


**REQUEST FOR THE INVESTIGATION OF:**

Becky Goettchen, Polk County  
Attorney

To: *The Prosecutorial Standards and Conduct Committee of the Iowa County Attorneys Association, Inc;*

The undersigned, being first duly sworn or affirmed, requests that he aforementioned Assistant Attorney General be investigated and the appropriate action be taken by the Prosecutorial Standards and Conduct Committee of the Iowa County Attorneys Association, Inc. I offer the following matters in support of this request for investigation.

**PLEASE SEE ALL ATTACHED DOCUMENTS:**

Signature:   
Address: 2700 Coral Ridge Ave  
Coralville, Ia  
52241

State of Iowa; County of \_\_\_\_\_

Subscribed and Sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_  
20 \_\_\_\_\_

\_\_\_\_\_  
Notary Public in and for the State of Iowa

On March 12, 2009 while presenting the State's rebuttal closing argument in State of Iowa Vs. John W Sickels and James A. Christensen, a Union County criminal case tried in Woodbury County. Assistant Attorney General Becky Goettsch committed numerous acts of prosecutorial misconduct. Despite attempts by the court to address those issues in instructions and rulings, the defendants were so prejudiced that no remedy other than a mistrial would have assured them a fair and impartial trial.

During the course of her argument Goettsch made no less than six misstatements of the law, improper burden shifting, and ignored the presumption of innocence guaranteed a defendant by the United States Constitution.

The constant, repetitive, and intentional actions of the State's counsel required seven objections by defense counsel. Six of the seven objections were sustained by the court. The only objection that was not sustained was the motion for a mistrial.

Copies of relevant portions of the certified transcript of said rebuttal argument, the objections, arguments of counsel, and the Court's rulings are attached hereto and made a part hereof as Exhibits A-F

- Exhibit A. Page 3 Lines 8-14
- Exhibit B. Pages 9 -17
- Exhibit C. Page 27 Lines 3-8
- Exhibit D. Page 32 Lines 12-25
- Exhibit E. Page 34 Lines 9-18
- Exhibit F. Page 34 Lines 22-25 and Pages 35-44

The defendant's counsel failed to object to two additional instances of improper burden shifting. The statements that were overlooked were of the exact same context as the original power point that was ordered removed by the Court only moments before.

These statements persistently made by Assistant Attorney General Goettsch, despite the Court's rulings, effectively told the jury to disregard law given to them by the Court in instructions and consider the law suggested by the prosecution.

Copies of relevant portions of the certified transcript of the un-objected to statement are attached hereto and made a part hereof as Exhibits G and H.

- Exhibit G. Page 3 Lines 20-25
- Exhibit H. Page 4 Lines 17-21

The State's persistent and unlawful arguments resulted in the jury being removed two times and one bench conference between counsels, the contents of which are not a part of the record.

Copies of relevant portions of the certified transcript of the jury being removed and the bench conference are attached hereto and made a part hereof as Exhibits I through K.

- Exhibit I. Page 10 Line 10
- Exhibit J. Page 32 Line 23
- Exhibit K. Page 34 Line 20

Assistant Attorney General Goettsch was willing to lie to gain a conviction in the case. Ms. Goettsch was well aware that there was a valid arrest warrant for Lisa Smith prior to the trial. During Lisa Smith's deposition in October of 2008, Assistant Attorney General Andrew Prosser advised defense counsel there was a valid Union County warrant for Smith. Assistant Attorney General Goettsch was present during the entirety of the deposition.

Additionally, Assistant Attorney Goettsch argued during a pre trial hearing to keep the information of the warrant out of the trial. During her closing argument, Ms. Goettsch fabricated her statements to the jury to make it appear that the prosecution was not aware of any warrants for Lisa Smith.

Copies of relevant portions of the certified transcript are attached hereto and made a part hereof as Exhibit L.

- Exhibit L. Page 33 Lines 18-24

Assistant Attorney General Goettsch's persistence in an unlawful and un-invited argument showed the State's willingness to seek a conviction at all costs. The resulting prejudice was so inflammatory that no remedy other than a mistrial could have provided the defendants with a fair and impartial trial afforded by the 5<sup>th</sup> 6<sup>th</sup> and 14<sup>th</sup> Amendments of the United States Constitution.

The complainant believes that Assistant Attorney General Goettsch acted with malice and forethought when delivering her rebuttal closing argument. Proof of the allegations lies in the power point presentation that was prepared well in advance of the trial:

**“Not guilty requires you to believe defendants and not believe Lisa Smith.”**

The aforementioned statement required objections and unfairly drew the jury's attention to the misstatements and away from the trial.

Assistant Attorney General Goetsch was forced to remove the offending statement by the court, after which she revisited the statement, or a variation of, on three more occasions during her rebuttal closing argument.

The prosecutor bears a dual role in representing the state during a criminal prosecution: To prosecute with vigor and diligence while assuring that the defendant receives a fair trial.

It is the prosecutor's duty to refrain from improper methods calculated to obtain a conviction.

Assistant Attorney General Goetsch by her actions on March 12, 2009 failed to insure that I received a fair trial and also used improper methods to gain a conviction at all cost.

On November 24, 2010 the Court of Appeals stated in their published opinion on the case that: "While this Court does not condone the prosecutor's conduct during her rebuttal closing." They further stated that Assistant Attorney General Goetsch: "Prepared her statement in advance and was not able to adjust after the Court sustained the first objection."

