ELECTRONICALLY FILED OCT 03, 2019 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 19–0214

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GREGORY MICHAEL DAVIS,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR LINN COUNTY
THE HONORABLE SEAN W. MCPARTLAND, JUDGE

APPELLEE'S BRIEF

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I. The marshalling instruction for first-degree murder did not contain cross-references to instructions that defined the insanity defense. Other jury instructions specified that insanity should be considered after finding that all elements of a crime were proven, and that all jury instructions needed to be read together. Was Davis's trial counsel ineffective for failing to object to the omission of cross-references?

Authorities

Sillick v. Ault, 358 F.Supp.2d 738 (N.D. Iowa 2005)
Strickland v. Washington, 466 U.S. 668 (1984)
Dolezal v. Bockes, 602 N.W.2d 348 (Iowa 1999)
Hannan v. State, 732 N.W.2d 45 (Iowa 2007)
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State v. Ondayog, 722 N.W.2d 778 (Iowa 2006)
State v. Overmann, 220 N.W.2d 914 (Iowa 1974)
State v. Sallis, 262 N.W.2d 240 (Iowa 1978)
State v. Shorter, 893 N.W.2d 65 (Iowa 2017)

State v. Stonerook, No. 05–1917, 2006 WL 3799546 (Iowa Ct. App. Dec. 28, 2006)
State v. Thorndike, 860 N.W.2d 316 (Iowa 2015)
State v. Uthe, 542 N.W.2d 810 (Iowa 1996)
State v. Welch, 507 N.W.2d 580 (Iowa 1993)
State v. Wills, 696 N.W.2d 20 (Iowa 2005)
2019 Iowa Acts ch. 140, § 31
Iowa Code § 814.7

II. Davis argued that ongoing methamphetamine use made him both unable to form specific intent and unable to comprehend the wrongness of his actions. The State requested an instruction on intoxication, in addition to insanity and diminished responsibility. Davis objected to the intoxication instruction. Did the trial court err in submitting that instruction?

Authorities

Middleton v. McNeil, 541 U.S. 433 (2004)
Alcala v. Marriott International, Inc., 880 N.W.2d 699 (Iowa 2010)
Foster v. State, 478 N.W.2d 884 (Iowa Ct. App. 1991)
State v. Adviento, 319 P.3d 1131 (Haw. 2014)
State v. Aguilar, 325 N.W.2d 100 (Iowa 1982)
State v. Ambrose, 861 N.W.2d 550 (Iowa 2015)
State v. Anderson, No. 15–1180, 2016 WL 5407954 (Iowa Ct. App. Sept. 28, 2016)
State v. Broughton, 425 N.W.2d 48 (Iowa 1988)
State v. Caldwell, 385 N.W.2d 553 (Iowa 1986)
State v. Collins, 305 N.W.2d 434 (Iowa 1981)
State v. Flores, 314 P.3d 120 (Haw. 2013)
State v. Haanio, 16 P.3d 246 (Haw. 2001)
State v. Jenkins, 412 N.W.2d 174 (Iowa 1987)
State v. Liggins, 557 N.W.2d 263 (Iowa 1996)
State v. Marin, 788 N.W.2d 833 (Iowa 2010)
State v. Predka, 555 N.W.2d 202 (Iowa 1996)
State v. Spates, 779 N.W.2d 770 (Iowa 2010)
State v. Taylor, 307 P.3d 1142 (Haw. 2013)

State v. Traywick, 468 N.W.2d 452 (Iowa 1991)
State v. Van Rees, 246 N.W.2d 339 (Iowa 1976)
State v. Youngbear, 202 N.W.2d 70 (Iowa 1972)
Steinkuehler v. State, 507 N.W.2d 716 (Iowa 1993)

III. Instructions on numerous lesser included offenses were submitted. Those marshalling instructions included cross-references to instructions about insanity and diminished responsibility. Davis was convicted of first-degree murder. Was his counsel ineffective for failing to object to instructions on general intent offenses that cross-referenced the diminished responsibility defense?

Authorities

Strickland v. Washington, 466 U.S. 668 (1984)
Hannan v. State, 732 N.W.2d 45 (Iowa 2007)
State v. Ambrose, 861 N.W.2d 550 (Iowa 2015)
State v. Callender, 444 N.W.2d 768 (Iowa Ct. App. 1989)
State v. Keller, 760 N.W.2d 451 (Iowa 2009)
State v. LeCompte, 327 N.W.2d 221 (Iowa 1982)
State v. Negrete, 486 N.W.2d 297 (Iowa 1992)
State v. Ondayog, 722 N.W.2d 778 (Iowa 2006)
State v. Thorndike, 860 N.W.2d 316 (Iowa 2015)

IV. Davis's trial counsel asked an expert witness to state and explain his conclusion about Davis's capacity to form specific intent. That witness replied that Davis had the capacity for goal-directed action, but lacked the capacity to know that he was committing a crime. Davis had raised alternative defenses: insanity and diminished responsibility. Was counsel ineffective for asking that question and eliciting that testimony?

Authorities

Strickland v. Washington, 466 U.S. 668 (1984)

Grismore v. Consolidated Products Co., 5 N.W.2d 328 (Iowa 1942)
Hering v. State, No. 13–1945, 2016 WL 3269454 (Iowa Ct. App. June 15, 2016)
In re Detention of Palmer, 691 N.W.2d 413 (Iowa 2005)
State v. Bugely, 562 N.W.2d 173 (Iowa 1997)
State v. Hardin, No. 03–1089, 2004 WL 2947440 (Iowa Ct. App. Dec. 22, 2004)
State v. Keller, 760 N.W.2d 451 (Iowa 2009)
State v. Mickens, 462 N.W.2d 296 (Iowa Ct. App. 1990)
State v. Moses, 320 N.W.2d 581 (Iowa 1982)
State v. Norem, No. 14–1524, 2016 WL 146237 (Iowa Ct. App. Jan. 13, 2016)
State v. Thorndike, 860 N.W.2d 316 (Iowa 2015)
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Iowa R. Evid. 5.705
Iowa R. Evid. 5.801(d)(2)(A)
Laurie Kratky Doré, *Iowa Practice Series: Evidence*, § 5.704.2 (updated 2018)

V. Davis alleges cumulative error, without explaining any relationship or interaction among his various claims. Does that waive the argument? Could cumulative error possibly be found on this record?

Authorities

United States v. Dunkel, 927 F.2d 955 (7th Cir. 1991)
State v. Arterburn, No. 13–0035, 2014 WL 1715061 (Iowa Ct. App. Apr. 30, 2014)
Hyler v. Garner, 548 N.W.2d 864 (Iowa 1996)
Inghram v. Dairyland Mut. Ins. Co., 215 N.W.2d 239 (Iowa 1974)
State v. Mitchell, 450 N.W.2d 828 (Iowa 1990)
Iowa R. App. P. 6.903(2)(g)(3)

ROUTING STATEMENT

Davis seeks retention on his claim about the marshalling instruction for first-degree murder that omitted language referencing his insanity defense. *See* Def's Br. at 12. No objection was raised when the jury instructions were given. Iowa has no "plain error" rule. *See State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999). Davis raises this as an ineffective-assistance claim, in the alternative. Those claims are best resolved "on a more developed record in a postconviction-relief proceeding," unless it is apparent that prejudice could not be shown. *See State v. Shorter*, 893 N.W.2d 65, 84 (Iowa 2017). If amenable to resolution at all, it would be on the principle that "[j]ury instructions are not considered separately; they should be considered as a whole." *State v. Fintel*, 689 N.W.2d 95, 104 (Iowa 2004); *accord State v. McMullin*, 421 N.W.2d 517, 518–20 (Iowa 1988). Because this case requires application of these established legal principles, it should be transferred to the Court of Appeals. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This is Gregory Michael Davis's direct appeal from a conviction for first-degree murder, a Class A felony, in violation of Iowa Code section 707.2(1)(a), for killing Carrie Davis.

In this direct appeal, Davis argues: **(1)** the trial court erred by denying his motion for new trial, which alleged his trial was unfair because of the unchallenged omission of language referencing his insanity defense from the marshalling instruction for first-degree murder; **(2)** the trial court erred by submitting a jury instruction on the intoxication defense, over Davis's objection; **(3)** the trial court erred in denying his renewed motion for new trial, which alleged that his trial was unfair because various marshalling instructions on lesser-included offenses that required general intent also contained cross-references to jury instructions about diminished responsibility; **(4)** his trial counsel provided ineffective assistance in examining a witness who testified that Davis had specific intent to kill Carrie, but did not have the capacity to know the wrongful nature of his conduct; and **(5)** the cumulative effect of these errors violated Davis's rights to a fair trial and due process of law.

Statement of Facts

It was undisputed that Davis killed Carrie, his girlfriend, by stabbing her repeatedly until she died. Then, he rolled her body up in multiple blankets and a carpet, and put it in his trailer. *See* TrialTr.V2 16:13–19:4; TrialTr.V2 40:23–50:20; TrialTr.V3 105:3–11.

On Sunday, October 1, 2017, Davis's mother observed the trailer, saw the rolled-up carpet, and asked Davis about it. Davis told her that Carrie's body was in the trailer. His mother inferred that Carrie's body was inside the carpeting. *See* TrialTr.V3 35:8–39:21. She contacted an attorney that evening. The next day, she called the Marion police on a non-emergency line and requested a welfare check. *See* TrialTr.V3 40:3–42:14; TrialTr.V3 68:5–69:1; *see also* TrialTr.V2 23:2–24:16; TrialTr.V2 27:2–23; State's Ex. 4. The officer who responded found "two rolls of rolled up carpet." One of them "appeared to be wrapped around an object." He moved some of the fabric and looked inside—and he saw a human foot. *See* TrialTr.V2 27:19–29:20.

Investigators searched the vacant residence where the trailer containing Carrie's body was found. There were no illegal drugs or drug paraphernalia inside. *See* TrialTr.V2 40:23–42:8. There were pieces from two plastic cards in the driveway, which had been cut up. One of the cards had Carrie's name on it. *See* TrialTr.V2 45:12–46:4; State's Ex. 5-7; App. 87.

Investigators searched Davis's residence, which also contained no illegal drugs or drug paraphernalia. *See* TrialTr.V2 50:18–53:6. A mattress had been placed to conceal a large bloodstain on the floor.

