2 68:4–69:1; State's Ex. 7; C-App. 14. Also on Monday evening, before A.S. had sent her reply e-mail to Schwartz, she received text messages from Schwartz that said "[t]hinking of you" and "I luv ya n u r worth the world." *See* State's Ex. 5; C-App. 12; TrialTr.V2 70:19–71:15. Those text messages were "unprompted." *See* TrialTr.V2 63:10–65:9.

Schwartz sent A.S. another e-mail, before sunrise on Tuesday. *See* State's Ex. 8; C-App. 15; TrialTr.V2 69:2–70:18. It was addressed to "Sweetest [A]." Schwartz wrote that she felt very close to A.S., and she said: "I do hope to learn more about you as the days go by." She also wrote: "[S]ometimes i think i get the better end of the deal cause I get one of your hugs. :) So if I get to attached make sure you say something." And Schwartz had ended the e-mail with "[l]ove ya!" *See* State's Ex. 8; C-App. 15.

A.S. had class with Schwartz on Tuesday. A.S. was quiet in class and tried to keep to herself. But Schwartz approached her after class:

> [T]he bell rang for everybody to leave, and Ms. Schwartz asked me, "What's wrong," because I'd been quiet. And I said, "Nothing. I don't want to talk about it." And she persisted and said, "What's wrong?" Again, I didn't

want to talk about it. She grabbed my arm, said, "You're going to talk about it," and I hesitated. At this point we had gotten to the top of the stairs, and with her persistence I was like, okay, I will talk to you. And I had sat down on the step, anticipating that she would sit next to me like a normal person would when they are communicating with you somewhere if you're on a step, but instead she sat on the step behind me and straddled around me with her legs wrapped around either side of me and took me in what I would describe as kind of a bear hug.

[. . .]

Her left arm, I very vividly remember, was across my face. Because I was crying, and so I had tears, my nose was running, and I very, very fully remember her having on a fleece jacket because, if you're familiar with fleece, it does not absorb anything. And so here I am with this jacket, slimy all over my face. I was really uncomfortable. It was hard to breathe. At that same point I recall hearing students down below at the bottom of the stairwell, you know, sneakers, like, the screech, and people talking going on amongst themselves wherever they were going. I very vividly remember her right above my right ear, very close, like, to the point where I can feel her breath on my ear, and her whispering into my ear, "It's going to be okay, it's going to be okay, it's going to be okay." And in my head I was like, I need to get out of here. And at that point she had me in this bear hug, so left arm was across my face; the other arm is kind of down towards my hip. Her hand went up above my clothes to the chest and then it had gone down to my pants line. *And she went below my clothing towards my pubic area. I would describe it as, I guess, to say kind of, like, above the clitoris area*. At that point two boys started walking up the steps, and she stood up and went down to the platform of the steps, the middle one, and started directing these boys to whatever they were supposed to do. And I stood up. These boys clearly passed me. I'm, like, a crying mess, and I walked past her and I go down to the main level. And . . . she says down to me, "Are you going to be okay?" And I just said, "Yep," and I left.

TrialTr.V2 71:16–74:1 (emphasis added). Schwartz had taken A.S. to a relatively isolated staircase, before she touched A.S. over her clitoris, "[u]nderneath [her] clothes." *See* TrialTr.V2 77:14–78:23. When she did that, A.S. felt "violated." *See* TrialTr.V2 79:11–13. A.S. was "frozen" and "in a state of shock." *See* TrialTr.V2 80:15–19. Schwartz did not stop until they heard sounds that indicated that other students were about to come up the stairs. *See* TrialTr.V2 79:14–80:14. ("You could hear their footsteps and them talking before coming up the stairs.").

After that assault, Schwartz sent A.S. another e-mail. It said:

> quiet girl today. I do want to hear what happened last night if you want to share. I am here in person, no kids 4th or written works to. So what do you believe?

State's Ex. 10; C-App. 16; TrialTr.V2 82:25–84:9.

A.S. went on with her school day. That meant going to Hurley's classroom to "work on the yearbook." Hurley said that they needed to talk to A.S.'s parents about this. That evening, A.S. and Hurley went to talk to A.S.'s mother. *See* TrialTr.V2 81:6–24.

Meanwhile, Hurley gave Schwartz's first e-mail to the principal, Jennifer Sornson. *See* TrialTr.V3 10:21–12:2; *accord* TrialTr.V2 85:17–86:17. Sornson obtained other e-mails and text messages from A.S. and A.S.'s parents, and then she began a Level I investigation. That

meant speaking with Schwartz. *See* TrialTr.V2 181:2–185:1. Schwartz admitted to sending A.S. those e-mails and those text messages. She also admitted to hugging A.S. on more than one occasion. And she admitted to inviting A.S. to visit her room during "planning time," when nobody else would be around. *See* TrialTr.V2 185:2–187:25. Sornson testified that Schwartz left her employment with the school at the beginning of that investigation. *See* TrialTr.V2 188:13–25

But A.S. never told Hurley, Sornson, or any school official about the incident of sexual touching in the staircase. A.S. explained why:

> Because I was terrified. It was confusing. This was another female who did this to me and it really threw me off, and I was embarrassed and afraid. . . . [W]hen this started to get all stirred up, students were making comments and I was afraid to say anything.
>
> [. . .]
>
> Like, I received messages on Facebook. . . . I remember somebody saying, "I'm going to go beat the shit out of whoever got Schwartz fired," and I'm sitting in the back like, they have no idea it's me and they're talking like this.

See TrialTr.V2 86:17–88:16. A.S. did not even tell her parents. *See* TrialTr.V2 103:12–104:22. A.S. reported the e-mails, and nothing else. But she told a confidant (Tia Shaffer, who taught at another school) that there was some inappropriate physical touching by a teacher. *See* TrialTr.V2 133:6–134:3; TrialTr.V2 146:18–148:9; TrialTr.V2 156:24–157:12. Also, in 2010, A.S. wrote poetry that described the incident in

a private journal. That poetry included granular details that aligned with A.S.'s testimony at trial (and her other statements describing the same incident). *See* TrialTr.V2 142:11–145:2; State's Ex. 11; C-App. 17.