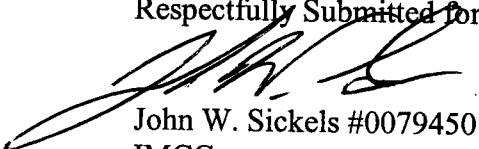
As stated previously, The Court determined that Assistant Attorney General Goetsch prepared her rebuttal in advance. Ms. Goetsch knowingly prepared a power point presentation that contained an improper statement, shifted the burden of proof to the defendants, and blurred the presumption of innocence guaranteed by the Constitution.

Copies of relevant portions of the certified transcript are attached hereto and made a part hereof as Exhibit M.

Exhibit M. Pages 14-15

The complainant prays that the Prosecutorial Standards and Conduct Committee take the appropriate action to correct the situation.

Respectfully Submitted for Consideration



John W. Sickels #0079450  
IMCC  
2700 Coral Ridge Avenue  
Coralville, Iowa 52241

Cc: Attorney General Tom Miller  
Governor Terry Branstad

1 (Requested excerpt from March 12, 2009)

2 \* \* \*

3 THE COURT: Ms. Goettsch, the State's  
4 rebuttal.

5 MR. PROSSER: I have to get my computer  
6 going.

7 THE COURT: Okay.

8 MR. MCCONVILLE: Your Honor, I'm going to  
9 object to that. The first three lines is a  
10 misstatement of the law.

11 THE COURT: Sustained.

12 MR. MCCONVILLE: Move that it be stricken  
13 and taken off that there.

14 THE COURT: Sustained.

15 MS. GOETTSCHE: If I may, thank you.

16 Mr. Scott told you that our job is to prove  
17 this to you beyond a reasonable doubt. Let's take  
18 a logical unimpassioned look at this and see if we  
19 have done that.

20 To give the defendants a not guilty verdict  
21 as they have asked you for, you have to essentially  
22 disbelieve, forget Lisa Smith. Because if you  
23 believe her beyond a reasonable doubt, that alone  
24 is enough to sustain a verdict of guilty to sexual  
25 abuse in the second degree.

1 she would have just slinked off and nobody would  
2 have known the difference. Might have said the  
3 next morning, Gosh, that was dumb. Sure as heck  
4 wouldn't be around here telling all of you people  
5 these intimate details. So that is not reasonable  
6 doubt.

7 Gone. We have also heard some talk about,  
8 well, she was in the bag. Let's talk about that  
9 misconception. The defendants want you to believe  
10 that somehow women have a couple cocktails and turn  
11 into the girl gone wild. Women have a couple  
12 cocktails and they're ready to have promiscuous  
13 sudden two-minute sex -- not even two-minute sex,  
14 three pumps sex with someone who is a relative  
15 stranger right there behind the bar. Pull my pants  
16 down, bend over, done. Use your common sense.  
17 Women do not just get half in the bag and then  
18 that's just okay. It's certainly not reasonable  
19 doubt. Well, she was -- she might have been drunk,  
20 so that's reasonable doubt. Every girl that has a  
21 few cocktails, free game. If that's reasonable  
22 doubt -- It's not reasonable doubt.

23 Plus, whether she's intoxicated, not  
24 intoxicated, I mean Mr. Sickels wants us to believe  
25 that, She was drunker than me. She was really

Exhibit B 1089

p.9

1 drunk. If that's the case, he's a police officer,  
2 he should have known she couldn't consent. Which  
3 is it? You can't have it both ways.

4 MR. MCCONVILLE: Excuse me, Your Honor. I  
5 object to that. That's a misstatement of the law.  
6 I'd like to take a matter up with the Court.

7 THE COURT: All right. Well, we will take a  
8 recess and the jury will remember the admonition.

9 \* \* \*

10 (Jury exits courtroom.)

11 \* \* \*

12 THE COURT: Let the record show hearing is  
13 being held outside the presence of the jury during  
14 the State's rebuttal argument. The defendants are  
15 present.

16 Mr. McConville, you wanted to make a record.

17 MR. MCCONVILLE: Yes, Your Honor, I did.  
18 And I objected to the statement that was made  
19 because this is the second time there's been  
20 misstatements of the law made in this court. The  
21 first one the Court struck because it basically  
22 said that we had to prove that we were telling the  
23 truth or that they didn't have to believe us. Plus  
24 it was a misstatement of the law that if they  
25 believed her and didn't believe -- if they did

1 believe her, they didn't have to believe anything.  
2 else.

3 THE COURT: But --

4 MR. MCCONVILLE: But at any rate --

5 THE COURT: The record does not reflect what  
6 was shown to the jury at the beginning of the  
7 State's rebuttal argument.

8 MR. MCCONVILLE: I understand.

9 THE COURT: So if we could have that shown  
10 and read into the record, then we would know what  
11 specifically you're talking about.

12 I think you objected to the first three  
13 lines on this slide; is that right?

14 MR. MCCONVILLE: Yes, sir.

15 THE COURT: And for the record, they are...

16 MR. MCCONVILLE: Nothing requires you to  
17 believe defendants and not believe Lisa Smith.

18 That shifts the burden of proof to the  
19 defendants to be believed, Your Honor, and is  
20 contrary to the constitution and the laws of this  
21 state and the instructions of the Court. And not  
22 believe Lisa Smith, it's just the opposite. It has  
23 reversed the burden of proof totally.

