IN THE SUPREME COURT OF IOWA
Supreme Court No. 18–1623

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTHONY FRANK ERNST,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DUBUQUE COUNTY
THE HONORABLE MICHAEL J. SHUBATT, JUDGE

APPLICATION FOR FURTHER REVIEW

(Iowa Court of Appeals Decision: May 13, 2020)

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QUESTIONS PRESENTED FOR FURTHER REVIEW

The Iowa Court of Appeals reversed and remanded for dismissal based on its conclusion that the circumstantial evidence was not sufficient to prove that Ernst had the specific intent to commit theft, because that was a "stacked inference" from circumstantial evidence that the State used to establish that Ernst was the person who had pried open the locked door to the garage.

If identity is proven beyond a reasonable doubt by inference from sufficient circumstantial evidence, does the State face a heightened burden in proving the defendant's specific intent by subsequent inferences from circumstantial evidence?

TABLE OF AUTHORITIES

Federal Cases

State Cases

STATEMENT SUPPORTING FURTHER REVIEW

On May 13, 2020, the Iowa Court of Appeals reversed Ernst's conviction for attempted burglary. *State v. Ernst*, No. 18–1623, 2020 WL 1879669 (Iowa Ct. App. May 13, 2020). It concluded that the evidence was insufficient to prove his specific intent to commit theft, because "[t]he State's argument requires a stacking of inferences: first the inference he forced entry to the garage, then the inference he did so with intent to commit theft." *See* SlipOp. at *9–10. That analysis is incompatible with established Iowa law on circumstantial evidence.

The original panel opinion explained that it was applying a different standard for direct evidence and circumstantial evidence. *See* Opinion (4/15/20), at *8 (quoting *State v. Kittelson*, 164 N.W.2d 157, 162 (Iowa 1969), *overruled by State v. O'Connell*, 275 N.W.2d 197, 204–05 (Iowa 1979)). The State filed a petition for rehearing, which was granted. The revised opinion correctly states that "[f]or purposes of proving guilt beyond a reasonable doubt, direct and circumstantial evidence are equally probative." *See* SlipOp. at 8 (quoting *O'Connell*, 275 N.W.2d at 205). But its analysis still treats circumstantial evidence as insufficient to *prove* facts, and it rejects any inferences from facts proven that way as "stacked inferences."

This case illustrates the friction between *O'Connell* and complaints about "stacked inferences." If a witness testified that they saw Ernst pry open the garage door, that would support an inference that he had specific intent to commit theft. *See, e.g.*, *State v. Erving*, 346 N.W.2d 833, 836 (Iowa 1984) (quoting *State v. Allnutt*, 156 N.W.2d 266, 271 (Iowa 1968)) ("[I]n the great majority of cases of unlawful breaking and entering, the act is done with intent to steal."). The panel opinion rejects that inference in this case, simply because Ernst's identity was *also* proven by circumstantial evidence. But that violates the basic principle that direct and circumstantial evidence are equally probative. *See O'Connell*, 275 N.W.2d at 205; Iowa R. App. P. 6.904(3)(p). This Court should point out the error, and correct it.

Proving one element by inference from circumstantial evidence does not affect the State's burden of proof on other elements. *See, e.g.*, *State v. Blair*, 347 N.W.2d 416, 421–22 (Iowa 1984) (concluding that circumstantial evidence from victim's manner of death was sufficient to support inference that killing was premeditated and deliberate, and then finding other circumstantial evidence was sufficient to establish that defendants were the killers through another inference that "rises above mere speculation, suspicion, or conjecture").

The panel opinion's treatment of circumstantial evidence undermines all prosecutions for specific-intent crimes. *See State v. Walker*, 574 N.W.2d 280, 289 (Iowa 1998) (noting "[s]pecific intent is seldom capable of direct proof" and often must be established by inferences from circumstantial evidence). And it is particularly ironic to apply a heightened standard for proof of specific intent in this case, where the need to prove identity with circumstantial evidence was a result of the defendant's efforts to deny involvement and obscure his identity—which is, itself, strong circumstantial evidence of guilt. *See, e.g.*, *State v. Odem*, 322 N.W.2d 43, 47 (Iowa 1982).

Here, any reasonable fact-finder could infer that whoever had pried open this locked garage door had the intent to steal something from inside. The State need not disprove every possible alternative explanation in order for inferences of guilt beyond a reasonable doubt to arise from circumstantial evidence—that frequent misstatement is another artifact from pre-*O'Connell* cases. *See State v. Bentley*, 757 N.W.2d 257, 262–63 (Iowa 2008); *but see* Opinion (4/15/20), at *9 ("We do not agree the evidence is consistent with guilt and inconsistent with any other rational hypothesis."); *cf.* Def's Br. at 43–44 (quoting *State v. Truesdell*, 679 N.W.2d 611, 618–19 (Iowa 2004)). But even if

that accurately described the State's burden, nobody has ever offered any other rational explanation of the intruder's intent (except for the State's alternative theory of specific intent to commit assault, which was eliminated when the trial court partially granted Ernst's motion for judgment of acquittal). *See* TrialTr.V3 43:4–54:17; *accord* SlipOp. at *7–8. Iowa prosecutors and lower courts should not be left to guess which possible alternative explanations the State will have the burden of disproving in future prosecutions on similar facts.