In January 2010, a peer stole A.S.'s phone and wiped the data from it. A.S. still had some of Schwartz's text messages because she had typed them into a computer file, during the school's investigation. But that was only one portion of the text messages that Schwartz had sent to A.S. during this period. *See* TrialTr.V2 84:10–15; TrialTr.V2 112:7–113:6. Amy Belli was the peer who stole and wiped A.S.'s phone. Belli was one of many students who were furious with A.S., because they knew A.S. had something to do with Schwartz leaving the school. *See* TrialTr.V2 161:17–162:20. She stole A.S.'s phone and intended to keep it for herself. But before she wiped the data, she looked through A.S.'s text messages—including messages that Schwartz sent to A.S. Belli reacted to those messages with "shock." Belli had liked Schwartz and she had been upset that Schwartz left their school—but Belli said "the messages [that she] was reading were just not appropriate." *See* TrialTr.V2 161:24–166:3; *accord* TrialTr.V2 169:5–170:17. Ten years later, Belli could not remember the exact content of those messages. But she knew there were more than the few messages that A.S. had

saved by writing down before Belli stole her phone, and she knew that reading those text messages had changed how she felt about A.S.— and how she felt about Schwartz. *See* TrialTr.V2 168:14–170:17.

In January 2020, A.S. reported that incident of sexual touching to the police. When asked about why she chose to report it, A.S. said:

> There was a couple reasons why. I had learned that [Schwartz] was teaching in another school district and was teaching middle school special education, and that — when I found that out, it just broke my heart because in my heart I was like, who has she done this to. And I felt a little responsible because I never turned it in at that point when I was younger. And another factor is when the original investigation through the school occurred in 2009, I was under the understanding that I had ten years after I turned eighteen to report this; otherwise, it would be beyond time frame of reporting. So I had reported it three months shy of me turning twenty-eight. . . .
>
> [. . .]
>
> I felt I would regret it if I didn't.

TrialTr.V2 90:22–91:20; *accord* TrialTr.V2 132:13–133:1 (explaining that she did not want to run out of time to report, and she "was scared for the kids that [Schwartz] was working with" in special education).

On cross-examination, Schwartz introduced evidence that A.S. sent an e-mail to the Cedar Falls School District in September 2018, where Schwartz was a special education teacher. That e-mail said:

> [Schwartz] began writing emails (from her school email) to me describing her "love" for me, texting me, writing on my classroom work about her "love" for me, . . .

> I have physical proof of all of these. There was one day at school (which finally spurred me to do something) when she kept me after class, interrogated me as to why I was so upset, she manipulate me, she took me to the stairwell, touched me inappropriately, and thankfully two students were walking up the stairwell which caused her to let me go. . . . When I reported what happened with [Schwartz] to the staff at [the school] who were doing the investigation, I failed to tell them about the inappropriate physical interaction that occurred (I was far to scared to tell anyone at that point).
>
> . . . I've finally gotten to a point where I want my story to be heard, because it hurts me to think that she is working with an even more vulnerable population now (special education) than she was at Independence.

Def's Ex. A; C-App. 20; TrialTr.V2 114:12–116:22. A.S. also took steps to notify the Iowa Board of Educational Examiners, because she wanted to make sure that Schwartz could not continue working as a teacher to gain access to another minor victim. *See* TrialTr.V2 116:23–121:8; Def's Ex. B–C; C-App. 21–22; *accord* TrialTr.V2 128:24–129:15.

Schwartz presented evidence that all licensed teachers are (and were) mandatory reporters under Iowa law. *See* TrialTr.V3 33:6–21; TrialTr.V4 22:5–24:7. The implication was that A.S. must not have been telling the truth when she testified that she told Tia Shaffer about inappropriate physical touching, because Shaffer was a teacher too, all teachers are mandatory reporters, and there was no evidence that Shaffer made any report. *See* TrialTr.V5 65:15–66:5. But when the

State called Shaffer on rebuttal, Schwartz objected to all questions about what A.S. told Shaffer, along with all questions about *whether* A.S. had talked with Shaffer about Schwartz. She called it "vouching." The trial court sustained each and every one of those objections. *See* TrialTr.V4 237:4–238:19; *but see State v. Mincks*, No. 18–1054, 2020 WL 2487889, at *4 (Iowa Ct. App. May 13, 2020); *cf*. Iowa R. Evid. 5.801(d)(1)(b). Even so, Shaffer was still permitted to testify that she was aware of an accusation involving Schwartz, and aware that there was already an ongoing investigation. *See* TrialTr.V4 237:4–9.

Schwartz testified. She tried to explain her e-mails, including her admission that she knew that she was not supposed to love her students in the way that she loved A.S. *See* TrialTr.V4 197:18–202:12. Schwartz admitted to giving A.S. the full-frontal hug that was shown in the photo from the pumpkin patch—but she said that was the only time that she had ever given A.S. a hug like that, and that on all other occasions, she would give a "side hug." *See* TrialTr.V5 195:13–197:17; *cf*. TrialTr.V5 32:5–34:2. Schwartz said that when she spoke with a police officer in 2020, she knew to expect questions about something that happened in a staircase, because "[A.S.] had made prior claims in 2018 and then before that, and [Schwartz] had to get a time line." *See*

TrialTr.V4 185:8–186:20. But then, when she acknowledged that she was offering more details than she gave in that interview, she claimed that was because she "didn't know what [A.S.] was alleging" in 2020. *See* TrialTr.V4 227:10–228:4. Schwartz also presented testimony from other former students who liked her. *See, e.g.*, TrialTr.V4 91:3–93:25; TrialTr.V4 100:23–105:14. But both of them testified that they never received full-frontal hugs from Schwartz, nor text messages or e-mails from Schwartz that professed her love and complimented their bodies. *See* TrialTr.V4 94:1–97:15; TrialTr.V4 107:23–110:15.

Additional facts will be discussed when relevant.