24 THE COURT: So you objected.

25 MR. MCCONVILLE: And I did and you struck

Exhibit B 3 of 9

P. 11



1 it, Your Honor.

2 THE COURT: I sustained the objection and  
3 asked her to take it down and move on.

4 MR. MCCONVILLE: You did. And the second  
5 objection, Your Honor, was the comment was made  
6 that she's too drunk to consent. There is nothing  
7 in the law that says being drunk prevents a person  
8 from consenting. There is a provision in the law  
9 that if a person is passed out and totally  
10 incapacitated, but this leaves this jury with the  
11 belief that this lady, just because she's drunk,  
12 may not have the capacity to consent even though  
13 the facts don't back that up.

14 And that's not the law in this case, and  
15 that's why I would move to strike that statement.  
16 And I'm going ask the Court to give us an  
17 instruction on that that. That is not the law and  
18 that the fact that a person is -- would be drunk  
19 doesn't have anything to do with whether they can  
20 consent or not consent under the law. Because  
21 there is no evidence here she was incapacitated or  
22 passed out, which is the only exception, Your  
23 Honor. And, plus, that's not alleged in the  
24 charges.

25 These people are just saying things,

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1 grabbing at straws and misstating the law out of  
2 the sensationalism that started with the very first  
3 words of the opening statement in this case. And  
4 if they continue to do it, I'm going move for a  
5 mistrial.

6 THE COURT: All right. Did you object in  
7 the presence of the jury and ask for a ruling on  
8 that statement or did you just ask to make a  
9 record?

10 MR. MCCONVILLE: My recollection is that I  
11 objected and asked the Court if we could take up --  
12 and I don't recall. She could tell me. But my  
13 recollection is I objected and asked the Court if  
14 we could take up a matter outside the presence of  
15 the jury.

16 THE COURT: Okay. Any response?

17 MS. GOETTSCHE: My -- My recollection is I'm  
18 talking about what Mr. Sickels said in his  
19 statement that he was saying how he was drunker --  
20 she was drunker than him. I wasn't arguing law at  
21 that point. I don't intend to argue law. I wasn't  
22 suggesting that that should be part of their legal  
23 analysis. I was discounting what Mr. Sickels'  
24 statement was.

25 THE COURT: So would you have any objection

Exhibit B 5 of 9

p. 13

1 then to the requested jury instruction by  
2 Mr. McConville?

3 MS. GOETTSCHE: I think that confuses the  
4 issue. He's not charged that way. I mean -- And,  
5 in fact, that's in the jury instructions that says  
6 it has to be by force or against the will. It's  
7 not that -- we haven't added that other thing that  
8 says incapacitated. And actually my next statement  
9 is that's not even what the evidence shows. What I  
10 was arguing was Mr. Sickels' statement, She was  
11 drunker than me. That's not even what the evidence  
12 shows. She wasn't intoxicated. That's been our  
13 position the entire time.

14 THE COURT: So Mr. McConville, what  
15 specifically are you asking the Court to instruct?

16 MR. MCCONVILLE: I guess, Your Honor, I  
17 would -- my recollection -- Maybe I heard it wrong,  
18 but I know we have it on the record is that I got  
19 the impression anyway that her comment was she  
20 would be too drunk to consent and/or I don't know  
21 whether she said Mr. Sickels should have known if  
22 she was that drunk she was too drunk to consent or  
23 something to that effect. I think the provisions  
24 in the law would say that just because a person is  
25 intoxicated, if they're not incapacitated, they

1 still have the -- it doesn't mean they don't have  
2 the ability to consent.

3 And I'd have to think about the wording  
4 here, Your Honor, but something to the effect that  
5 intoxication does not mean that a person does not  
6 have the ability to consent.

7 MR. PROSSER: Judge, I'm not aware of any  
8 law that says anything about being too drunk or not  
9 too drunk to consent. There's a section of 709, a  
10 kind of sexual assault, that talks about a variety  
11 of it being a person being incapable of consent.  
12 But it doesn't say -- I don't think it says  
13 anything about being too drunk or not being too  
14 drunk.

15 MR. MCCONVILLE: Could we have the court  
16 reporter look it up just to see if my memory is  
17 incorrect so we know what it was that was said?  
18 Maybe my recollection is not correct, but my  
19 recollection was that something that -- the comment  
20 was made. At least it led me to believe that she  
21 was referring to the jury that either -- whether it  
22 was because of what Mr. Sickels said or whatever  
23 that there was a possibility that this lady, if she  
24 was that drunk, would be too drunk to consent  
25 anyway. Now, maybe I misheard --

Exhibit B 7099

p. 15

1 THE COURT: Just give her a chance to look  
2 it up.

3 \* \* \*

4 (Record read as requested.)

5 \* \* \*

6 MR. MCCONVILLE: That's the gist of what I  
7 thought, Your Honor, was said. That since he's a  
8 police officer, he should have known she was too  
9 drunk to consent was the way I interpreted that.  
10 And I think that's the proper interpretation, and I  
11 also think it's a misstatement of the law and all  
12 the facts of the case.

13 THE COURT: The provision of the law that  
14 Mr. Prosser was referring to, I believe, would be  
15 section 709.4, sexual abuse in the third degree.  
16 And it would be a crime if the act was between  
17 persons who are not at the time cohabiting as  
18 husband and wife if any of the following are true:  
19 Subparagraph A, the other person is suffering from  
20 a mental defect or incapacity which precludes  
21 giving consent. Mentally incapacitated means  
22 person is temporarily incapable of apprising or  
23 controlling the person's own conduct due to the  
24 influence of a narcotics, anesthetic, or  
25 intoxicating substance.