See TrialTr.V2 55:16–57:17; State's Ex. 6-6 through 6-9; App. 88–91. Investigators found a crumpled note in the garage, which said:

> Greg Davis is and the spirit of Christ with the powers of the devil and always holds the power of God or the know how and ability and the ability to know how to do anything and everything by praying to himself to do what he or she or everyone or even Greg Davis wants. God can love or hate but not murder. Greg Davis can do anything so is similar to God but can choose to murder if he sees it necessary. God mostly love.

TrialTr.V2 65:7–23; State's Ex. 6-31; App. 92. Other notes with similar writings were found, referencing "immunity for Greg Davis" and "the day the life got took." *See* TrialTr.V2 65:24–68:7; State's Ex. 6-32 through 6-36; App. 93–97.

On October 2, 2017, around 12:44 a.m., Davis's pickup was caught on a traffic camera with "the two articles of what appear to be the carpeting rolled up in the back." *See* TrialTr.V2 149:3–154:20; State's Ex. 11. Scraps of a torn-up note were found in Davis's pickup. An investigator reassembled its pieces and read it aloud at trial:

> I stabbed Carrie in a vicious attack four days ago when I was — I believe that word is was on drugs and, I believe, possessed by what I believe was the devil. I am— and then there's a completely obscured word that I can't read — truely (sic) sorry and, I believe, and apologize to her friends and family. She is in the trailer. And then there's a line that's completely scribbled out that I cannot read. She was the love of my life. Greg Davis. And then there's actually — the word "void" is written over the top of it.

See TrialTr.V2 133:20–142:14; State's Ex. 13. Investigators also found a garbage bag in the bed of the pickup. Upon tearing it open, they found it contained clothing with apparent bloodstains (which were still damp) and a paper towel with a similar stain. *See* TrialTr.V2 130:20–133:12; State's Ex. 8-4 through 8-12; App. 104–112.

Davis was taken into custody that day, at his parents' residence. *See* TrialTr.V2 87:6–94:2. An officer who took Davis into custody said:

> His appearance seemed to be normal to me, I guess. And his demeanor, I mean, we woke him up while he was sleeping on the deck, so he was startled by us, but his demeanor seemed normal. He was able to communicate with us.

TrialTr.V2 94:3–14; *accord* State's Ex. 10. There was nothing about Davis's appearance or demeanor that gave them reason to suspect he was under the influence of alcohol or drugs. *See* TrialTr.V2 94:15–18. Davis had no illegal drugs or drug paraphernalia on his person. *See* TrialTr.V2 94:18–95:21; TrialTr.V2 125:13–126:25.

After Davis was taken into custody, investigators searched his parents' residence. *See* TrialTr.V2 100:5–102:6. Inside the third stall in the garage, they found an extension cord tied into "a makeshift noose," attached to the overhead chain-arm mechanism of the garage door and positioned near a step-ladder. *See* TrialTr.V2 102:7–103:4; TrialTr.V2

106:2–107:17; State's Ex. 7-5 through 7-10; App. 98–103. An investigator who had "seen multiple hangings" interpreted this as "a process that was started and then not finished by making a knot," which meant that somebody was contemplating suicide. *See* TrialTr.V2 116:1–117:2.

Police interviewed Davis, and a recording of that interview was admitted into evidence. *See* TrialTr.V3 71:4–77:7; State's Ex. 12. An officer testified that Davis was lucid, coherent, and was "able to make decisions during the interview" and to "respond verbally to questions." *See* TrialTr.V3 72:3–74:20.

Davis raised insanity and diminished responsibility as defenses. Davis had received drug treatment, but had never been hospitalized for a mental illness. *See* TrialTr.V3 43:20–44:11. Davis's mother said she was concerned that Davis had symptoms of paranoid schizophrenia, and she did not like Carrie because she seemed to be "in the way of [Davis] getting help." *See* TrialTr.V3 46:16–49:12; *but see* TrialTr.V3 64:8–66:5. Davis's mother said they repeatedly urged Davis to seek treatment for mental health issues, and he faced no external barriers to doing so. *See* TrialTr.V3 61:17–64:7; *accord* TrialTr.V4 91:19–93:22.

Dr. Gary Keller examined Davis at IMCC and diagnosed him with major depressive disorder. *See* TrialTr.V4 12:7–13:2. Dr. Keller

said Davis's symptoms were primarily anxiety, depressed mood, stress, and difficulty concentrating. *See* TrialTr.V4 13:3–14:3. Davis described his mental health history in terms involving "depression and anxiety," but not schizophrenia or psychosis. *See* TrialTr.V4 16:12–20. When describing his symptoms, Davis described some conspiracy theories, illusory conversations, and "images of Jesus"—but "he acknowledged that was in his mind," as opposed to reality. *See* TrialTr.V4 14:4–19.

Dr. Arnold had Andersen evaluated Davis's competency at the State's request. TrialTr.V4 41:22–42:12. He testified for the defense:

> **DR. ANDERSEN**: I concluded that at the time of the alleged crime he did not have the capacity to form the specific intent of a criminal act. He did have the intent to kill Ms. Davis. He, however, believed this act was morally right and necessary and that by killing her he would be freeing her of her evil forces and lead to her resurrection and perhaps to life in a better location.
>
> **DEFENSE**: You concluded that he did not have the capacity to form specific intent at the time he committed that act?
>
> **DR. ANDERSEN**: If I can nuance a — that a bit. He had the specific intent of killing her. He did not have a specific criminal intent. His understanding was that what he was doing was morally right and necessary. So, yes, he had an intent to kill in order to do the second part of specific intent, to achieve a consequence of freeing her from evil and ushering her into a better place, but he did not have a criminal intent in that at that time he did not believe he was killing her against the law.

See TrialTr.V4 49:25–52:15. Dr. Andersen's opinion hinged on Davis's use of methamphetamine; he called this a "meth-induced psychosis" that was an example of "the typical response to high-dose, repeated methamphetamine use." *See* TrialTr.V4 52:16–56:21. Dr. Andersen credited Davis's statements as truthful, including his accounts of his methamphetamine use. He concluded that "[Davis] had the intent to kill [Carrie]"—but he also said that Davis did not have the capacity to know that killing her was wrongful or unlawful. *See* TrialTr.V4 58:8–59:4; *accord* TrialTr.V4 64:15–20; TrialTr.V4 68:12–69:12.

Dr. Arthur Konar evaluated Davis on November 9, 2017. *See* TrialTr.V4 99:13–100:14. His primary finding was that Davis "had a really horrible case of substance abuse" and "chemical dependency," together with "a lack of impulse control." *See* TrialTr.V4 101:9–22. Because Dr. Konar believed Davis was addicted to methamphetamine, he saw this as involuntary intoxication. *See* TrialTr.V4 143:25–145:11. Davis was on suicide watch at the Linn County Jail, but "his agitation was more along the notion of trying to come to terms of what he had done, trying to put things together." *See* TrialTr.V4 127:23–129:5.

Dr. Konar described some of the effects of ongoing, long-term methamphetamine abuse (as distinct from its aftereffects):

> So when somebody utilizes something like methamphetamine for three to five days or even longer in a nonstop type of thing, really a couple of major things occur. The first thing that occurs is that that person often has the same sorts of psychotic types of episodes as an individual who is not — who is schizophrenic. They are going to be paranoid. They are going to have visual hallucinations. They are going to have delusions. They are going to hear voices. And all of those aspects that you would expect in terms of a psychotic type of episode is exactly what occurs here. In fact, it's called a substance-induced psychosis.
>
> [. . .]
>
> . . . [A] couple of things tend to occur when they're tweaking. This has been shown throughout multiple different sorts of research. Number one, folks tend to get aggressive. They tend to get paranoid, and they often tend to get violent during those times.

See TrialTr.V4 129:6–132:3. Ultimately, Dr. Konar diagnosed him with "[s]ubstance-induced psychosis in partial remission." *See* TrialTr.V4 139:24–140:19. Dr. Konar said that Davis "did not have the ability to form intent" at the time of the killing and "also did not understand how his behaviors would ultimately affect the individual that he hurt." *See* TrialTr.V4 140:22–141:21. Dr. Konar's opinion that Davis was hallucinating during the killing was based on what Davis had said:

> [Davis] stated that he was seeing and hearing things. He had thought that Carrie was the devil. He also thought that he was the devil. He thought that the way to essentially help her was to kill her and, therefore, essentially allow her to be resurrected, because he also thought that he was Jesus Christ.

> He was having a wild additional type of paranoid delusion in which he believed that there were chickens and chicken people that were on the roof, and these chicken people were armed, and they were essentially protecting him from other people coming on in. He believed that essentially that if he had killed her, that he was going to do her a favor because he was going to at that point save her; that somehow after he killed her he believed that these Muppet hands would come on in and essentially bring life back to her and allow her to be in a — free from these horrors.

See TrialTr.V4 141:22–143:14. Dr. Konar believed this was an instance of involuntary psychosis, as opposed to voluntary substance abuse, because "[t]hat addition dependency on methamphetamine comes from a long-term depression, and his ability to simply stop using was no longer in his control." *See* TrialTr.V4 143:17–144:16. He recognized that Dr. Andersen disagreed with him on that point. *See* TrialTr.V4 144:17–145:11. He also recognized that a person "can take meth and still have volition over [their] actions." *See* TrialTr.V4 164:2–10. And Dr. Andersen agreed that there was "no organic reason for [Davis's] psychosis, nothing internal" that generated or compounded what he viewed as "substance-induced psychosis" from methamphetamine. *See* TrialTr.V4 165:13–166:2. Finally, Dr. Konar agreed that Davis had acted to kill Carrie, with the intention of killing her. *See* TrialTr.V4 166:3–19; *accord* TrialTr.V4 168:8–171:18.

When Davis spoke to police after his arrest, he told them that it had been two days since he last used methamphetamine—and he said he was feeling fine. *See* State's Ex. 12 at 9:55; *accord* TrialTr.V3 72:3–74:20. Dr. Andersen testified that long-term methamphetamine use can generate psychosis, which would abate "about nine months" after methamphetamine use ceases. *See* TrialTr.V4 56:3–21. Even Dr. Konar agreed that Davis appeared functional in the recorded interview on the day of his arrest. *See* TrialTr.V4 160:22–161:16.