ARGUMENT

I. The evidence was sufficient to support conviction. Schwartz engaged in an ongoing scheme of conduct to escalate close physical contact and emotional intimacy with A.S., to enable more sexual conduct with A.S.

Preservation of Error

There is no longer any error-preservation requirement for challenges to sufficiency of the evidence on direct appeal. *See State v. Crawford*, 972 N.W.2d 189, 194–202 (Iowa 2022).

Standard of Review

"Sufficiency of evidence claims are reviewed for a correction of errors at law." *See State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012).

A verdict withstands a sufficiency challenge if it is supported by substantial evidence. That means evidence which, if believed, would be enough to "convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." *See State v. Hennings*, 791 N.W.2d 828, 823 (Iowa 2010) (quoting *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008)). A reviewing court will "view the evidence in the light most favorable to the verdict and accept as established all reasonable inferences tending to support it." *See State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995). That generally means accepting and crediting any testimony that aligns with the verdict—including victim testimony.

Merits

During her sophomore year, A.S. was a student in one of Schwartz's classes. A.S. started to take another class with Schwartz, during the fall semester of her senior year. That class began on about August 24, 2009. *See* TrialTr.V2 34:14–38:6. Over the course of the following month, Schwartz took steps to escalate their relationship from an ordinary teacher-student relationship into something more. She would hover near A.S. in class. *See* TrialTr.V2 38:3–39:21. She would find A.S. outside of class. And she would tell A.S. stories that were intimately personal and inappropriately sexual. *See* TrialTr.V2 38:19–42:2. She asked A.S. to share intimate details about her own personal life. *See* TrialTr.V2 42:10–25. Schwartz would tell A.S. that she was "beautiful" and "pretty," and she made other comments that communicated "an infatuation with [A.S.'s] strength." *See* TrialTr.V2 43:12–45:12. Whenever they interacted, Schwartz wanted "constant physical contact" with A.S.—she remembered noticing that Schwartz "either wanted a hug or she had to touch [her] in some way . . . almost every time." *See* TrialTr.V2 43:1–11. Those were not brief side-hugs. They were "very intimate and very close." They were "chest-to-chest." To A.S., they "seemed to take a long time." *See* TrialTr.V2 46:4–12.

Schwartz's sufficiency challenge is an argument that this is not like *State v. Wickes*, because the evidence only "consisted of a handful of emails and text messages over the course of three days and the fact that Schwartz helped A.S.'s family pick pumpkins." *See* Def's Br. at 31–35. But her argument ignores A.S.'s testimony about interactions over the course of the month that preceded those three days, which established that Schwartz had made persistent efforts to groom A.S. to accept closer intimacy and escalating physical contact. In *Wickes*, there was more documentary evidence. But the evidence in this record establishes a similar scheme of conduct to engage in sexual contact with a student. Like in *Wickes*, the evidence showed that these were "full-frontal hug[s]" that included "chest-to-chest contact." *See State v. Wickes*, 910 N.W.2d 554, 566 (Iowa 2018); TrialTr.V2 46:4–12; State's Ex. 3; C-App. 11; TrialTr.V2 139:6–140:11. And like in *Wickes*, Schwartz's e-mails that referenced those hugs showed that they were fulfilling some desire for Schwartz, who would "tell [A.S.] how much [she] enjoyed them." *See Wickes*, 910 N.W.2d at 567; State's Ex. 8; C-App. 15 (stating that hugging A.S. was "the better end of the deal"); State's Ex. 6; C-App. 13 (telling A.S. "you give the best hugs ever"). And, like in *Wickes*, Schwartz's e-mails showed "awareness that the

sentiments [she] was expressing to A.S. . . . were wrong." *See Wickes*, 910 N.W.2d at 567; State's Ex. 6; C-App. 13 ("So I am probably not suppose to love my students, but I do you."). And those e-mails were only part of the story—A.S. testified that Schwartz had escalated this physical contact and emotional intimacy over the course of the month between August 24 and September 28. *See* TrialTr.V2 34:14–46:12; *accord Wickes*, 910 N.W.2d at 559, 568 (finding sufficient evidence of a pattern, practice, or scheme of conduct over a "forty-five-day period" at the start of the fall semester). The State could prove that Schwartz engaged in a scheme of conduct to groom A.S. for sexual intimacy through A.S.'s testimony about those escalating interactions, over the course of the month that preceded Schwartz's most overt attempt.

In *Wickes*, hugging was the only sexual contact between the teacher/defendant and the student/victim. In this case, A.S. testified that Schwartz put her hand down A.S.'s pants and touched A.S. under her clothes, "above the clitoris area." TrialTr.V2 71:16–78:23. That is clear evidence of her intention to engage in sexual conduct with A.S. And it strengthens the inference that Schwartz was grooming A.S. to accept more intimate physical contact, in order to facilitate that kind of sexual contact and for her own sexual gratification, all along. That

unambiguous incident of sexual touching is not mentioned anywhere in Schwartz's sufficiency challenge, on appeal. *See* Def's Br. at 31–35. Schwartz cannot defeat the logical inference that arose from evidence of her attempt to touch A.S.'s vagina: that her conduct over the course of the preceding month had been part of a scheme to condition A.S. to let Schwartz touch her body, for her own sexual gratification. *Accord Wickes*, 910 N.W.2d at 569 (explaining that evidence is sufficient if it establishes a scheme to engage in sexual contact with a student, "even if it is only one student over a forty-five-day period"). As such, this evidence is sufficient to support Schwartz's conviction.

II. The trial court did not err in overruling Schwartz's objection to Jury Instruction 16. The jury instructions, taken together, correctly explained the applicable law.