Exhibit B 8 of 9

p. 16

1 I think that the argument that was made is a  
2 misstatement of the law that the defendant is not  
3 charged with that crime. And telling the jury that  
4 as a peace officer he should have known she  
5 couldn't consent is just an inaccurate statement.  
6 So the objection will be sustained.

7 If you want the Court to give a jury  
8 instruction, I will consider that, but I need to  
9 know what language you want the Court to use.

10 MR. MCCONVILLE: I know, Judge, and I tell  
11 you, I haven't even had time to think about it, but  
12 since we have the jury out, could we take a minute  
13 or two, Your Honor, and --

14 THE COURT: Take all the time you want.

15 MR. MCCONVILLE: I know -- I appreciate  
16 you're not rushing me timewise. I didn't mean to  
17 indicate that, if that's the way that came off,  
18 Judge. I didn't mean that.

19 MR. PROSSER: Your Honor, I -- just for the  
20 record, I think counsel's comment is fair argument  
21 from the defendant's offered testimony on direct  
22 and cross-examination as to the state of -- alleged  
23 state of Lisa Smith's intoxication despite the  
24 State's assertions and Lisa Smith's assertions to  
25 the contrary.

1 somehow they want you to believe that's reasonable  
2 doubt here because somehow Larry was behind this.  
3 What's interesting is we haven't really heard from  
4 the defense what exactly they think Larry did.

5 MR. SCOTT: Your Honor, I'm going to object.  
6 I believe that is improper burden shifting.

7 MS. GOETTSCH: They brought it up, Judge.

8 THE COURT: I think that this is rebuttal.

9 MS. GOETTSCH: There was some suggestion  
10 that maybe, what, Larry comes into the club that  
11 night after she's had consensual sex and he's the  
12 one or there's a fight there and that's how the  
13 place gets wrecked. Well, if that was the case --  
14 Assume for a minute that was the case. Then when  
15 Lisa goes to Lisha a week later and Lisha saying,  
16 Now, Lisa, something happened here that night.  
17 What was it? Why is this place a mess?

18 Lisa has told Lisha in the past about  
19 domestic violence. Why wouldn't Lisa have just  
20 said at that point, Lisha, Larry was out here  
21 again, we had another fight. She's done that in  
22 the past. She confides in Lisha. Why if it was --  
23 if it was a Larry thing that the bar is a mess, why  
24 would she go to this extreme where she has to give  
25 all these statements, travel up here, go through

1 she would have to go back through the kitchen, where  
2 the dishwashers are and then back out this door  
3 back out to that little utility room and then out  
4 the back locked door.

5 Now, if you are being surrounded by two men  
6 that are within arm's length of you, are you  
7 thinking about going out the back door? Are you  
8 thinking you can even run at that point? No. And  
9 I asked Lisa, Why didn't do you that? She said, I  
10 don't know. I don't know. I wasn't thinking that.  
11 Why did you not scream? Well, who's going to hear?

12 Also the conceptions that we have about what  
13 we would do if we were being attacked. I submit to  
14 you they're different for whether it's someone you  
15 know or whether it's the stranger jumping out of  
16 the bushes and chasing you down the street with a  
17 ski mask.

18 MR. SCOTT: Your Honor, I'm going to object  
19 to that. It's completely improper and I mean -- If  
20 we can approach for a moment?

21 THE COURT: Yes.

22 \* \* \*

23 (Bench conference)

24 \* \* \*

25 THE COURT: The objection is sustained. You

Exhibit D

p. 32



1 think there was something mentioned that is  
2 improper rebuttal and I would object to that also.

3 THE COURT: Sustained.

4 MS. GOETTSCH: When you're done looking at  
5 all the facts, there's no reasonable doubt here.  
6 There's no reasonable doubt left. All the things  
7 that they want you to believe, all the rabbit holes  
8 that they want you to go through don't hold water.

9 In order to find the defendants not guilty,  
10 there has to be some element in you to believe what  
11 the defendants have told you in their statements  
12 and in their testimony.

13 MR. MCCONVILLE: Objection. That's the same  
14 misstatement of the law that you made her take down  
15 in the first place, and I want to take this up with  
16 the Court right now, Your Honor.

17 THE COURT: We will take a recess. The jury  
18 will remember the admonition given earlier.

19 \* \* \*

20 (Jury exits courtroom.)

21 \* \* \*

22 THE COURT: You can be seated. The record  
23 will reflect that hearing is being held outside the  
24 presence of the jury. During the State's rebuttal  
25 argument, there was a request of defense counsel.

Exhibit E

p. 34

1 think there was something mentioned that is  
2 improper rebuttal and I would object to that also.

3 THE COURT: Sustained.

4 MS. GOETTSCH: When you're done looking at  
5 all the facts, there's no reasonable doubt here.  
6 There's no reasonable doubt left. All the things  
7 that they want you to believe, all the rabbit holes  
8 that they want you to go through don't hold water.

9 In order to find the defendants not guilty,  
10 there has to be some element in you to believe what  
11 the defendants have told you in their statements  
12 and in their testimony.

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14 misstatement of the law that you made her take down  
15 in the first place, and I want to take this up with  
16 the Court right now, Your Honor.