The jury found Davis guilty of first-degree murder. After the verdict, Davis replaced his counsel. His new counsel filed numerous motions for new trial, renewing some preserved claims and raising new claims attacking his trial counsel's performance as ineffective. *See* Motion for New Trial (1/11/19); App. 38; Supplemental Motion for New Trial (1/15/19); App. 45; Response (1/29/19); App. 62; Third Supplement (1/30/19); App. 71. The court denied all of those motions and sentenced Davis to life in prison without parole. *See* Ruling on Mot. for New Trial (1/27/19); App. 48; Ruling (1/30/19); App. 74; Ruling (1/31/19); App. 79; Denial of Motion & Judgment (2/1/19); App. 81; Sent.Tr. 2:15–19:17; Sent.Tr. 32:17–33:13.

Additional facts will be discussed when relevant.

ARGUMENT

I. Davis's trial counsel was not ineffective in failing to challenge omission of internal cross-references to other jury instructions from Jury Instruction 22.

Preservation of Error

Error was not preserved. The parties submitted their proposed jury instructions in a joint filing. *See* Joint Proposed Jury Instructions (9/7/18) at 26–27; App. 11–12. Davis informed the trial court that his proposed instruction (22B) only differed from the State's version (22A) in two ways, both relating to the numbered elements of the offense. *See* TrialTr.V5 13:2–14:1. The State argued that version 22A was preferable because it mirrored the model instructions. *See* TrialTr.V5 14:5–15; Memo (9/12/18); App. ----; *cf.* ISBA Model Criminal Jury Instr. 700.1. The trial court selected proposed instruction 22A "based upon the fact that it is a model instruction," and noted that it included the concepts that Davis had identified. *See* TrialTr.V5 14:16–22.

Davis did not object to the proposed instruction's omission of cross-references to instructions on the insanity defense. *See* TrialTr.V5 13:2–14:22. Davis did not raise the issue when the parties reviewed all internal cross-references in the jury instructions to check numbering. *See* TrialTr.V5 18:21–22:25. Davis heard the instructions read aloud to the jury, and did not flag this issue. *See* TrialTr.V5 23:1–26:7. Finally,

in argument on the motion for new trial, Davis conceded that error had not been preserved by timely objection. *See* Sent.Tr. 12:8–24.

Davis raised this argument in a motion for new trial, and the court ruled on it. *See* Motion For New Trial (1/11/19) at 2; App. 39; Ruling (1/27/19) at 1–3; App. 48–50. But that was already too late. *See State v. Ambrose*, 861 N.W.2d 550, 555–56 (Iowa 2015) (explaining error was not preserved for argument about jury instructions when "[t]he objection made at trial by Ambrose failed to give the trial court an opportunity to correct the error he now claims on appeal"); *State v. Ondayog*, 722 N.W.2d 778, 785 (Iowa 2006) (noting "timely objection to jury instructions in criminal proceedings is necessary to preserve alleged error for appellate review"). Davis argues "the district court is required to instruct the jury as to the law applicable to all material issues in the case." *See* Def's Br. at 21. But the Iowa Supreme Court firmly rejects any suggestion that error preservation requirements might not apply to claims alleging error in jury instructions.

> It is the trial court's duty to instruct a jury fully and fairly, even without request, but our adversary system imposes the burden upon counsel to make a proper record to preserve error, if any, in this factual circumstance by specifically objecting to instructions in their final form, requesting instructions and voicing specific exception in event they are refused.

State v. Sallis, 262 N.W.2d 240, 248 (Iowa 1978) (citing *State v. Overmann*, 220 N.W.2d 914, 918 (Iowa 1974)). "In the absence of such an objection, any alleged error in the instruction is waived." *See State v. Welch*, 507 N.W.2d 580, 584 (Iowa 1993) (citing *State v. Bell*, 223 N.W.2d 181, 185 (Iowa 1974)).

Davis can argue that his counsel was ineffective for failing to preserve error through a timely challenge to this instruction. *See, e.g.*, *Ondayog*, 722 N.W.2d at 785. Until recently, Iowa appellate courts could address ineffective-assistance claims on direct appeal "when the record [was] sufficient to permit a ruling." *See State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005). Recent amendments to section 814.7 reallocate the authority to decide those claims in the first instance. *See* Iowa Code § 814.7 (2019); 2019 Iowa Acts ch. 140, § 31. Because section 814.7 applied retroactively to cases pending on appeal when it was enacted, this remedial amendment that serves the same function in directing these claims to specific courts that are optimally equipped to resolve them is also procedural, and applies to all pending appeals. *See Hannan v. State*, 732 N.W.2d 45, 50–51 (Iowa 2007); *accord Dolezal v. Bockes*, 602 N.W.2d 348, 351 (Iowa 1999); *Smith v. Korf, Diehl, Clayton and Cleverly*, 302 N.W.2d 137, 138–39 (Iowa 1981).

If this Court disagrees or chooses not to decide whether the amendment to section 814.7 is applicable to pending appeals, it could still preserve this claim for resolution "on a more developed record in a postconviction-relief proceeding." *See Shorter*, 893 N.W.2d at 84.

Standard of Review

There is no standard of review for an unpreserved claim. Claims alleging ineffective assistance of counsel are reviewed de novo. *See, e.g.*, *State v. Thorndike*, 860 N.W.2d 316, 319 (Iowa 2015).

Merits

To establish ineffective assistance of counsel, "a defendant must typically show that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *State v. Keller*, 760 N.W.2d 451, 452 (Iowa 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Both elements must be proven, and failure to prove a single element is fatal to the claim. "If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently." *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

Each of the instructions for lesser included offenses noted that, after finding all elements were proven, "[y]ou must then consider the defense of insanity as described in Instructions No. 14–18." *See* Jury

Instr. 30, 32, 34, 36, 38, 42–44; App. 29–37. The instruction defining first-degree murder did not contain that language. *See* Jury Instr. 22; App. 28. Davis argues his trial counsel breached an essential duty by failing to object, and that he was prejudiced because that omission "resulted in the jury erroneously believing insanity was not applicable for consideration when deliberating on first-degree murder." *See* Def's Br. at 28–34. This claim fails on both breach and prejudice.

A. Davis cannot show breach of an essential duty because the jury instructions, taken together, accurately instruct on all applicable defenses.

Trial counsel has a duty to object to instructions that misstate the law or omit concepts entirely. However, "[i]t is well settled that a trial court need not instruct in a particular way so long as the subject of the applicable law is correctly covered when all the instructions are read together." *See State v. Uthe*, 542 N.W.2d 810, 815 (Iowa 1996); *accord State v. Canal*, 773 N.W.2d 528, 532–33 (Iowa 2009).

Here, the instructional package contained and explained the applicable law on the insanity defense, using this instruction:

> The Defendant claims he is not guilty by reason of insanity. You must first determine if the State has proved all the elements of the crime charged beyond a reasonable doubt. If you find the State has proved all the elements, then you must consider the issue of the Defendant's sanity.

Jury Instr. 14; App. 21. Another instruction contained a similar explanation of the need to consider the insanity defense after finding that the State carried its burden of proof beyond a reasonable doubt: "If the State has proved all the elements of a crime, you should then determine if the Defendant has proved he was insane." *See* Jury Instr. 16; App. 23. When jury instructions contain minor ambiguities that are clarified and resolved by *other* jury instructions, trial counsel has no duty to object and cannot be ineffective for declining to do so. *See Fintel*, 689 N.W.2d at 104; *accord* Sent.Tr. 16:2–17:18.

Davis argues that jurors would presume that, in light of the inclusion of cross-references in the marshalling instructions for all lesser-included offenses, omitting that language from the marshalling instruction for first-degree murder must have been intentional. *See* Def's Br. at 26–30. But it is just as likely that jurors viewed that extra language as a reminder that the insanity defense *also* applied to lesser-included offenses, rather than an indication that it *only* applied to lesser offenses. First-degree murder was the focus of the trial, and a reasonable juror would understand that insanity would be a defense to first-degree murder from the reference to "the crime charged" in the instruction introducing the concept. *See* Jury Instr. 14; App. 21.

And if insanity were inapplicable to first-degree murder, it would be impossible for Davis to be "not guilty by reason of insanity"—instead, he would have to be "not guilty of first-degree murder, and not guilty of other crimes by reason of insanity." *See* Jury Instr. 14; App. 21.

An instruction that elaborated on the insanity defense explained that Davis was claiming that "he is not criminally responsible for his conduct by reason of insanity." *See* Jury Instr. 15; App. 22. Nothing in that instruction was crime-specific, and a reasonable juror would understand that insanity was a complete defense to all of the charges. Some defenses were explained in terms that made them applicable to specific charges, and not to others—but the insanity defense was not one of them. *Compare* Jury Instr. 16; App. 23 ("If the State has proved all the elements of *a crime*, you should then determine if the Defendant has proved he was insane." (emphasis added)), *with* Jury Instr. 17; App. 24 ("If you have reasonable doubt the Defendant was capable of acting deliberately, with premeditation, and the specific intent to kill, then the Defendant cannot be guilty of First Degree Murder. You should then consider the lesser included charges."); Jury Instr. 19; App. 26 ("No amount of intoxicants or drugs taken voluntarily can reduce second degree murder to manslaughter.").

Indeed, the jury instructions highlighted that contrast by explaining: "'Diminished Responsibility' does not entirely relieve a person of the responsibility for his actions and is not the same as an insanity defense." *See* Jury Instr. 17; App. 24. Diminished responsibility was uniquely applicable to first-degree murder; its reference to the insanity defense having *broader* application would remind jurors to analyze both.

A nearly identical claim was rejected in *State v. Stonerook*, where the Iowa Court of Appeals held that declining to object to an instruction without that cross-reference was not a breach of duty:

> Stonerook maintains counsel was ineffective in failing to object to the marshalling instruction for first-degree murder. In particular, he argues he was denied his right to due process because this instruction allowed the jury to convict him without addressing or considering his affirmative defense of insanity.
>
> [. . .]
>
> Stonerook asserts the marshalling instruction should have contained some reference to his affirmative defense of insanity. He further posits that this error was "magnified" due to the fact that the murder marshalling instruction was contained in instruction fourteen while the affirmative defense instructions did not start until instruction forty-one. . . .
>
> . . . It is not disputed here that all of the essential elements of first-degree murder were included in the marshalling instruction. We therefore find no fault in the marshalling instruction for failing to mention Stonerook's insanity defense. *See Sillick v. Ault*, 358 F.Supp.2d 738, 761–62 (N.D. Iowa 2005) (rejecting identical claim).
>
> [. . .]