Preservation of Error

Schwartz raised this objection to the proposed jury instructions. The trial court overruled that objection. *See* TrialTr.V5 9:8–11:18; TrialTr.V5 14:16–22. That ruling preserved error for this challenge. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review

A ruling on whether jury instructions correctly state the law is generally reviewed for correction of errors at law. *See State v. Kraai*,

969 N.W.2d 487, 490 (Iowa 2022) (citing *State v. Rohm*, 609 N.W.2d 504, 509 (Iowa 2000)). However, when a trial court chooses between two competing versions of jury instructions, where *both* versions are correct statements of law, then review is for abuse of discretion. *See State v. Tipton*, 897 N.W.2d 653, 696 (Iowa 2017) (quoting *Stringer v. State*, 522 N.W.2d 797, 800 (Iowa 1994)) (noting that "[t]rial courts have a rather broad discretion in the language that may be chosen to convey a particular idea to the jury"). Schwartz is arguing that these jury instructions did not correctly state the law. *See* Def's Br. at 36–40. As such, for this challenge, review is for correction of errors at law.

Merits

Schwartz argues that the jury instructions were incorrect because they included the word "hugging" in the definition of "sexual conduct":

> "Sexual conduct" includes, but is not limited to kissing, hugging, touching of the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubes, or genitals, or a "sex act".

Jury Instr. 16; App. 14. Schwartz argues that "hugging" is not one of the kinds of contact that are enumerated in section 709.15(3)(a)(2) as "sexual conduct." *See* Def's Br. at 36–40. That is true. But that section states that sexual conduct "is not limited to" its enumerated examples. *See* Iowa Code § 709.15(3)(a)(2). A similar kind of hugging qualified as

sexual conduct in *Wickes*. Of course, it is not correct to instruct jurors that hugging a student is *always* sexual exploitation, or that Schwartz could be convicted of sexual exploitation by a school employee on the basis of non-sexual hugs (or a scheme to engage in non-sexual hugs). Schwartz is correct that it would be a misstatement of the law, if the jury instructions had enabled jurors to convict her on that basis.

However, Iowa courts "review the instructions 'as a whole to determine their accuracy.'" *See Kraai*, 969 N.W.2d at 490 (quoting *State v. Donahue*, 957 N.W.2d 1, 10 (Iowa 2021)). In other words, "[a] challenged instruction is 'judged in context with other instructions relating to the criminal charge, not in isolation.'" *Id.* (quoting *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996)). And "[a]n incorrect or improper instruction can be cured 'if the other instructions properly advise the jury as to the legal principles involved.'" *See id.* (quoting *Thavenet v. Davis*, 589 N.W.2d 233, 237 (Iowa 1999)). In this case, another element in the marshalling instruction required a finding that Schwartz engaged in the qualifying sexual conduct (and that it was part of a pattern, practice, or scheme of conduct), and that she "did so with the specific intent to arouse or satisfy the sexual desires of [Schwartz] or [A.S.]." *See* Jury Instr. 14(3); App. 13. This means

that Schwartz could not be convicted under a misapprehension that *any and all* hugging between teacher and student would qualify as sexual exploitation by a school employee. Rather, jurors could only convict Schwartz if they determined that she engaged in those hugs "with the specific intent to arouse or satisfy the sexual desires" of someone involved. *See* Jury Instr. 14(3); App. 13. This is wholly consistent with *Wickes*: the jury still had to "examine the actions of the teacher 'in light of all of the circumstances to determine if the conduct at issue was sexual and done for the purposes of arousing or satisfying the sexual desires of [Schwartz] or the [A.S.]' in violation of [section] 709.15(3)(a)(1)." *See Wickes*, 910 N.W.2d at 565–66 (quoting *State v. Romer*, 832 N.W.2d 169, 180 (Iowa 2013)). Thus, when read together, the jury instructions still correctly stated the applicable law.

Schwartz could still argue that jurors should find the hugs were not sexual, and acquit her. And her counsel did make that argument:

> So when we talk about the sexual conduct, Instruction Number 16, I want you to think about that in context with Number 14, because that sexual conduct is a definition. And in Number 14, it talks about that there must be specific intent to satisfy the sexual desires of [Schwartz] or [A.S.]. So those two things have to be read in context with each other. . . . [L]ook at the context and the intent. And so you're going to have to look at the specific intent on the next line in Number 14. Does the hug arouse the sexual desires of either of the individuals? . . . No.

See TrialTr.V5 67:24-68:12. Schwartz argues "[t]he State emphasized to the jury that hugging was a sexual conduct in its closing arguments." *See* Def's Br. at 38–39 (citing TrialTr.V5 39:6–40:21). But what it said was actually consistent with *Wickes*, and the instructions as a whole:

> . . . Folks, rely on your notes, but I believe [Schwartz] said something to the extent of the only time she hugged [A.S.] full frontal was at the pumpkin patch. You know why? Because we have evidence. We have a picture of her. She cannot deny that because there's a picture of that. Admit what you can't deny, deny what you can't admit. That's what she was doing. She admitted what she can't deny because there's photographic evidence of how she hugged this student, and she would submit to you that this is the only time that she ever hugged this student this way, ...
>
> But folks, common sense, look at the closeness of these two parties. This is exactly what [A.S.] described as their hugs, that they used to hug each other this way. . . . [I]t's so in consistent and contradictory that in [Schwartz's] own emails, she talks about hugs and tells this girl, I get the better part of the deal. Yet she claims that that's it. That's all we got, because you know what, I can't deny that.
>
> Folks, I want you to look at that evidence with everything else. Why does she try not to say that she hugged this student? Because she knows that sexual conduct in those instructions you've been given includes hugging, that you can find hugging as a sexual conduct. . . . The nature of the hugging in this particular case was a sexually-motivated hug, and she says it to you, I get the better part of the deal. Those are her own statements, your hugs.
>
> . . . There's no reason why you look for this better part of the deal and . . . tell [A.S.] I need to have a hug, which [A.S.] described that it took so long. Because this teacher was gaining some — deriving some pleasure out of this, and she tells you that herself in her own words.