17 THE COURT: We will take a recess. The jury  
18 will remember the admonition given earlier.

19 \* \* \*

20 (Jury exits courtroom.)

21 \* \* \*

22 THE COURT: You can be seated. The record  
23 will reflect that hearing is being held outside the  
24 presence of the jury. During the State's rebuttal  
25 argument, there was a request of defense counsel.

1 Did you want to make a record?

2 MR. MCCONVILLE: Yes, Your Honor. Comes now  
3 the defendant Sickels, moves the Court for a  
4 mistrial. This is the fifth time in the rebuttal  
5 argument that this counsel has made a misstatement  
6 of the law. And it has already caused the Court on  
7 one occasion to have to do an instruction to this  
8 jury.

9 And this misstatement of the law is the  
10 exact same misstatement of the law which was the  
11 first one up there on the board which the Court  
12 already struck, that they have to believe the  
13 defendants. That is a misstatement of the law.  
14 The defendants don't have to prove anything. They  
15 don't have to do anything. If they don't believe  
16 any of these people, they can find -- they have to  
17 find these defendants not guilty. They do not have  
18 to believe anything that we put on nor do we have  
19 to put on anything.

20 And five times is just too many, Judge. And  
21 I know we spent nine days here, but this is just  
22 unbelievable. I have never seen this. It's  
23 prosecutorial misconduct to try to get in a  
24 statement that this Court has already stricken once  
25 in the same closing argument, and I move for a

Exhibit F 2 of 11

1       mistrial.

2               MR. SCOTT: Your Honor, I would agree with  
3       Mr. McConville. There have been numerous  
4       misstatements of the law. There has been an  
5       ongoing attempt during this rebuttal -- frankly, in  
6       opening statement as well, but during this rebuttal  
7       argument to shift the burden.

8               The statements are improper. They are  
9       misstatements of the law of a constitutional  
10       proportion and, you know, frankly, I would like to  
11       see this done sua sponte, but I do at this time  
12       join Mr. McConville's motion for a mistrial. I  
13       don't think that this can be remedied.

14              It's been an ongoing thing that they have to  
15       believe something that these defendants say in  
16       order to find them not guilty. It is absolutely a  
17       misstatement of the law and, again, of a  
18       constitutional proportion. Thank you.

19              THE COURT: What's the State's position?

20              MR. PROSSER: Your Honor, I -- I just can't  
21       agree with any of that. I think the substance and  
22       the intent of counsel's comment has to do with the  
23       statements of the defendants that the  
24       untruthfulness of the statements of the defendants  
25       and the potential effect that those statements may

1 be having on the jurors' mind.

2 I didn't hear before and I don't hear any --  
3 I mean counsel did not stand up and say the law  
4 says anything. She was talking about -- and I  
5 don't know exactly -- I'm not a verbatim  
6 transcriber, but she was talking about the effect on  
7 the jurors' mind of believing what the defendants  
8 said. And I think it's perfectly proper argument  
9 by the State to say, Look, folks, you know, you  
10 have to consider what these defendants have said in  
11 reaching your verdict in this case.

12 And I think that was the intent -- the  
13 substance and the intent of the argument. And I  
14 don't think it's been done five times, and I think  
15 there was one comment up at the beginning that was  
16 taken off before any comment was made.

17 And I don't recall five other times that  
18 this was done, but I think counsel is a little  
19 angry right now and I think that may have been an  
20 exaggeration. I don't know how many times, but  
21 this argument has not been done five times, and I  
22 think it's a fair argument.

23 THE COURT: Let's just review the record to  
24 see if it's been done twice. Could you put up,  
25 please, the first three lines of the rebuttal

1 argument that the Court asked you to take down.

2 MR. PROSSER: I will try.

3 THE COURT: All right. So the first three  
4 lines of the slide that the Court struck before the  
5 arguments began was quote, unquote, "Not guilty  
6 requires you to believe defendants and not believe  
7 Lisa Smith."

8 The objection to that was sustained. The  
9 statement that was made in the rebuttal argument  
10 that caused this objection was, quote, "In order to  
11 find the defendants not guilty, there has to be  
12 some element in you to believe what the defendants  
13 have told you in their statements and in their  
14 testimony."

15 So it's the same thing. And the Court is  
16 troubled by the fact that the Court sustained the  
17 objection, struck the argument, and then at the  
18 conclusion of the State's rebuttal we have exactly  
19 the same argument that the Court previously struck.

20 MS. GOETTSCH: Judge, I'm commenting on the  
21 fact -- I'm not stating the law, but I'm saying  
22 that common sense dictates if you're going to  
23 disregard Ms. Smith, you're somehow giving credence  
24 to what the defendants said. And they have given  
25 statements. They don't have to, but they did.

1 They testified. They don't have to, but they did,  
2 and I should be able to comment on their  
3 believability.

4 And there is something psychologically to  
5 what a juror has to go through that if they're  
6 going to say, Well, we're not going to believe Lisa  
7 Smith, and they're somehow believing part of the  
8 defendants. I don't think that's -- I'm not  
9 quoting the law. It's a common sense argument.  
10 That's where I was going with it. I don't  
11 understand why I can't comment on if you're going  
12 to endorse them, let's look at their statement. I  
13 mean they have put their testimony out there. I'm  
14 shocked.

15 THE COURT: You're shocked?

16 MS. GOETTSCHE: I guess I don't think that is  
17 improper when I'm saying this is your common sense  
18 way of viewing this evidence.