> [A]s the State appropriately notes, juries are instructed to "consider all of the instructions together" and that "[n]o one instruction includes all of the applicable law." Generally, a jury is presumed to follow its instructions. *State v. Frank*, 298 N.W.2d 324, 327 (Iowa 1980). We must therefore presume that the jury here did not read solely the first-degree murder marshalling instruction and ignore or overlook the subsequent insanity instructions. . . . The jury was not allowed to find Stonerook guilty of murder if it further found he was insane, as Stonerook seems to suggest. In fact, the jury was specifically instructed that "[i]f you find the State has proved all of the elements, then you *must* consider the issue of the defendant's insanity." (Emphasis added.) The number of additional instructions that fall between the murder and insanity instructions do not alter our conclusion.
>
> Accordingly, we conclude counsel did not breach an essential duty in failing to object to either the first degree-murder marshalling instruction or the relative placement of the insanity instructions as the instructions were accurate to the law and appropriate to the facts of this case.

State v. Stonerook, No. 05–1917, 2006 WL 3799546, at *2–3 (Iowa Ct. App. Dec. 28, 2006); *accord Kirklin v. State*, No. 01–0230, at *2 (Iowa Ct. App. Dec. 28, 2001) (rejecting a similar claim that counsel was ineffective for failing to challenge marshalling instructions that did not make reference to insanity defense, because other instructions "advised the jury if defendant has proved either of these elements [of insanity] by a preponderance of the evidence, then the defendant is not guilty by reason of insanity," and "[t]here was direction to the jury to read all of the instructions and that they were to be read together").

Just like in *Stonerook*, the jury was instructed that it "must consider all of the instructions together," and "[n]o one instruction includes all of the applicable law." *See* Jury Instr. 7; App. 19. The jury instructions, taken as a whole, gave jurors the correct framework for applying the insanity defense as a complete defense to any crime. *See* Jury Instr. 14; App. 21 ('You must first determine if the State has proved all the elements of the crime charged beyond a reasonable doubt. If you find the State has proved all the elements, then you must consider the issue of the Defendant's sanity."); Jury Instr. 16; App. 23 ("If the State has proved all the elements of a crime, you should then determine if the Defendant has proved he was insane."). The omission of a cross-reference did not give rise to a duty to object. *See State v. Broughton*, 450 N.W.2d 874, 876 (Iowa 1990) (quoting *State v. Blackford*, 335, N.W.2d 173, 178 (Iowa 1983)) ("[N]ot every right to insist that a particular instruction be given need be availed of by counsel in order to satisfy the standard of normal competency."); *accord State v. Gilmore*, No. 11–0858, 2012 WL 3589810, at *1, *6–9 (Iowa Ct. App. Aug. 22, 2012) ("Because the jury instructions accurately conveyed the law on insanity, trial counsel had no duty to object, and therefore did not render ineffective assistance.").

B. Davis cannot show prejudice. Adding this language to Jury Instruction 22 would not create a reasonable probability of a different result.

Davis argues that prejudice is presumed. *See* Def's Br. at 32–33. However, Davis can only raise this as an ineffective-assistance claim, which "[is] not to be reviewed on the basis of whether the claimed error would have required reversal if it had been preserved at trial." *See State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008). Instead, Davis must establish "a reasonable probability the outcome of the proceeding would have been different" if that cross-reference had been included in the marshalling instruction. *See Thorndike*, 860 N.W.2d at 322. Davis's argument is that, because of that omission, "[t]here was no insanity consideration." *See* Def's Br. at 29. But the jury deliberated after closing arguments, which framed the case and emphasized facts that counsel saw as critical to an insanity defense:

> During the time of these last five years prior to this incident, both Dr. Andersen and Dr. Konar described long-term meth abuse, prolonged anxiety, paranoia, psychotic behavior, hallucinations, delusions, suicidal thoughts. And you heard evidence from both Greg's mother and his brother — and there's photos of the house that Greg lived in in Ohio, and there's obviously photos of 14th Street — as to the paranoia, as to the hallucinations, his obsession with taking things apart because he believed they were listening in on him, taking doorbells apart, smoke detectors, light bulbs, always worried that someone was watching him, hearing voices.

TrialTr.V5 47:12–23. From there, he transitioned into discussing diminished responsibility. *See* TrialTr.V5 47:24–49:15. And then, he gave the jury a choice between diminished responsibility or insanity.

> Dr. Konar and Dr. Andersen disagree on one thing, and that is whether this meth-induced psychosis is a diminished responsibility or it goes beyond diminished responsibility and turns into an insanity.
>
> Dr. Konar described to you the difference, and that was that the long-term use, chronic use and dependence on methamphetamine developed into a psychosis in and of itself. So we're talking about internal versus external. Dr. Andersen's description was it's an external source. Smoking the meth causes psychosis. Dr. Konar didn't disagree, but he also thought that the long-term effect of smoking, that turned it into a psychosis in and of itself; therefore, insanity.
>
> Dr. Konar found that he didn't have sufficient mental capacity to know and understand the nature and quality of the act and sufficient capacity and reason to distinguish right from wrong. We heard both doctors talk about he knew the difference between moral right and wrong, just not criminal right and wrong.

TrialTr.V5 49:16–50:12. After that, he summarized the advocacy as: "[I]f you don't believe either of those doctors, that's the only way you're going to get a murder first degree. If you believe those doctors, then it is not murder in the first degree. It's murder in the second degree or not guilty by reason of insanity." *See* TrialTr.V5 52:6–11. Just like in *Thorndike*, counsel's arguments pinpointed the actual issue, which minimizes the potential for the instructions to mislead the jury. *See*

Thorndike, 860 N.W.2d at 322; *accord State v. Clark*, No. 14–2035, 2016 WL 1130286, at *5–6 (Iowa Ct. App. Mar. 23, 2016) (rejecting ineffective-assistance claim on failure to include a cross-reference to instruction on specific intent in marshalling instruction for assault, finding no prejudice because "any confusion as to whether the crime included an element of specific intent would have been eliminated by comments made by Clark's counsel during closing argument").

In its rebuttal, the State did not argue that insanity was not relevant to first-degree murder. Instead, it argued that the evidence did not support a finding of insanity or diminished responsibility. *See* TrialTr.V5 52:13–59:13. It referenced Davis's interview with police, and it argued: "[T]his is not a man who has taken leave of his senses. This is not a man who has lost touch with reality. He is as sane as rain." *See* TrialTr.V5 58:4–59:13. Davis's claim that jurors were misled into believing that insanity was irrelevant to a charge of first-degree murder withers upon reading the transcript of closing arguments. Every juror surely understood that Davis and the State were primarily arguing about the value of that expert testimony on Davis's sanity because, as they were just instructed, they could not convict Davis if they believed he was insane. *See* TrialTr.V5 54:1–56:1; TrialTr.V5 57:17–58:10.

Davis argues that prejudice arose because the State was able to display Jury Instruction 22 in its closing argument and argue that the elements were all proven. *See* Def's Br. at 32–34. But the State could still have displayed the marshalling instruction's numbered elements, no matter what was included in the subsequent paragraph. Moreover, Davis's counsel *began* his closing argument with the exact point that, according to Davis's brief, was never explained to the jury:

> Mr. Vander Sanden put up there the elements of murder one, which you'll have in your instructions. One of the elements that he did not address which has been the core of this case since we started — we talked about it from voir dire, opening statement. It was never a whodunit. It was a why.
>
> We produced two doctors, one of which was requested by the State, who explained to you their diagnosis, their — the way they do their evaluations, and they both concluded that Mr. Davis did not have the capacity to form the specific intent to commit a crime. Both of them concluded that.
>
> . . . We've heard nothing else. Meth-induced psychosis, both men. Doctors with over 85 years of experience doing forensics examinations, and the prosecutor wants you to think that Mr. Davis tricked both of them.
>
> This is not an excuse. This is a reason. In our system we punish people because of their criminal intent, and both doctors explained to you people that he was unable to form — he did not have the capacity to form the intent to commit a crime.

See TrialTr.V5 44:15–45:24. Davis may respond by characterizing that as an argument about diminished responsibility, rather than insanity.

But capacity to form specific intent *to commit a crime* was a reference to testimony from both Dr. Konar and Dr. Andersen that Davis could take goal-directed action, but lacked the ability to tell whether it was criminal or otherwise wrongful—which is a description of insanity, not diminished responsibility. *See* Jury Instr. 15–16; App. 22–23; *see also* TrialTr.V4 50:8–52:15 (Dr. Andersen: "He did not have a specific criminal intent. His understanding was that what he was doing was morally right and necessary."); TrialTr.V4 140:22–145:11 (Dr. Konar: "[Davis] did not have the criminal intent to kill Carrie because in doing so he really didn't appreciate that the act itself would actually end up having her not come back to life."); *cf.* TrialTr.V4 65:3–7; TrialTr.V4 69:17–21; TrialTr.V4 166:3–19; TrialTr.V4 174:17–175:15. The jury would understand that counsel was reprising that same argument, which directly challenged Davis's capacity to intend a *criminal* act, rather than his capacity to undertake goal-directed action.

All in all, "[t]he jury was fully instructed on the elements of first-degree murder and the State's responsibility to prove them," and "the instructions as given, when read as a whole, state the applicable law in understandable fashion." *See McMullin*, 421 N.W.2d at 520. Additional thoughts on prejudice will be discussed in Division V.

II. The instruction on intoxication explained the law on an issue that arose fairly from the evidence. If giving this instruction was error, it was wholly harmless.

Preservation of Error

The State requested submission of this model instruction on intoxication and its application to specific intent crimes. *See* Jury Instr. 19; App. 26 ("Intoxication is a defense only when it causes a mental disability, which makes the person incapable of forming the specific intent."); TrialTr.V5 10:8–17. Davis objected, arguing that intoxication was not his defense:

> What we did state was that Mr. Davis had been using drugs for some years, which caused him to be under some type of substance-induced psychosis. We didn't necessarily assert that he was under the influence of drugs at the time of the crime, but that the psychosis was a side effect of the drugs.