TrialTr.V5 39:6–41:5. The State never urged the jury to convict on the basis of non-sexual hugs. Rather, the State urged the jury to find these hugs were sexual conduct because they were sexual in nature, and that Schwartz had hugged A.S. with the specific intent to arouse or gratify her own sexual desires. To that end, the State focused on evidence that established the *intimate nature* of the hugs—it emphasized the evidence that they were full-frontal hugs of considerable duration, that they were clearly of great importance to Schwartz (based on her conduct and e-mails), and that Schwartz had tried to minimize them. This made sense, because these jury instructions *as a whole* required the jury to apply the correct analysis from *Wickes*—not a "per se" rule that any hug between a teacher and student is sexual exploitation.

"Jury instructions 'must convey the applicable law in such a way that the jury has a clear understanding of the issues it must decide.'" *State v. Coleman*, 907 N.W.2d 124, 138 (Iowa 2018) (quoting *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 892 (Iowa 2015)). Here, the jury instructions did just that. The fact that jurors could not convict Schwartz on the basis of non-sexual hugs was "adequately embraced in other instructions." *See Tipton*, 897 N.W.2d at 694; Jury Instr. 14; App. 13. As such, Schwartz cannot establish error.

In any event, if there was instructional error, then that error would be harmless. *See Kraai*, 969 N.W.2d at 496–97. There was documentary evidence that established that these hugs were similar to what A.S. described in her testimony: full-frontal, chest-to-chest. *See* TrialTr.V2 46:4–12; State's Ex. 3; C-App. 11; TrialTr.V2 139:6–140:11. They lasted for a long time. And Schwartz referred to the hugs as "the better part of the deal," and she complimented A.S.'s body. *See* State's Ex. 8; C-App. 15; *accord* State's Ex. 6; C-App. 13; TrialTr.V2 65:10–68:3. Those e-mails completely discredited Schwartz's claims that she only hugged A.S. in that way on that single occasion, at the pumpkin patch. *See* TrialTr.V5 195:13–197:17. Jurors surely inferred that Schwartz was lying because she could not offer any non-sexual explanation for why she would hug A.S. like that.

Moreover, A.S. testified that Schwartz tried to escalate towards an actual sex act—Schwartz reached into her pants and touched the area above her clitoris. *See* TrialTr.V2 71:16–78:23. That was clear evidence that Schwartz had the specific intent to arouse and gratify her sexual desires, as she escalated physical intimacy with A.S. (and ratcheted up their emotional intimacy, during that same period). *See Wickes*, 910 N.W.2d at 566–68 (explaining that defendant's messages

with the victim "linked his sexual desire toward [the victim] with the hugs they exchanged," and supported the conclusion "that [she] had become the object of [his] fantasies and sexual desires, and the hugs that coincided with these messages were for his sexual gratification"). And the jury found that was proven, beyond a reasonable doubt. *See* Jury Instr. 14(3); App. 13. This jury found that Schwartz engaged in a pattern, practice, or scheme to engage in conduct with A.S. with the specific intent to arouse or gratify sexual desires. There is no way that submitting a modified definition of "sexual conduct" would have changed the verdict on this trial record, given that finding.

III. The trial court did not err in excluding evidence about the outcome of any school or agency investigations.

Preservation of Error

Error is not preserved. Schwartz is correct that the parties argued about the admissibility of this class of evidence, and the court granted the State's motion in limine to exclude evidence of the results of the school's investigation. *See* TrialTr.V2 7:22–14:20. But Schwartz never made any offer of proof, and the existing record does not enable a reviewing court to identify the actual substance of the evidence that she claims was erroneously excluded. *See State v. Lacey*, 968 N.W.2d 792, 806 (Iowa 2021) ("Without an offer of proof, we can do no more

than speculate about the substance of Lacey's proposed testimony. Accordingly, we hold that Lacey failed to preserve error on the matter."); *State v. Leedom*, 938 N.W.2d 177, 191–92 (Iowa 2020) (finding error was not preserved on challenges to evidentiary rulings without offer of proof); *State v. Windsor*, 316 N.W.2d 684, 688 (Iowa 1982) (citing *In re Estate of Herm*, 284 N.W.2d 191, 197 (Iowa 1979)) ("[P]rejudice will not be presumed or found when the answer to the question was not obvious and the proponent made no offer of proof.").

Schwartz cites *Alberts* on error preservation. *See* Def's Br. at 41–42 (citing *State v. Alberts*, 722 N.W.2d 402, 407 (Iowa 2006)). But in *Alberts*, the proponent had filed "offers of proof in the form of deposition testimony." *See Alberts*, 722 N.W.2d at 406–07. The court relied on those transcripts on appeal, in assessing the admissibility of the proffered evidence and the existence of prejudicial error. *See id.* at 408–12. Here, Schwartz made no such offer of proof. Schwartz's brief does not cite to any part of the record that establishes the substance of the testimony that she would have presented, if not for this ruling. Her theories of relevance are hypothetical, and they require this Court to "speculate about the substance" of her never-offered evidence. *See Lacey*, 968 N.W.2d at 806. As such, error is not preserved.

Standard of Review

A ruling that excluded proffered evidence as irrelevant or as unfairly prejudicial would be reviewed for abuse of discretion. *See id.* at 807 (citing *State v. Thompson*, 954 N.W.2d 402, 406 (Iowa 2021)).

Merits

Begin with a clarifying question: what does the record say about the actual evidence that was excluded? The closest that the State can find is defense counsel's statement that Sornson (the school principal) "stated in [her] deposition she believed it should have been founded, however, the licensing board determined no sanctions were necessary." *See* TrialTr.V2 8:18–9:18. Note that the minutes of testimony include Sornson's report that establishes that *she* deemed the complaint was "founded." *See* Minutes (8/11/20) at 49–50; C-App. 7–8; *accord id.* at 15; C-App. 6 (noting that Sornson recalled that "she deemed the report of inappropriate contact . . . to be 'founded.'"). But there is no report from the superintendent or any state agency in the record.