19 THE COURT: Well, what was the objection to  
20 begin with when this was shown to the jury?

21 MR. MCCONVILLE: I think it was a  
22 misstatement of the law, Your Honor. It shifted  
23 the burden and it wrongly said -- and I'm  
24 paraphrasing. I don't recall everything I said,  
25 but it wrongly implied to the jury that these

1 defendants have to prove something when all the  
2 instructions and the law is to the contrary. And  
3 if you don't believe them, you have to --

4 MS. GOETTSCH: That's not what it says,  
5 Judge. And I have taken that down.

6 THE COURT: Then you put it right back up.

7 MS. GOETTSCH: I didn't put it up.

8 THE COURT: You stated exactly the same  
9 thing in conclusion of your argument after being  
10 told by the Court not to do it.

11 MS. GOETTSCH: Well, I apologize.

12 THE COURT: Well, the question is whether  
13 it's improper shifting of the burden of proof over  
14 to the defense and whether it misstates the burden  
15 of proof in this case.

16 The burden of proof is stated in Instruction  
17 Number 4. The burden is on the State to prove the  
18 defendants guilty beyond a reasonable doubt. And  
19 that instruction provides, in part, if after a full  
20 and fair consideration of all the evidence you are  
21 firmly convinced of the defendant's guilt, then you  
22 have no reasonable doubt and you should find the  
23 defendant guilty. But if, after a fair and full  
24 fair consideration of all the evidence in the case,  
25 from the lack or failure of evidence produced by



1 the State, you are not firmly convinced of the  
2 defendant's guilt, then you have a reasonable doubt  
3 and you should find the defendant not guilty.

4 Your little shorthand of that leaves out  
5 some fairly important premises of constitutional  
6 law and that is you -- in order to find the  
7 defendants not guilty, there has to be some element  
8 that you to believe what the defendants have told  
9 you in their statements and in their testimony. In  
10 other words, in order to find reasonable doubt, you  
11 have to believe the defendants. But there is a  
12 whole lot of other evidence in this case and the  
13 Court's jury instruction refers to a full and fair  
14 consideration of all the evidence in the case. So  
15 the objection was sustained to begin with and then  
16 did you it again.

17 So the question is whether or not there  
18 should be a mistrial. The defendant's motion for  
19 mistrial is denied. The objection will be  
20 sustained. We're going to bring the jury in and  
21 we're going to finish this closing argument and  
22 we're going to submit this case.

23 MS. GOETTSCHE: I apologize. Nothing was  
24 intentional. When I was saying that an element is  
25 that -- Of course, they have testified, so that's

1 in their head. So I'm saying an element of your  
2 not guilty verdict would to a certain extent  
3 involve believing what the defendant is saying.  
4 But I'm going to leave that alone. It was not  
5 intentional. I apologize.

6 THE COURT: I think that would be a good  
7 idea to leave it alone. And I believe you that it  
8 wasn't intentional and that's why I'm not going to  
9 grant a mistrial. And I'm not finding  
10 prosecutorial misconduct, but you weren't careful.  
11 And after the Court's already sustained the  
12 objection to the beginning of your closing argument  
13 on the exact same premise, for you to come back to  
14 it at the conclusion of your argument is just not  
15 being careful and not making a good record for  
16 appeal.

17 MR. SCOTT: Your Honor --

18 THE COURT: That's all I --

19 MR. SCOTT: I understand you have sustained  
20 the objection. I would like to be heard on this  
21 for one brief moment.

22 THE COURT: Sure.

23 MR. SCOTT: In addition to that line on the  
24 Power Point presentation and the closing argument  
25 that was made, I do believe that -- Well, I believe

1 that it is prosecutorial misconduct and I believe  
2 one other thing that indicates that, Your Honor, is  
3 that this is the exact same language that was  
4 presented in their proposed jury instructions that  
5 you denied that they have been trying to get in  
6 throughout this entire closing argument.

7 .. And I think that that adds to the -- well,  
8 to the point that this should be mistried because  
9 it's not just some sort of slip of the tongue and  
10 it's not just some sort of slip of the Power  
11 Points. I mean these are intentional acts that are  
12 attempting to put in the jurors' mind law that the  
13 Court -- law that is not of the State of Iowa, law  
14 that is against the constitution, and law that was  
15 told to these prosecutors would not be part of the  
16 law of this case based on their requested jury  
17 instructions.

18 And that's the additional record that I  
19 would like to make on that motion for mistrial,  
20 Your Honor.

21 THE COURT: All right.

22 MR. MCCONVILLE: Could I say one other  
23 thing? I'm not going to argue with your ruling. I  
24 wanted to clear up the record.

25 THE COURT: Sure.

Exhibit F 10 of 11 p.43

1 MR. MCCONVILLE: When I said this is the  
2 fifth time, I also said the second time on this  
3 statement. I have made -- And I will stand on  
4 whatever Misty shows, because I'm sure the record  
5 is going to show it. I have made five objections  
6 in this closing rebuttal and all five of them have  
7 been sustained.

8 THE COURT: That's right.

9 MR. MCCONVILLE: So that was not a  
10 misstatement and that was not an exaggeration even  
11 though the Court knows I am occasionally in the  
12 position where I do have a tendency to exaggerate.  
13 This time it was not.