TrialTr.V5 10:18–11:8. The trial court ruled: "I don't think that the defense can offer evidence, which it did in this case, of the defendant's chronic drug use and offer testimony through Dr. Andersen and Dr. Konar that he was under the influence of drugs at the time and then not have this instruction given. So Instruction No. 19 will be included in the set given to the jury." *See* TrialTr.V5 11:19–25. This was a final ruling that considered and rejected a timely objection from Davis, so error was preserved. *See Ambrose*, 861 N.W.2d at 555–56.

Standard of Review

Challenges to jury instructions are reviewed for errors at law. *See State v. Spates*, 779 N.W.2d 770, 775 (Iowa 2010). Davis argues that review is de novo, because "the trial and resulting convictions were infected" in ways that implicate his due process rights. *See* Def's Br. at 35–36. Davis cites *Middleton v. McNeil*, which is about errors in instructions that may relieve the State of its burden to prove every element of the offense. *See* Def's Br. at 36 (citing *Middleton v. McNeil*, 541 U.S. 433, 437 (2004)). That case is inapplicable; this claim alleges error from an instruction that *adds* a potential barrier to conviction. Within the argument, Davis makes only a single reference to any constitutional right: at the very end, he alleges that the instruction "impact[ed] his right to a fair trial" because it was given without substantial evidence to support it. *See* Def's Br. at 36–41. This is not a ruling on a claim about constitutional rights, so review is not de novo. *See State v. Traywick*, 468 N.W.2d 452, 455 (Iowa 1991) (rejecting claim that due process rights were implicated by challenge to ruling that excluded evidence, because "[a]n allegedly erroneous ruling . . . must go to the heart of the case in order to be considered of such magnitude as to implicate the due process clause").

Merits

"The district court has a duty to instruct fully and fairly on the law regarding all issues raised by the evidence." *See State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996). A jury instruction on a particular issue may be given when "the challenged instruction accurately states the law and is supported by substantial evidence." *See Spates*, 779 N.W.2d at 775 (citing *State v. Predka*, 555 N.W.2d 202, 204 (Iowa 1996)). Moreover, "[e]rror in giving a particular instruction does not warrant reversal unless the error was prejudicial to the party." *See id.*

A. There was substantial evidence to support an intoxication instruction, and the trial court was correct to grant the State's request to include one.

Davis claims: "[T]here was no evidence of intoxication at the time of the offense as the law required for an intoxication defense and instruction." *See* Def's Br. at 37. Davis also claims: "Testimony was not presented to support a defense of temporary intoxication on the day in question to negate specific intent." *See* Def's Br. at 39. The transcript tells a different story. After Dr. Andersen testified that Davis "had a waxing and waning abnormal mental state depending on how often and how large a dose he was taking of methamphetamine," he linked that to Davis's methamphetamine use on the day of the killing:

> **DEFENSE**: And what was your understanding of [Davis's] meth abuse leading up to this incident?
>
> **DR. ANDERSEN**: He increased in the year of the alleged crime his use of methamphetamine. A typical dose might be a hundred milligrams or a quarter gram. He went to as much as three and a half grams, called in the community an eightball. And so on the day of this act he was using a heavy dose and continued through about October 1st, if I have my dates correct, at which time he stopped and some clarity of mind returned.
>
> **DEFENSE**: That would have been after the incident; is that correct?
>
> **DR. ANDERSEN**: That's correct. He continued for a period of time, but he basically ran out of money.

See TrialTr.V4 52:16–53:15; *accord* TrialTr.V4 55:12–56:2 (confirming that he believed Davis "voluntarily smoked methamphetamine, which then led to the psychosis, which then led to the diminished capacity"). Dr. Andersen also agreed that Davis told him that he had confessed to his mother on October 1, "when he was coming off his reported high." *See* TrialTr.V4 61:17–23. Dr. Andersen remarked that his analysis of the effect of methamphetamine on capacity would vary based on factors like "when you took the dose, how much it was and whether you're coming down"—which all relate to temporary intoxication, not long-term changes to Davis's sober baseline. *See* TrialTr.V4 62:12–25.

Dr. Konar took a different approach, and described long-term methamphetamine-induced psychosis as a result of "nonstop" use,

arising "after somebody uses meth for a number of days in a row." *See* TrialTr.V4 129:17– 132:3. Dr. Konar asked counsel to clarify whether the inquiry was about effects of long-term methamphetamine use "while they're abusing or after they've stopped using." Counsel replied that he should focus on effects observed *while* drug abuse continued. *See* TrialTr.V4 129:17–132:6. Dr. Konar attempted to frame Davis's methamphetamine use as involuntary, but he never deviated from his view that Davis's methamphetamine use was still ongoing at the time of the killing. *See* TrialTr.V4 143:25–145:11. In Dr. Konar's view, drug abuse was part of the reason Davis was unable to form specific intent.

Davis elicited testimony that a "tox screen or a blood draw" would have helped to answer "our questions regarding whether he was using meth or not" at the time of the killing—the same questions Davis now asserts were never raised by the evidence. *See* TrialTr.V4 171:25–172:6. When the State mentioned that a tox screen of samples taken at the time of arrest would be inconclusive because it would not identify *when* Davis used methamphetamine, Dr. Konar maintained that it would still have supported his theory that assumed *continuous* methamphetamine use, as a cause of debilitating intoxication over a period that started before the killing and ended afterwards:

> I suppose that he could have not used meth, even though he was a meth addict, and then killed her and then turned around and started using meth like a crazy man, yes. That is — I don't possibly see that as a scenario that makes sense, but, yes, it is possible.

See TrialTr.V4 175:21–176:15. And even in closing arguments, Davis argued for a temporal connection between the killing and meth use:

> We do know the toxicology report from Carrie Davis, and the doctor said her use was very soon or close to the time of her death based on the results. I'm guessing she's not smoking meth by herself.

See TrialTr.V4 47:1–11; *accord* TrialTr.V4 47:24–50:6 ("His dosage, [Davis's] dosage of meth increased the summer of 2017, and, in essence, as did the psychosis, the hallucinations, the paranoia.").

This claim is interesting because Davis is arguing that there was not enough evidence to support a finding that he was too intoxicated by methamphetamine to form specific intent. *See* Def's Br. at 39–40. But his diminished responsibility defense was indistinguishable from an intoxication defense. *See* TrialTr.V5 47:24–48:12. Both intoxication and diminished responsibility are relevant if they preclude capacity to form specific intent, and are only applicable to specific intent crimes. Davis insisted that he proved diminished responsibility, arising from his ongoing or recent intoxication—so the intoxication instruction was at least as applicable as the diminished responsibility instructions.

See, e.g., *State v. Aguilar*, 325 N.W.2d 100, 103 (Iowa 1982) (citing *State v. Collins*, 305 N.W.2d 434, 437–38 (Iowa 1981)) ("[W]hen the evidence shows the mental condition at issue was caused by voluntary intoxication it is sufficient to instruct on that issue and not give an additional instruction on diminished responsibility generally."); *Foster v. State*, 478 N.W.2d 884, 886 (Iowa Ct. App. 1991) (citing *State v. Caldwell*, 385 N.W.2d 553, 557 (Iowa 1986)) ("While intoxication is not a complete defense, it can establish diminished responsibility, thereby negating specific intent"). There is no way for Davis to undermine the applicability of the intoxication instruction without simultaneously disproving one of his own defenses.

This instruction explained how the law applied to these issues, to the point where failing to give it might have given rise to claims alleging that counsel was ineffective for objecting to that instruction. *See, e.g.*, *Steinkuehler v. State*, 507 N.W.2d 716, 721–22 (Iowa 1993). In some jurisdictions, failure to give that instruction *over objection* would even amount to reversible error. *See State v. Adviento*, 319 P.3d 1131, 1154 (Haw. 2014) (citing *State v. Haanio*, 16 P.3d 246, 256 (Haw. 2001), *overruled on other grounds by State v. Flores*, 314 P.3d 120, 133–35 (Haw. 2013)) (noting that Hawaii adheres to a rule for

defenses that would have mitigated culpability if believed by the jury, which "requir[es] jury instructions based on the evidence rather than pursuant to the parties' strategic decisions"); *State v. Taylor*, 307 P.3d 1142, 1153 (Haw. 2013) ("Failure to give the mistake of fact jury instruction under these circumstances constitutes plain error."). Davis argues that giving this intoxication instruction equated to "making an argument in the case." *See* Def's Br. at 38–39. But the trial court had a duty to grant the State's request to include the intoxication instruction because it accurately stated the law that applied to the issues that were raised in Davis's presentation of the evidence. It was not an argument; it explained the applicable law, and left the jury to apply it.

Davis's claim is wholly foreclosed by *State v. Jenkins*, where the Iowa Supreme Court rejected an argument that the trial court erred by giving an intoxication instruction over the defendant's objection, and the defendant "insist[ed] that his defense was prejudiced by the trial court's submission of an issue unsubstantiated by the evidence" and that "the trial court's instruction permitted the jury to disregard defendant's primary defense of insanity." *See State v. Jenkins*, 412 N.W.2d 174, 177 (Iowa 1987). That claim was meritless because the defendant had presented evidence pertaining to intoxication:

> There was considerable testimony, both from State and defense witnesses, pointing to defendant's intoxication on the night in question. Moreover, questions concerning the effect of alcohol on defendant's mental state were posed by defense counsel to the psychiatrist testifying on defendant's behalf. It is well settled that the court must instruct on all material issues so that the jury understands the matters which they are to decide. *State v. Van Rees*, 246 N.W.2d 339, 343 (Iowa 1976). The trial court did so here and we find no merit in defendant's argument to the contrary.

Jenkins, 412 N.W.2d at 177. Davis repeatedly highlighted the volume and emphasized the value of evidence from defense witnesses on the influence of ongoing or recent methamphetamine use on his capacity to form specific intent on the night in question. Just like in *Jenkins*, the court was obligated to instruct on issues raised by that evidence.