Schwartz argues that evidence of the outcome of some other investigation would be relevant because it would have "refuted "[t]he obvious inference the jury would make" from other evidence "that the school concluded Schwartz acted improperly and [she] was forced to

leave her job." *See* Def's Br. at 45; *accord* Def's Br. at 48–49. But the court never prohibited Schwartz from offering evidence about when, how, or why she left her teaching position at Independence. From the minutes of testimony, it appears that Schwartz had previously stated that "she agreed to leave and was offered severance," *before* Sornson referred the matter to the state licensing board for their investigation. *See* Minutes of Testimony (8/11/20) at 12; C-App. 5; *accord id.* at 15; C-App. 6 (Sornson indicating that "the school came up with an agreement for [Schwartz] to leave"); *id.* at 50; C-App. 8 (marking that Schwartz "has admitted the violation, has resigned, or has agreed to relinquish any teaching license held," which meant that Sornson's Level I investigation was "[c]losed and referred to school officials for further investigation as a personnel matter"). There is no reason why Schwartz could not have testified (or elicited testimony from Sornson) that she resigned during the investigation and received severance, by agreement between her and the school district. And the State offered testimony from Sornson (without an objection) that Schwartz had left employment at the school *at the beginning* of Sornson's investigation. *See* TrialTr.V2 188:13–25. And there was also evidence that Schwartz was teaching at another Iowa school by 2018, when A.S. reached out

to that school to tell them what Schwartz did. *See* Def's Ex. A; C-App. 20; TrialTr.V2 114:12–116:22. So there was no room for an inference that any investigation had caused Schwartz to lose her license to teach. Schwartz's argument in her brief on appeal does not establish error in this ruling—to the contrary, the outcome of a subsequent investigation could not help to explain Schwartz's departure from that teaching job, which occurred *before* any investigation had reached any conclusion.

Of course, that was not the relevance argument that Schwartz made below. Schwartz argued that "it's relevant to talk about . . . what was investigated at the time of the alleged incident in 2009" and that A.S. made "prior inconsistent statements . . . in that proceeding." *See* TrialTr.V2 9:15–11:4. Again, Schwartz never made an offer of proof on what those statements might have been. She was likely referring to the fact that A.S. never told the school that Schwartz had reached into her pants and touched her underneath her clothes. But that evidence *did* come in, via testimony from A.S.—and again, without any need for any testimony about the outcome of any school/agency investigation. *See* TrialTr.V2 86:17–88:16; TrialTr.V2 103:12–104:22. And she could elicit testimony from Sornson, confirming that A.S. never reported any incidents of inappropriate physical touching in 2009. *See* TrialTr.V2

189:7–9. Schwartz was able to admit evidence of statements that were made during the investigation in 2009—and she did not need to offer evidence of the outcome of those investigations, to do so.

Neither version of Schwartz's advocacy has offered a theory of relevance for evidence of the outcome/findings of any investigation—she has only explained the relevance of *other* evidence that the court had not excluded (and most of which was actually presented at trial). Her true reason for seeking to admit *this* evidence—that investigation into complaints of about Schwartz's conduct had ended with a finding that they were "unfounded"—was that she wanted jurors to hear that another fact-finder had already determined that Schwartz did not do what A.S. was describing in her testimony, so jurors would consider that in determining whether they believed A.S. or Schwartz. But this is not a tenable theory of relevance, for two reasons. First, A.S. never told school officials that Schwarz had touched her, under her clothes. *See* TrialTr.V2 86:17–88:16; TrialTr.V2 103:12–104:22; *cf.* TrialTr.V2 189:7–9. Logically, officials could not have investigated that incident—and the findings of any investigation *without* that critical information would be undermined by that incompleteness. Second, parties cannot present evidence of another fact-finder's actions or conclusions after

taking reports from testifying witnesses, to encourage jurors to adopt those express or implied credibility findings as their own. *See State v. Huston*, 825 N.W.2d 531, 537–38 (Iowa 2013) ("We see no probative value to the DHS determination the abuse report against Huston was founded. Whether or not the abuse report was deemed founded is irrelevant to any issue for the jury to decide."). The State was not able to elicit testimony from Sornson that she *did* conclude that complaints about Schwartz's conduct were founded (even without the worst facts), because of *Huston*—Sornson's conclusion was not relevant to any issue that the jury had to decide. The same applies to any investigation from another school official/agency that reached a contrary conclusion.

At trial, Schwartz argued that the Iowa Court of Appeals opinion in *State v. Thoren* changed the analysis—but she did not explain how or why. *See* TrialTr.V2 10:1–17. On appeal, Schwartz argues that the Iowa Supreme Court opinion on further review in *Thoren* "reached a different conclusion" from *Huston*, on the admissibility of evidence of the outcome of a licensing board investigation. *See* Def's Br. at 44–45. That is false. *Thoren* reached the same conclusion: that evidence of the massage license board's investigation was not relevant for any permissible purpose. *Thoren* did not overrule or qualify *Huston*—to

the contrary, *Thoren* reinforced *Huston*. It reiterated: "Evidence about the Board's investigation cannot be used when its sole relevance is to enhance the credibility of the victim." *See State v. Thoren*, 970 N.W.2d 611, 622 (Iowa 2022) (citing *State v. Mitchell*, 633 N.W.2d 295, 299–300 (Iowa 2001)). Of course, *Thoren* recognized that relevant evidence may be uncovered by a licensing board, during its investigation. Such evidence may be admissible, subject to the ordinary rules of evidence. *See Thoren*, 970 N.W.2d at 622 (explaining that a concern about the agency's investigative process or standard of proof "does not in itself make evidence from the investigation irrelevant"). But that does not change the fact that the proponent still has the burden of establishing that any proffered evidence from/about such an investigation must be "somehow relevant to the criminal charges." *See id.* at 622–23. And it was not relevant—it would only create "a substantial risk that the jury will substitute the agency's judgment for its own." *See id.* at 623–24. And here is what *Thoren* had to say about *Huston*:

> In making this determination, we take guidance from our prior decision in *State v. Huston*, 825 N.W.2d 531. There we held it was reversible error in a child endangerment prosecution to allow evidence that the department of human services had investigated and issued a founded report of child abuse against the defendant. *Id.* at 539–40. We reasoned there was a real danger that the jury would be unfairly influenced by this finding. *Id.* at

> 537–38. Similar concerns exist here. The women who complained to the Board appeared at trial and testified. Thus, . . . there was no need to introduce evidence about the Board's investigation. The jury could evaluate those incidents based on the testimony of the women involved.