14 THE COURT: The motions for mistrial are  
15 overruled. Have Patti bring in the jury.

16 \* \* \*

17 (Jury enters courtroom.)

18 \* \* \*

19 THE COURT: Thanks. Be seated. The  
20 objection is sustained.

21 Ms. Goettsch, you may proceed.

22 MS. GOETTSCH: Thank you. We have the  
23 burden of proof in this case. You heard the  
24 defendants testify. You have to ask yourselves  
25 about their believability. You know what the truth

1 (Requested excerpt from March 12, 2009)

2 \* \* \*

3 THE COURT: Ms. Goettsch, the State's  
4 rebuttal.

5 MR. PROSSER: I have to get my computer  
6 going.

7 THE COURT: Okay.

8 MR. MCCONVILLE: Your Honor, I'm going to  
9 object to that. The first three lines is a  
10 misstatement of the law.

11 THE COURT: Sustained.

12 MR. MCCONVILLE: Move that it be stricken  
13 and taken off that there.

14 THE COURT: Sustained.

15 MS. GOETTSCHE: If I may, thank you.

16 Mr. Scott told you that our job is to prove  
17 this to you beyond a reasonable doubt. Let's take  
18 a logical unimpassioned look at this and see if we  
19 have done that.

20 To give the defendants a not guilty verdict  
21 as they have asked you for, you have to essentially  
22 disbelieve, forget Lisa Smith. Because if you  
23 believe her beyond a reasonable doubt, that alone  
24 is enough to sustain a verdict of guilty to sexual  
25 abuse in the second degree.

Exhibit G

1           Sexual abuse in the second degree is when  
2           someone is aided and abetted. You listened to  
3           Ms. Smith. She told you that that's exactly what  
4           Mr. Christensen did to help the act occur with John  
5           Sickels. If you believe her, you're entitled to  
6           that verdict.

7           To disbelieve her, to discount her, to say  
8           that something in her testimony has reasonable  
9           doubt, you really have to logically come to two  
10          conclusions in your mind: A, that she has a  
11          motive. Because I think we would all agree that  
12          people lie for a reason. I suppose there's some  
13          situation where someone just lies for fun; I'm  
14          going to tell a big lie and see what happens just  
15          for fun. But most lies are told because there's a  
16          reason, there's a motive behind it.

17          The other aspect or conclusion that you must  
18          come to to find reasonable doubt here is you have  
19          to believe the defendants, believe the defendants  
20          and give Lisa Smith a motive to lie or some  
21          combination thereof. That's what they're asking  
22          you to do.

23          Let's look at all the reasons that they have  
24          put forth that they don't want you to return the  
25          verdict of guilty. And let me also say this:

Exhibit H

1 drunk. If that's the case, he's a police officer,  
2 he should have known she couldn't consent. Which  
3 is it? You can't have it both ways.

4 MR. MCCONVILLE: Excuse me, Your Honor. I  
5 object to that. That's a misstatement of the law.  
6 I'd like to take a matter up with the Court.

7 THE COURT: All right. Well, we will take a  
8 recess and the jury will remember the admonition.

9 \* \* \*

10 (Jury exits courtroom.)

11 \* \* \*

12 THE COURT: Let the record show hearing is  
13 being held outside the presence of the jury during  
14 the State's rebuttal argument. The defendants are  
15 present.

16 Mr. McConville, you wanted to make a record.

17 MR. MCCONVILLE: Yes, Your Honor, I did.

18 And I objected to the statement that was made  
19 because this is the second time there's been  
20 misstatements of the law made in this court. The  
21 first one the Court struck because it basically  
22 said that we had to prove that we were telling the  
23 truth or that they didn't have to believe us. Plus  
24 it was a misstatement of the law that if they  
25 believed her and didn't believe -- if they did

Exhibit I

p. 10

1 she would have to go back through the kitchen where  
2 the dishwashers are and then back out this door  
3 back out to that little utility room and then out  
4 the back locked door.

5 Now, if you are being surrounded by two men  
6 that are within arm's length of you, are you  
7 thinking about going out the back door? Are you  
8 thinking you can even run at that point? No. And  
9 I asked Lisa, Why didn't do you that? She said, I  
10 don't know. I don't know. I wasn't thinking that.  
11 Why did you not scream? Well, who's going to hear?

12 Also the conceptions that we have about what  
13 we would do if we were being attacked. I submit to  
14 you they're different for whether it's someone you  
15 know or whether it's the stranger jumping out of  
16 the bushes and chasing you down the street with a  
17 ski mask.

18 MR. SCOTT: Your Honor, I'm going to object  
19 to that. It's completely improper and I mean -- If  
20 we can approach for a moment?

21 THE COURT: Yes.

22 \* \* \*

23 (Bench conference)

24 \* \* \*

25 THE COURT: The objection is sustained. You

Exhibit 5

p. 32



1 think there was something mentioned that is  
2 improper rebuttal and I would object to that also.

3 THE COURT: Sustained.

4 MS. GOETTSCH: When you're done looking at  
5 all the facts, there's no reasonable doubt here.  
6 There's no reasonable doubt left. All the things  
7 that they want you to believe, all the rabbit holes  
8 that they want you to go through don't hold water.

9 In order to find the defendants not guilty,  
10 there has to be some element in you to believe what  
11 the defendants have told you in their statements  
12 and in their testimony.

13 MR. MCCONVILLE: Objection. That's the same  
14 misstatement of the law that you made her take down  
15 in the first place, and I want to take this up with  
16 the Court right now, Your Honor.