Dr. Andersen specifically linked the question of diminished responsibility to the issue of intoxication. *See* TrialTr.V4 50:8–52:4 (asserting that, in evaluating diminished responsibility in this case, "the question is did [Davis] suffer from some degree of intoxication, which is the most common reason for diminished responsibility"). Even in the face of Davis's objection to the intoxication instruction, it was still correct to give that instruction because it was "shown by the evidence" to exactly the same degree as diminished responsibility. *See State v. Broughton*, 425 N.W.2d 48, 51 (Iowa 1988).

B. The jury found that Davis formed specific intent to kill Carrie. There can be no prejudice from submitting this intoxication instruction, which gave Davis another chance to avoid that finding.

Davis argued that he was suffering from a substance-induced psychosis from methamphetamine abuse. The jury found he had the capacity to form specific intent—over an intoxication instruction that specified its applicability to first-degree murder. *See* Jury Instr. 19; App. 26. Davis argues he was prejudiced by this instruction because "[t]he jury would see this as inconsistent defenses and it eroded the credibility of [his] insanity defense," and "[t]he jury would wonder why the defense never mentioned, argued, or brought up intoxication." *See* Def's Br. at 38. But on the very next page, Davis argues that experts "emphasized drug-usage had led to psychosis." *See* Def's Br. at 39. Indeed, at trial, the defense was laser-focused on describing the effects of methamphetamine abuse on Davis's sanity and on his capacity to form specific intent. The jury would never see an inconsistency here, other than recognizing that Davis was presenting them with a choice between the insanity defense and the remaining defenses that went to Davis's capacity to form specific intent—which was Davis's advocacy. Davis's counsel had always intended to develop alternative defenses that enabled this closing argument:

> Dr. Konar and Dr. Andersen disagree on one thing, and that is whether this meth-induced psychosis is a diminished responsibility or it goes beyond diminished responsibility and turns into an insanity.
>
> . . . Dr. Andersen's description was it's an external source. Smoking the meth causes psychosis. Dr. Konar didn't disagree, but he also thought that the long-term effect of smoking, that turned it into a psychosis in and of itself; therefore, insanity.
>
> [. . .]
>
> I submit to you the decision that you need — or that needs to be made is whether this psychosis, this meth-induced psychosis was one which was voluntary or which was involuntary. . . .
>
> [. . .]
>
> If you believe those doctors, then it is not murder in the first degree. It's murder in the second degree or not guilty by reason of insanity.

See TrialTr.V5 49:16–50:6 and 51:14–52:11. Two things are clear: Davis's advocacy already contained the competing alternatives that he now describes as an "inconsistency" that could have been prejudicial, and the jury rejected *both* of those alternatives when it found Davis guilty of first-degree murder. There is no possibility of prejudice on these facts, when the jury considered and resolved the same questions that Davis had always sought to present. *See, e.g.*, *State v. Marin*, 788 N.W.2d 833, 838 (Iowa 2010), *overruled on other grounds by Alcala v. Marriott International, Inc.*, 880 N.W.2d 699, 708 n.3 (Iowa 2010) ("[W]e see no difference in the outcome of the case even if the court

had given the instruction requested by Marin. The requested instruction and the one given by the court informed the jury it could use Marin's intoxication, whether voluntary or involuntary, to negate the state of mind necessary to be convicted of first-degree murder."); *State v. Youngbear*, 202 N.W.2d 70, 71–72 (Iowa 1972) (rejecting argument that "the trial court improperly submitted to the jury the issue of defendant's intoxication when that defense was not raised or relied on" because it was unpreserved, and also noting that there was "nothing prejudicial in the instruction as given"); *State v. Anderson*, No. 15–1180, 2016 WL 5407954, at *12 (Iowa Ct. App. Sept. 28, 2016) (finding no prejudice on claim that trial counsel was ineffective for declining to request verdict forms that included any specific option for diminished responsibility: "[s]ince the jury found Anderson guilty, it may be concluded that it rejected his intoxication defense and similarly would have rejected the diminished-responsibility defense").

Davis gives no further explanation of how giving this instruction could have been prejudicial, except to insist prejudice is "absolute." *See* Def's Br. at 40–41. The focus of Davis's defense was squarely on the effects of methamphetamine use on his sanity and on his capacity to form specific intent. There is no possibility of prejudice here.

III. Davis's trial counsel was not ineffective for declining to object to cross-references in marshalling instructions for lesser included offenses, referring to a range of instructions that included diminished responsibility.

Preservation of Error

Davis implies that error was preserved by a ruling on his second motion for new trial. *See* Def's Br. at 41 (citing Ruling on Motion to Reconsider (1/30/19) at 2–3; App. 76–77). Again, a post-trial motion is too late to preserve error on a challenge to jury instructions. *See, e.g.*, *Ambrose*, 861 N.W.2d at 555–56; *Ondayog*, 722 N.W.2d at 785; *State v. Callender*, 444 N.W.2d 768, 770–71 (Iowa Ct. App. 1989) (citing *State v. LeCompte*, 327 N.W.2d 221 (Iowa 1982)) ("[D]efendant did not preserve error for appeal as he failed to object to the instruction when it was submitted."). Davis can argue that his trial counsel was ineffective for failing to preserve error through a timely challenge to this instruction. *See, e.g.*, *Ondayog*, 722 N.W.2d at 785. The State believes that amendments to section 814.7 apply to cases that were already pending when it went into effect, leaving this Court without authority to resolve ineffective-assistance claims on direct appeal. *See Hannan*, 732 N.W.2d at 50–51. If this Court disagrees or chooses not to decide if that amendment to section 814.7 applies to pending cases, it could still preserve this claim for resolution in PCR proceedings.

Standard of Review

There is no standard of review for an unpreserved claim. Rulings on claims alleging ineffective assistance of counsel are reviewed de novo. *See, e.g.*, *Thorndike*, 860 N.W.2d at 319.

Merits

Again, to establish ineffective assistance of counsel, Davis must demonstrate both breach and prejudice. *See Keller*, 760 N.W.2d at 452 (citing *Strickland*, 466 U.S. at 687). Both elements are essential, and failure to prove a single element is fatal to the claim.

Jury Instructions 17–18 were about diminished responsibility. The insanity defense was defined in Jury Instructions 14–16. Davis argues that his counsel should have objected to the cross-reference in to "the defense of insanity as described in Instructions No. 14–18," in the marshalling instructions on lesser included offenses that did not include specific intent elements, because it misled the jury about the defenses that might apply to those offences. *See* Def's Br. at 43–45. But those cross-references cannot establish any basis for a claim of ineffective assistance of counsel for four reasons. First, the jury found that Davis *did* have capacity to form specific intent, which means it necessarily rejected the diminished responsibility defense. Second,

the jury did not reach the instructions on lesser included offenses—jurors found Davis guilty of first-degree murder, so any errant words in the marshalling instructions on lesser-included offenses could not possibly have been prejudicial. *See State v. Negrete*, 486 N.W.2d 297, 299 (Iowa 1992) ("The jury's failure to convict defendant of either of the lesser-included offenses of second-degree murder or involuntary manslaughter strongly supports a determination that defendant suffered no prejudice."). Third, as the court noted in its ruling, the cross-references directed jurors to consider "the defense of insanity," so including the numbers of additional instructions was, "at worst, inefficient." *See* Ruling on Motion to Reconsider (1/30/19) at 3; App. 76. Fourth, if these cross-references *had* misled the jury and caused jurors to consider the diminished responsibility defense in assessing culpability for general intent crimes, that would only benefit Davis.

The trial court was correct when it rejected this claim in Davis's second motion for new trial, finding no possibility of any impact on the outcome from any erroneous reference in those instructions:

> [T]he jury found Defendant guilty of the charged crime of murder in the first-degree and consequently would not have had occasion to deliberate about lesser included offenses. As the jury would not have reached those issues, Defendant could not have been prejudiced by any error in the instructions on those issues.

Ruling on Motion to Reconsider (1/30/19) at 2–3; App. 75–76. Davis cannot establish prejudice because there is no possibility that the jury's verdict would have been different, had other jury instructions been submitted on these lesser included offenses. Davis still would have been convicted of first-degree murder, and minor errors in these jury instructions on lesser included offenses could not have mattered.

IV. Davis's trial counsel was not ineffective for asking a question that elicited Dr. Andersen's opinion that Davis acted with specific intent to kill Carrie.

Preservation of Error

Davis argues that error was preserved by the post-trial ruling on the ineffective-assistance claim that he raised in his post-trial motion. *See* Def's Br. at 45 (citing Ruling on Motion for New Trial (1/27/19) at 4–5; App. 51–52). Again, that is too late. Davis's claim itself alleges that his trial counsel was ineffective for failing to take corrective action in response to the allegedly objectionable testimony from Dr. Andersen. *See* Def's Br. at 46–48. Error preservation matters less for this claim because Davis recognizes that it is an ineffective-assistance claim, and identifies the correct standard of review. *See* Def's Br. at 45–46. But it is still important to identify the difference between this claim and a hypothetical claim where error was preserved by a timely objection.

While it is correct to say that error was preserved for Davis's claim of ineffective assistance of counsel, that is different from finding that error was preserved for a claim that the trial court erred in admitting the evidence over an objection. Even with a post-trial ruling from the district court in hand, Davis is still raising an ineffective-assistance claim on direct appeal, without the benefit of the kind of expanded record that the parties could develop in PCR proceedings. *See, e.g.*, *Shorter*, 893 N.W.2d at 84. And it is still barred by section 814.7, which allocates the authority to decide these specific claims in the first instance to district courts who *can* review that expanded record. *See* Iowa Code § 814.7. If this Court disagrees or chooses not to decide whether the amendment to section 814.7 applies to pending appeals, it could still preserve this claim for resolution in a PCR action.

Standard of Review

Rulings on claims alleging ineffective assistance of counsel are reviewed de novo. *See, e.g.*, *Thorndike*, 860 N.W.2d at 319.

Merits

Again, to establish ineffective assistance of counsel, Davis must affirmatively show both breach and prejudice. *See Keller*, 760 N.W.2d at 452 (citing *Strickland*, 466 U.S. at 687). Here, he can show neither.