Id. at 624. It did not qualify or modify *Huston*, and it cannot be said to have "reached a different conclusion." *See* Def's Br. at 44–45. And the same principle applies here: the jury could assess the evidence as presented through testimony from A.S. and other witnesses, without any need for evidence of what someone else thought of the evidence.

As a final word on *Thoren*, note that the Iowa Supreme Court rejected one of the State's purported theories of relevance by finding "the State could have proved" that purportedly relevant fact "without introducing evidence of the Board's investigation and settlement." *See Thoren*, 970 N.W.2d at 623. As previously described, both versions of Schwartz's advocacy suffer from that same problem. Schwartz did not need to offer evidence of the findings/outcome of any investigation to prove what she was purportedly attempting to prove: that A.S. made inconsistent statements about what Schwartz did, or that she left her teaching position (with severance) as the result of an agreement with the school that was reached before the conclusion of any investigation. So *Thoren* forecloses those indirect attacks on this ruling, too.

If Schwartz could establish error in this ruling, her claim would still fail because any error would be harmless and non-prejudicial. *See* Iowa R. Evid. 5.103(a); *accord State v. Parker*, 747 N.W.2d 196, 209 (Iowa 2008). A.S. testified about her reasons for declining to report the incident of sexual touching in the stairwell. *See* TrialTr.V2 86:17–88:16; TrialTr.V2 103:12–104:22. That fact was already known to the jury, and it did not change the verdict. Jurors would understand that the outcome of any investigation that preceded that key disclosure had no relevance. Schwartz gives the game away in this section of her brief: she argues error in this ruling was prejudicial because the case "came down to a credibility determination between A.S. and Schwartz." *See* Def's Br. at 52–53. That is, Schwartz is arguing that she was prejudiced because the jury was not able to consider the investigation's findings in making that credibility determination. This is precisely what *Thoren* and *Huston* prohibit: offering another fact-finder's determination as to whether allegations were "founded," and suggesting that jurors should consider that official finding in deciding what testimony *they* believe.

Schwartz cannot identify any real prejudice for the same reason that she cannot identify error: because that evidence was not relevant or admissible for any permissible purpose. As such, her challenge fails.

IV. Schwartz's sentence does not violate *Alleyne*. Also, she repeatedly told the jury that every licensed teacher is a mandatory reporter, and nobody disputed A.S.'s age, so any *Alleyne* error would be harmless.

Preservation of Error

Error is not preserved. Schwartz raised this claim at sentencing. But this is really a challenge to the jury instructions. In *State v. Heard*, a defendant argued that his sentence violated *Alleyne* because the jury was never asked to find that he was *not* a juvenile offender, which was a fact that made certain sentencing options unavailable.

> We assume without deciding that when a defendant's age is genuinely in dispute, a jury finding that he or she is eighteen or older should be required before imposing a life-without-parole sentence. But the defendant must raise the issue of his age and claim to be a minor before the issue must be submitted to the jury. Heard failed to do so. Understandably so because he had already acknowledged in his own court filing that he was an adult at the time of Hutchinson's murder.
>
> Heard contends his life-without-parole sentence is illegal without a jury finding on his age. We disagree. In our view, a defendant, at most, can claim a procedural error if an issue as to his age was not submitted to the jury. . . .
>
> Heard's claim challenges the procedural jury instruction requirements under Alleyne, not the constitutionality of the sentence. As such, Heard's claim is not an attack on an illegal sentence. Because Heard did not raise this challenge during trial, the age issue is not preserved on appeal. *See State v. Taggart*, 430 N.W.2d 423, 425 (Iowa 1988) ("[T]imely objection to jury instructions in criminal prosecutions is necessary in order to preserve any error thereon for appellate review."). We affirm Heard's life-without-parole sentence.

State v. Heard, 934 N.W.2d 433, 445–46 (Iowa 2019). Similarly, here, Schwartz did not challenge the omission of any special interrogatory that would have asked the jury to make a finding on whether she was a mandatory reporter, or whether A.S. was younger than 18 years old. *See* TrialTr.V5 8:16–11:18. Because Schwartz did not raise this challenge *during* trial, error is not preserved.

Standard of Review

A ruling on an *Alleyne* challenge would be reviewed *de novo*. *See Heard*, 934 N.W.2d at 439; *State v. Pettinger*, No. 19–1309, 2021 WL 210757, at *5–6 (Iowa Ct. App. Jan. 21, 2021).

Merits

The sentencing court found that Schwartz was not eligible for a deferred judgment or suspended sentence under section 907.3, as she was a mandatory reporter who was convicted of a chapter 709 crime against a victim who was under 18 years old. *See* Sent.Tr. 15:23–16:13; Iowa Code § 907.3 (stating that its list of alternative sentencing options "does not apply to . . . a violation of chapter 709 committed by a person who is a mandatory reporter of child abuse under section 232.69 in which the victim is a person who is under the age of eighteen").