17 THE COURT: We will take a recess. The jury  
18 will remember the admonition given earlier.

19 \* \* \*

20 (Jury exits courtroom.)

21 \* \* \*

22 THE COURT: You can be seated. The record  
23 will reflect that hearing is being held outside the  
24 presence of the jury. During the State's rebuttal  
25 argument, there was a request of defense counsel.

Exhibit K

p. 34

1 may proceed.

2 MS. GOETTSCHE: Thank you. Ms. Smith is not  
3 running out the back door, is not screaming, is not  
4 fighting because she knows it's not going to do any  
5 good. It's also -- As she testified to you, this  
6 happened very suddenly to her. In fact, when  
7 Mr. Christensen has her cornered behind the bar,  
8 she's even saying, This isn't happening, right?  
9 Don't do this.

10 And she talked about how she wasn't even  
11 seeing this coming until it was too late. So what  
12 do we expect her to do? Would we expect her to  
13 call the police? They suggested in their argument  
14 that she should have tried to call Larry. At that  
15 point she's being surrounded by two police  
16 officers. That wasn't going to happen. That's not  
17 reasonable doubt because it didn't happen.

18 The other thing that we have heard some  
19 mention of about is the warrant. She has lots of  
20 motives I think is what we heard. We hadn't heard  
21 about the warrant. There was some discussion that  
22 maybe there was a warrant out. You heard the  
23 testimony that neither she nor either one of the  
24 defendants --

25 MR. MCCONVILLE: Excuse me, Your Honor. I

Exhibit L

p. 33

More importantly, [L.S.'s] testimony was significantly corroborated by the admissions of the defendants. For example, in his trial testimony, Sickels admitted that he asked L.S. for [oral sex] for himself and Christensen after the other patrons had left the Club. Sickels even admitted the first thing that happened after L.S. said [no] was that he approached L.S. behind the bar, kissed her, [and had sexual intercourse]. While Sickels testified that L.S. reciprocated, Sickels admitted not another word was exchanged between them after L.S. said "no" to oral sex. Defendant Christensen admitted that after the sex act was completed, he said to L.S. "this never happened," or words to that effect, as he and Sickels were leaving the Club. While Christensen testified that he said this because he thought L.S. was embarrassed because he had walked in on something, Christensen's testimony corroborates [L.S.'s] testimony that these words were said.

Given the physical evidence at the crime scene and the admissions of the defendants, the State's case was strong. The complainant's testimony was credible. Her statements to the DCI, her deposition testimony and her trial testimony were consistent on her central allegations of sexual abuse. The testimony of the defendants was neither consistent nor credible. Under the circumstances of this case, the Court doubts that the misstatements of the prosecutor on rebuttal had any serious impact on the outcome.

The court also analyzed the "severity and persuasiveness" element of prejudice:

Nevertheless, the performance of the prosecutor in her rebuttal closing smudged an otherwise clean record in this long and difficult trial. The prosecutor repeated the offensive burden shifting statement on at least two occasions in rebuttal. But when viewed in the context of the entire trial, these isolated statements did not rise to the level of a due process violation.

This trial was not characterized by the pervasive lack of civility or unprofessional conduct that has warranted a new trial or a reversal of a conviction in other cases. . . . While this Court does not condone the prosecutor's conduct during her rebuttal closing, the Court does not find that this trial contained the sort of improper questioning or disparaging and belittling remarks by the prosecutors concerning the defendants that has supported a finding of prejudicial prosecutorial misconduct in our jurisprudence.

This trial was conducted over the better part of eight days. There will be hundreds of pages of transcript on appeal. The prosecutors exhibited professionalism throughout the trial. They honored the presumption of innocence and assumed the burden of proof throughout voir dire, opening statement, the presentation of

Exhibit M 1 of 2

evidence and the opening closing argument. It was only on rebuttal that the prosecutor erred in the formulation of her argument. She prepared her rebuttal in advance and was not able to adjust after the Court sustained the first objection. But in the context of the entire trial, these missteps alone did not deprive the defendants of a fair trial. The misconduct of the prosecutor was not severe and pervasive.

(Citations omitted.)

The court concluded "the defendants failed to establish that the misconduct of the prosecutor denied them a fair trial or deprived them of due process," stating:

This Court was a firsthand observer of the entire trial including the prosecutorial misconduct and the jury's reaction to it. The Court is firmly convinced that there is no reasonable probability the prosecutor's misconduct prejudiced, inflamed or misled the jurors so as to prompt them to convict the defendants for reasons other than the evidence and the law contained in the Court's jury instructions. Instead, the Court believes the jury took the prosecutor's arguments, the defendants' objections and the Court's rulings sustaining the objections in stride. The Court believes the jury returned a verdict based on the evidence and the law set forth in the Court's jury instructions.

(Citations omitted.)

We note generally, a jury is presumed to follow its instructions. *State v. Frank*, 298 N.W.2d 324, 327 (Iowa 1980). "[B]ecause the trial court is a firsthand observer of both the alleged misconduct and any jury reaction to it," we recognize "a trial court is better equipped than appellate courts can be to determine whether prejudice occurs." *Anderson*, 448 N.W.2d at 34. When we view the prosecutor's misstatements in the context of the entire trial, we are convinced the misstatements did not deprive Sickels of a fair trial and conclude he has failed to prove prejudice.

Exhibit M 2 of 2