Davis argues his trial counsel was ineffective for his handling of this exchange during Dr. Andersen's testimony on direct examination:

> **DEFENSE**: And what did you conclude, Doctor?
>
> **DR. ANDERSEN**: I concluded that at the time of the alleged crime he did not have the capacity to form the specific intent of a criminal act. He did have the intent to kill Ms. Davis. He, however, believed this act was morally right and necessary and that by killing her he would be freeing her of her evil forces and lead to her resurrection and perhaps to life in a better location.
>
> What I don't have information on is whether the presence of voluntary intoxication in any way invalidates the requirements for a defense of criminal responsibility — of diminished responsibility.
>
> **DEFENSE**: You concluded that he did not have the capacity to form specific intent at the time he committed that act?
>
> **DR. ANDERSEN**: If I can nuance a — that a bit. He had the specific intent of killing her. He did not have a specific criminal intent. His understanding was that what he was doing was morally right and necessary. So, yes, he had an intent to kill in order to do the second part of specific intent, to achieve a consequence of freeing her from evil and ushering her into a better place, but he did not have a criminal intent in that at that time he did not believe he was killing her against the law.

TrialTr.V4 51:18–52:15; *see also* Def's Br. at 46–47. Davis claims that his trial counsel should have objected to that second answer, and was ineffective for failing to do so. First, he argues "the question called for a yes or no answer." *See* Def's Br. at 47. But the first question was more open-ended, and the answer was essentially the same (with less detail).

Moreover, even if trial counsel had carefully controlled Dr. Andersen's testimony through pointed questions, the State could have explored the full extent of Dr. Andersen's conclusions on cross-examination. *See State v. Mickens*, 462 N.W.2d 296, 297 (Iowa Ct. App. 1990) (finding no prejudice on ineffective-assistance claim alleging breach occurred during trial counsel's direct examination, because the State could have introduced the same evidence on cross-examination). Any attempt to cut off Dr. Andersen's explanation of his conclusions, without some articulable bar to its admissibility, would not have changed anything—the State would have explored Dr. Andersen's opinion, moments later.

Second, Davis argues that Dr. Andersen's testimony "went outside the proper testimony of an expert regarding mental capacity and opined on [his] guilty or innocence." *See* Def's Br. at 47. But this was not testimony that Davis was guilty—it was testimony describing Davis's inability to understand the consequences of his actions, which was part of trial counsel's attempt to establish an insanity defense. *See* TrialTr.V4 51:18–52:15. *See Hering v. State*, No. 13–1945, 2016 WL 3269454, at *4 (Iowa Ct. App. June 15, 2016) ("Dr. Taylor did not give an opinion about Hering's guilt or innocence but instead gave a more general opinion he was capable of forming the requisite specific intent.

We conclude Hering has not shown he received ineffective assistance due to defense counsel's decision not to object to the testimony of Dr. Taylor on this ground."). Davis muddies the waters by challenging the testimony that indicated that he did, in fact, have the specific intent to kill Carrie—which seems intuitively different from testimony that he had *capacity* to act with that specific intent. *See* Def's Br. at 46–49. But that particular statement did not bear on the final issue of guilt—while it may have embraced an ultimate issue in one of the elements, that does not render it inadmissible under Iowa evidentiary rules. *See* Iowa R. Evid. 5.704 ("An opinion is not objectionable just because it embraces an ultimate issue."). Iowa courts have consistently permitted expert testimony exploring the defendant's mental state in cases where the defendant raises an insanity or diminished responsibility defense;

> [D]efendant's mental condition is peculiarly a matter of expert evaluation and analysis. It is a question upon which factfinders need more than ordinary assistance from witnesses trained by education and experience to recognize mental disorders. In testifying on these issues, the expert expresses no opinion on the conduct of the defendant nor on his guilt or innocence. He testifies only as to a mental condition. This should be no different than testifying to a physical condition. . . . Whether this condition exists in a particular case remains a question of fact, dependent of necessity to a great extent on expert opinion testimony.

State v. Moses, 320 N.W.2d 581, 588–89 (Iowa 1982).

Dr. Andersen agreed that it was up to the jury to decide whether Davis had specific intent to kill Carrie—but Dr. Andersen could help by relating his conclusion that, based on his assessment, Davis did have the capacity to form the intent to cause her death by his actions, which was persuasively illustrated by the fact that he repeatedly claimed to have formed that intent, in ways that an expert would find credible. *See* TrialTr.V4 68:16–69:12; *see State v. Hardin*, No. 03–1089, 2004 WL 2947440, at *4 (Iowa Ct. App. Dec. 22, 2004) (finding no duty to object to expert testimony on insanity where "the jury was instructed on the legal standard and the experts testified as to whether, in their respective opinions, she had or had not met that legal standard"). Any objection to this helpful expert testimony would have been meritless. Indeed, Iowa Rule of Evidence 5.704 clearly intends to permit this testimony—it lacks the specific provision from the corresponding Federal Rule of Evidence that would prohibit it. *See* Laurie Kratky Doré, *Iowa Practice Series: Evidence*, § 5.704.2 (updated 2018).

Davis cites *In re Detention of Palmer* to argue that "no witness can opine on a legal conclusion or whether the facts of the case meet a given legal standard." Def's Br. at 48–49 (citing *In re Detention of Palmer*, 691 N.W.2d 413, 418–19 (Iowa 2005)). But *Palmer* held that

the real problem with this kind of testimony is that it runs the risk of confusing jurors with legal terms that carry a specific legal meaning, and so "the best resolution for this problem is for the questioner to break down the legal terms into its factual elements." *In re Palmer*, 691 N.W.2d at 419–20). Dr. Andersen did just that—he separated his conceptions of insanity and specific intent into component parts. *See* TrialTr.V4 49:25–52:15. Moreover, *In re Palmer* specifically noted that objections about invading the province of the jury or usurping the function of the jury are "not valid or tenable if the opinion called for is about a matter which is a proper subject of expert testimony." *Id.* at 418 (quoting *Grismore v. Consolidated Products Co.*, 5 N.W.2d 328, 343 (Iowa 1942)). And in cases where the defendant raises an insanity defense, a diminished responsibility defense, or both, Iowa courts recognize that "defendant's mental condition is peculiarly a matter of expert evaluation and analysis." *Moses*, 320 N.W.2d at 588; *accord Hardin*, 2004 WL 2947440, at *4. Davis's mental state was placed at issue in a way that made Dr. Andersen's testimony helpful in assessing Davis's potential and actual specific intent, which means this challenged testimony was admissible and trial counsel had no duty to interrupt the witness, object to the answer, or move for a mistrial.

Additionally, even if trial counsel had prevented Dr. Andersen from testifying about Davis's specific intent on direct examination, that same testimony would have been admissible on cross-examination for two reasons. First, the State would have been able to ask Dr. Andersen whether, in his opinion, Davis had the capacity for goal-directed action at the time of the killing—and then, after Dr. Andersen answered, the State could explore his reasons for reaching that conclusion. *See* Iowa R. Evid. 5.705. The most probative basis for concluding that Davis was capable of forming specific intent during the killing would be facts that established that he *did*, in fact, form that specific intent to kill Carrie. The State could ask Dr. Andersen whether Davis was able to form that specific intent to kill Carrie, and then elicit similar testimony by way of presenting the underlying facts supporting Dr. Andersen's conclusion.

Second, Dr. Andersen could have been cross-examined about Davis's statements about the killing. Davis used them to try to prove insanity, but they also demonstrated capacity to form specific intent:

> **DEFENSE**: In this particular case was there an answer or area in which Mr. Davis was asked certain questions and he replied to something that, in your mind, led to your opinion of he did not have criminal intent to commit this crime?
>
> **DR. ANDERSEN**: The questions were fairly direct once I established a relationship, and that was, what was your intent? And I approached that from several angles and got a consistent answer.

> **DEFENSE**: And that was what, if you recall?
>
> **DR. ANDERSEN**: The answer was that he intended to kill her because he believed it was a moral necessity of ridding her of evil forces and bringing her to a better place.
>
> **DEFENSE**: Have you confirmed that answer on more than one occasion?
>
> **DR. ANDERSEN**: I confirmed that to the extent that I found it an honest answer that was validated over several repeated questions as I approached it from different angles, yes.

TrialTr.V4 67:16–68:7. Those statements from the person who was being examined and assessed qualified as the kind of information that "experts in the particular field would reasonably rely on." *See* Iowa R. Evid. 5.703. Davis fought hard to secure a ruling that his statements to these expert witnesses would be admissible under that rationale. *See* TrialTr.V4 108:9–127:22. And even if they were not admissible under Rule 5.703, those statements would be admissible as non-hearsay statements of a party opponent, so the State could have elicited them through cross-examination anyway. *See* Iowa R. Evid. 5.801(d)(2)(A). Indeed, that was just what happened when the State cross-examined Dr. Konar on the issue of specific intent:

> **STATE:** Now, you testified a little bit about specific intent. That's a legal term; correct?
>
> **DR. KONAR**: Oh, yes.
>
> **STATE**: And in testifying about it, what does that mean to you, Doctor, specific intent?

> **DR. KONAR**: What specific intent means is did this individual do an action which he intended to or wanted these consequences to occur.
>
> **STATE**: So you'd agree that it means not only being aware of an act, but doing it voluntarily, but in addition, doing it with a specific purpose in mind?
>
> **DR. KONAR**: Exactly.
>
> **STATE**: Okay. And here the defendant wanted to kill Carrie Davis; right?
>
> **DR. KONAR**: Yes.
>
> **STATE**: And he killed her; right?
>
> **DR. KONAR**: Yes.

TrialTr.V4 166:3–19. Absent the "breach" that Davis alleges, the State would have cross-examined Dr. Andersen with the same questions. Therefore, because the same testimony from Dr. Andersen about the statements establishing Davis's professed intent would still have been offered and admitted, Davis cannot establish prejudice on this claim.