Schwartz argues that it was unconstitutional under *Alleyne* to apply that provision of section 907.3 at her sentencing, because the jury was not asked to find and did not find beyond a reasonable doubt that she was a mandatory reporter or that A.S. was under 18 years old. *See* Def's Br. at 53–58. But this is not a "punishment that the jury's verdict alone does not allow." *See State v. Davison*, 973 N.W.2d 276, 287 (Iowa 2022) (quoting *Blakely v. Washington*, 542 U.S. 296, 304 (2004)). The jury found that Schwartz committed sexual exploitation by a school employee, which authorized the five-year indeterminate prison sentence that the court imposed. *Alleyne* required the jury to find all facts that increased the maximum or minimum sentence—but *Alleyne* does not require a jury to find facts that limited her eligibility for alternative sentencing options. *See, e.g.*, *United States v. Leanos*, 827 F.3d 1167, 1169–70 (8th Cir. 2016) (collecting cases that support its holding that "the requirements of *Alleyne* do not apply to a district court's determination of whether the safety valve provided in 18 U.S.C. § 3553(f) applies"). The Seventh Circuit explained the concept like this:

> [A] mandatory minimum sentence is not increased by the defendant's ineligibility for safety-valve relief. Rather, it is already triggered by the offense; the safety-valve provision merely provides lenity. Since "*Alleyne*, by its terms, applies to facts that 'increase[ ] the mandatory minimum,'" it does not apply to judicial factfinding that precludes safety-valve

> relief because such factfinding "does not increase [the] baseline minimum sentence." *See* [*United States v. Harkaly*, 734 F.3d 88, 97–99 (1st Cir. 2013)]. "A fact that precludes safety-valve relief does not trigger or increase the mandatory minimum, but instead prohibits imposition of a sentence below a mandatory minimum already imposed as a result of the guilty plea or jury verdict." *Id.* at 98.
>
> [. . .]
>
> Fincher argues this reasoning is improperly formalistic. He contends it draws a distinction based only on the difference between stating something in positive versus negative language. He informs us "a condition that causes something to not happen, makes it happen." We disagree. The distinction is more than merely positive versus negative phrasing. It goes to the heart of *Alleyne*'s purpose, which is to determine what constitutes an "element" of a crime. *Alleyne*, 570 U.S. at 114 ("[T]he essential Sixth Amendment inquiry is whether a fact is an element of the crime."). Under *Alleyne*, a fact that combines with the base offense to create a new, aggravated offense is an element of the crime. *Id.* at 113. Safety-valve eligibility factors do not combine with the base offense to create a new, aggravated crime. Instead, the base offense triggers the mandatory minimum on its own. Safety-valve eligibility mitigates the offense's penalty; it does not aggravate it. *See* [*United States v. King*, 773 F.3d 48, 55 (5th Cir. 2014).
>
> Therefore, we hold that judicial factfinding precluding safety-valve relief does not violate the Sixth Amendment. The district court did not err under *Alleyne* by finding Fincher possessed the gun in connection with his offense.

United States v. Fincher, 929 F.3d 501, 504–05 (7th Cir. 2019). By the same token, it did not violate *Alleyne* for the sentencing court to find facts that established Schwartz's ineligibility for mitigated punishment under section 907.3. Those facts did not increase the punishment—

they established that section 907.3 did not apply, but that just meant that Schwartz would not be eligible for mitigated punishment. Instead, she would receive the default statutorily authorized punishment for the offense that jurors found she committed, beyond a reasonable doubt.[1] Thus, it did not violate *Alleyne* for the district court to recognize that section 907.3 did not give it discretion to impose any other sentence.

Alternatively, if there was *Alleyne* error, it was wholly harmless. A.S. testified that her date of birth was March 19, 1992. *See* TrialTr.V2 29:21–24. And all of Schwartz's offense conduct occurred in fall 2009, when A.S. was 17 years old. *See* TrialTr.V2 32:11–37:16; TrialTr.V2 83:5–25. The defense did not dispute that fact. Instead, it leaned in—Schwartz tried to characterize her e-mails as "supporting a kid who was hurting and . . . trying to be there for that kid." *See* TrialTr.V5 170:6–9. Nor did the defense dispute the fact that Schwartz was a mandatory reporter. Schwartz stipulated to the admission of her teaching license. *See* TrialTr.V2 176:25–179:1; State's Ex. 12; C-App. 19. And Schwartz solicited testimony that all licensed teachers are

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[1] It also does not violate *Alleyne* for a sentencing court to determine that section 907.3 does not authorize a mitigated sentence for a conviction for a forcible felony—there is no need for a jury finding that the offense qualifies as a forcible felony. *See* Iowa Code § 907.3.

mandatory reporters. *See* TrialTr.V3 33:6–21. She offered testimony from Shelly Staker, who explained that "[a]nyone who's licensed by the Board of Educational Examiners" is a mandatory reporter, and that those same rules were in effect during 2009—and that included all licensed teachers. *See* TrialTr.V4 22:5–24:7. Schwartz's counsel even emphasized that fact in her closing argument:

> You also heard all of these teachers say, well, that they were teachers, but you heard Shelly Staker tell you that *anybody that's licensed in Iowa to be a teacher is a mandatory reporter*, and you didn't hear anybody come in here and tell you that they mandatorily reported what they believed was inappropriate or an assault. . . . Ms. Staker told — told you all on direct examination that you don't get to decide whether something happened or didn't happen when you're the teacher. You just make the call. If abuse is reported to you, you make the call.

TrialTr.V5 65:16-66:5 (emphasis added). This fact was admitted.

"*Alleyne* and *Apprendi* errors are subject to harmless-error analysis." *See United States v. Peña*, 55 F.4th 367, 375 (2d Cir. 2022) (citing *United States v. Confredo*, 528 F.3d 143, 156 (2d Cir. 2008)). "An *Alleyne* error is harmless only 'where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error.'" *See United States v. Carr*, 761 F.3d 1068, 1082 (9th Cir. 2014) (quoting *Neder v. United States*,

527 U.S. 1, 17 (1999)). The fact that A.S. was 17 years old in Fall 2009 was not contested, and it was supported by uncontradicted evidence of A.S.'s birthdate. *See* TrialTr.V2 29:21–24. The fact that Schwartz was a mandatory reporter was also undisputable and undisputed—indeed, the defense admitted that fact and relied on it in argument. *See* TrialTr.V3 33:6–21; TrialTr.V4 22:5–24:7; TrialTr.V5 65:16-66:5; *cf*. TrialTr.V2 179:2–18. This Court can be confident that the jury, if asked, would have found that Schwartz committed this offense while she was a mandatory reporter and while A.S. was 17 years old. Thus, even if there was error under *Alleyne*, it would be harmless error, so Schwartz's challenge would still fail.

CONCLUSION

The State respectfully requests that this Court reject these challenges and affirm Schwartz's conviction and sentence.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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