There are two additional factors that establish a lack of prejudice. First, as demonstrated by the excerpt quoted above, Dr. Andersen's testimony about Davis's specific intent was cumulative—there was other unchallenged testimony that he acted with intent to kill Carrie. *See* TrialTr.V4 166:3–19. Dr. Konar testified that, when Davis acted, "[h]e thought that the way to essentially help her was to kill her"—that articulated intent was "exactly what [Davis] was thinking in the midst of a substance-induced psychosis." *See* TrialTr.V4 141:22–143:14. And

Dr. Konar agreed that Davis had performed a series of "deliberate acts" in killing Carrie, hiding her body, and concealing some of the evidence. *See* TrialTr.V4 168:8–171:11. The kicker is that Dr. Konar reviewed and discussed Dr. Andersen's report, and counsel emphasized useful points of agreement between their reports (as well as the disagreement on the issue of whether Davis *voluntarily* used methamphetamine, which was the basis for counsel's argument that the evidence presented the jury with a choice between insanity through involuntary intoxication or diminished responsibility from voluntary intoxication). *See* TrialTr.V4 138:14–139:20; TrialTr.V4 143:25–145:11; TrialTr.V4 172:7–173:11. The State was entitled to proceed through that opened door:

> **STATE**: And you said that you agreed on a lot of things. However, Dr. Andersen found the defendant to be competent; correct?
>
> **DR. KONAR**: Yes.
>
> **STATE**: And to be sane; correct?
>
> **DR. KONAR**: Yes.
>
> **STATE**: And Dr. Andersen concluded that the defendant intended to kill Carrie Davis; correct?
>
> **DR. KONAR**: Yes.
>
> **STATE**: And that he wanted her to die; correct?
>
> **DR. KONAR**: Yes.

TrialTr.V4 177:19–178:4. Thus, even if Dr. Andersen had not testified to that conclusion, it still would have come in eventually. *See, e.g.*,

State v. Norem, No. 14–1524, 2016 WL 146237, at *8–9 (Iowa Ct. App. Jan. 13, 2016) (rejecting preserved argument because "[e]ven if we concluded the district court abused its discretion by allowing Dr. Dennert's testimony, the jury still would have heard Dr. Trahan's opinion that Norem's behavior was directed toward a specific goal"). Dr. Andersen's testimony was cumulative with other evidence about his conclusions—and about Davis's specific intent more generally—so Davis cannot establish a "reasonable probability" of a different result without it. *See State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997).

Second, jurors were specifically instructed that determining whether Davis had specific intent to kill "requires *you* to decide what he was thinking" at the moment of the killing, and that meant jurors needed to "consider the facts and circumstances surrounding the act." *See* Jury Instr. 13; App. 20 (emphasis added). Thus, the question of specific intent was expressly committed to the jury in their capacity as the fact-finder. *See Hardin*, 2004 WL 2947440, at *4. That matched Dr. Andersen's deference to the fact-finder on that ultimate question of whether the level of intentionality that he described was enough to meet the applicable legal standard for "specific intent," or whether it fell short because of other factors that Dr. Andersen found significant.

See TrialTr.V4 68:12–69:12. Jurors were instructed to give his opinion "as much weight as *you* think it deserves"—again, notifying the jurors that they must reach their own conclusions. *See* Jury Instr. 20; App. 27 (emphasis added). As a result, even if Davis was correct that this was tantamount to expressing an opinion on guilt or innocence, those subsequent answers and the jury instructions would have ameliorated any potential prejudice and reminded the jury that it was charged with deciding all ultimate issues based on the evidence presented.

This opinion was admissible and would have come in, no matter what trial counsel did. Thus, Davis cannot show breach or prejudice.

V. There is no cumulative error or cumulative prejudice.

Preservation of Error

Davis argues that error was preserved by the ruling on his motion for new trial. *See* Def's Br. at 50 (citing Ruling on Motion for New Trial (1/27/19) at 5; App. 52). The State cannot find a ruling on a claim about cumulative error or cumulative prejudice in that ruling. *See* Ruling on Motion for New Trial (1/27/19); App. 48. It is unclear how error preservation affects this claim, as it hybridizes other claims that are each independently preserved or unpreserved. The State will address the claim, notwithstanding error preservation concerns.

Standard of Review

Claims implicating the constitutional right to a fair trial are reviewed de novo. *See, e.g.*, *State v. Arterburn*, No. 13–0035, 2014 WL 1715061, at *3 (Iowa Ct. App. Apr. 30, 2014).

Merits

It is not enough to recite claims in a numbered list and assert cumulative prejudice. *See* Def's Br. at 51. Davis does not supply any fact-specific arguments to show *how* cumulative error is qualitatively more prejudicial, through some sort of interaction between errors. This Court should not develop that missing advocacy on his behalf. *See, e.g.*, *Inghram v. Dairyland Mut. Ins. Co.*, 215 N.W.2d 239, 240 (Iowa 1974) ("To reach the merits of this case would require us to assume a partisan role and undertake the appellant's research and advocacy. This role is one we refuse to assume."); *Hyler v. Garner*, 548 N.W.2d 864, 876 (Iowa 1996) ("[W]e will not speculate on the arguments [a party] might have made."); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs."); Iowa R. App. P. 6.903(2)(g)(3).

Even if Davis had offered an argument, he could not overcome the evidence of his sanity and specific intent that forecloses prejudice.

Davis killed Carrie by stabbing her repeatedly, with enough force that it intuitively suggested that was acting deliberately, not just flailing. *See* TrialTr.V3 95:16–97:7 ("[T]he instrument used to injure Carrie penetrated through her scalp and actually fractured the bone."); TrialTr.V3 102:14–104:19 (showing "defensive wounds"); TrialTr.V3 105:3–5 ("Carrie sustained 26 sharp force injuries."). After that, Davis took a series of deliberate actions to conceal some of the evidence of Carrie's death—including rolling her body up in blankets and hiding it in a roll of carpeting. *See* TrialTr.V2 40:23–50:20; *see also* TrialTr.V2 55:16–57:17 (discussing mattress placed to cover bloodstain on floor); *See* TrialTr.V2 130:20–133:12 (discussing garbage bag that contained Carrie's bloody clothes). And Davis could remember what happened and write about it, justifying why he could "choose to murder if he sees it necessary" and why there should be "immunity for Greg Davis" regarding "the day the life got took." *See* TrialTr.V2 65:7–68:7; State's Ex. 6-31 through 6-36; App. 92–97. The most critical note was Davis's confession to "stabb[ing] Carrie in a vicious attack," which identified his soon-to-be theory of defense—and which he tried to erase, void, destroy, and conceal. *See* TrialTr.V2 133:20–142:14; State's Ex. 13. Davis was aware of what he did, and aware that he needed an excuse.

His excuse was flimsy, at best. No drugs or paraphernalia were found in the trailer where Carrie's body was located. *See* TrialTr.V2 40:23–42:8. None were found in Davis's residence. *See* TrialTr.V2 50:18–53:6. Nor were illegal drugs or paraphernalia found on Davis's person, when he was arrested. *See* TrialTr.V2 94:18–95:21; TrialTr.V2 125:13–126:25. At the moment of arrest, Davis was doing something out of character for most methamphetamine addicts: taking a nap. *See* TrialTr.V2 94:3–14; *accord* State's Ex. 10. There was nothing about Davis's appearance or demeanor that gave the arresting officers any reason to suspect he was under the influence of alcohol or drugs. *See* TrialTr.V2 94:15–18. And during the subsequent interview, Davis was lucid, coherent, and was "able to make decisions during the interview" and to "respond verbally to questions." *See* TrialTr.V3 72:3–74:20; State's Ex. 12. By that point, his remorse had led him to contemplate suicide and tell his mother about Carrie's death. *See* TrialTr.V2 116:1–117:2; TrialTr.V3 35:8–39:21. All of this undermined his defense:

> [L]ater had regret for what he did, and that's why he tried to conceal the fact of his crime. That's why he wrote his note of contrition. And that's why he considered at some point maybe about taking his own life, because he knew what he had done was wrong and that he was remorseful. He wanted people to know that. And he wanted people to know that Carrie was in the trailer. He wanted her body to be found.

TrialTr.V5 60:12–19; *State v. Mitchell*, 450 N.W.2d 828, 832 (Iowa 1990) ("Courts in Iowa and elsewhere have found evidence of suicide attempts relevant to show the defendant's consciousness of guilt.").

His trial counsel had a clear strategy: paint a picture of a history of substance abuse that generated psychosis, to explain the killing in a way that mitigated his culpability. Counsel prioritized proving Davis's insanity defense over proving his diminished responsibility defense—which was demonstrated when Davis's counsel elicited testimony from Dr. Konar that Davis had wrapped Carrie's body in blankets after she was already dead because "he wanted to comfort her" and "[h]e wanted to keep her warm." *See* TrialTr.V4 174:17–25. This was the strategy: admit that Davis acted with intent to achieve specific outcomes, and leverage the absurdity of that intent to support an insanity defense. *See, e.g.*, TrialTr.V4 141:22–143:14 (Dr. Konar testifying that Davis killed Carrie because of armed chicken people and "Muppet hands").

None of that could overcome the clear evidence that Davis had lied to every doctor who assessed him. They all took him at his word, and placed immense faith in the honesty of his statements about his drug use and his delusions. *See* TrialTr.V4 63:1–6; TrialTr.V4 141:22–143:14; TrialTr.V4 161:17–165:12. But jurors could see for themselves.

> You take a look at his demeanor, at his appearance and the way he's able to interact with all those officers under stressful conditions. After all, he's just been taken into custody. He knows now the jig is up. You look at how he interacted with the police. When they were talking back and forth and he's being asked questions about things, wasn't he able to respond appropriately with the officers and carry on an appropriate conversation? When he was asked a question, he gave a direct answer. He's able to take on a conversation — carry on a conversation.
>
> When you take a look at those videos and the way that Greg Davis interacted back on October 2nd with the officers at the scene of his apprehension, down at the Marion Police Department when he was being questioned, I think the fair conclusion to draw is this is not a man who has taken leave of his senses. This is not a man who has lost touch with reality. He is as sane as rain. And you can tell by watching him and hearing him interact with other people in a normal way.

TrialTr.V5 58:20–59:13; State's Ex. 10; State's Ex. 12. Davis's counsel did his best, but no attempt to show Davis was insane could prevail over strong evidence of Davis's deliberate acts to conceal the murder and video evidence of his ability to function and communicate. *See* TrialTr.V4 168:8–171:11; TrialTr.V5 37:5–44:4. Davis's arguments about minor omissions and technical errors fail to grapple with the persuasive value of the facts proven at trial and the obvious centrality of the insanity defense in the presentation of the evidence and in both advocacies, from the very beginning. *See, e.g.*, TrialTr.V2 16:13–21:7. Thus, Davis is unable to establish prejudice—cumulative or otherwise.

CONCLUSION

The State respectfully requests that this Court reject Davis's challenges and affirm his conviction.

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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