The revised panel opinion no longer has citations to cases about circumstantial evidence that *O'Connell* overruled, but it still applies that same defunct approach. This Court should correct that error and explain that "stacked inferences" are not categorically different from inferences from facts that are proven by direct evidence—any other approach is incompatible with *O'Connell* and all subsequent cases. *See* Iowa R. App. P. 6.1103(1)(b)(1). Because a rational fact-finder could infer that Ernst broke into this garage and could infer that he acted with specific intent to commit a theft when he did so, this Court should reverse the panel opinion and affirm Ernst's conviction.

STATEMENT OF THE CASE

Nature of the Case

The Court of Appeals held the evidence was not sufficient to support Ernst's conviction for attempted burglary, because both identity and specific intent were proven by circumstantial evidence, and any inference about Ernst's specific intent had to be "stacked" on an inference that he was the burglar. *See* SlipOp. at *9–10. The State seeks further review.

Statement of Facts

The underlying facts of this burglary are accurately summarized in the panel opinion. *See* SlipOp. at *2–6. Key facts will be discussed when relevant.

ARGUMENT

I. If direct evidence and circumstantial evidence have equivalent probative value, then a "stacked inference" cannot be disfavored for relying on a fact that was proven by inference from circumstantial evidence.

Originally, the panel opinion expressly stated that it viewed circumstantial evidence as less probative than direct evidence. *See* Opinion (4/15/20), at *8 (quoting *Kittleson*, 164 N.W.2d at 162). After revision, that problem persists, albeit more subtly: the revised panel opinion treats a fact that reasonable jurors could find "proven" by inferences from circumstantial evidence as still disfavored and as if it cannot be used as the basis for any subsequent inferences. *See* SlipOp. at *9 ("This is not a case where there is direct evidence of forced entry and who committed it followed by circumstantial evidence pointing to an intent to commit a crime after entering."). This conflicts with *O'Connell* and other Iowa cases that insist that direct evidence and circumstantial evidence are equally probative. *See, e.g.*, *State v. Hearn*, 797 N.W.2d 577, 580 & n.1 (Iowa 2011); *Bentley*, 757 N.W.2d at 262–63; *State v. Radeke*, 444 N.W.2d 476, 479 (Iowa 1989); *State v. Doss*, 355 N.W.2d 874, 878 (Iowa 1984). The revised panel opinion quotes those words from *O'Connell*, but fails to understand that they also refer to the *effect* of proving a fact.

The statement that direct and circumstantial evidence are equally probative does not mean that eyewitness testimony has the same logical force in resolving a factual dispute as a fingerprint or a DNA test—it *can* have a similar impact, but every piece of evidence has its own logical relevance that may be enhanced or diminished by its specific relationship to the elements that must be proven and the other evidence presented. Indeed, "circumstantial evidence often may be equal or superior to direct evidence." *See O'Connell*, 275 N.W.2d at 205; *see generally State v. Booth-Harris*, No. 18–0002, 2020 WL 1966529, at *14–22 (Iowa Apr. 24, 2020) (Appel, J., dissenting) (stating that "eyewitness testimony is the leading cause of wrongful convictions" and discussing factors that may affect accuracy of recall). What *O'Connell* means is that *all* evidence, direct or circumstantial, has the context-specific probative value that logically arises from its interaction with other facts—and when it accumulates enough force to prove elements beyond a reasonable doubt, it can support conviction. Accordingly, when resolving sufficiency challenges, Iowa courts do not need to categorize each bit of evidence as direct or circumstantial—they can simply analyze whether all of the evidence, taken together, is logically sufficient to prove each of the elements of the offense.

Similarly, once an element (or an intermediate fact) is proven with some combination of direct and circumstantial evidence that is "substantial" and supports a reasonable fact-finder in concluding that it was proven beyond a reasonable doubt, that proven element or fact can raise additional inferences. The panel opinion would call this a "stacked inference" in situations where the element was proven by circumstantial evidence. But assigning any legal significance to that "stacking" would violate the principle from *O'Connell*. If the evidence supports a conclusion that the inference of identity is strong enough to foreclose any reasonable doubt, then identity is *proven*—and the analysis can move on to consider the logical effect of that finding on other elements or questions of fact that need to be resolved. Under *O'Connell*, it cannot matter if identity was proven by direct evidence or circumstantial evidence. As long as that evidence was substantial and would support a reasonable fact-finder in determining that there was no reasonable doubt as to identity, then identity is *proven* and the analysis moves on, assessing all remaining sufficiency challenges with the aid of any reasonable inferences that arise upon concluding that identity was proven. *See State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012) (quoting *State v. Keopasaeuth*, 645 N.W.2d 637, 640

(Iowa 2002)) (explaining that sufficiency review means viewing all the evidence in the light most favorable to the verdict, "including all reasonable inferences that may be fairly drawn from the evidence"). If a fact-finder may find identity proven beyond a reasonable doubt, subsequent inferences cannot become "unreasonable" simply because they arise from that conclusion—even if it required an inference from circumstantial evidence to get there. Stated differently, as long as the evidence was sufficient to prove identity beyond a reasonable doubt, then using identity as part of a basis for inferring some additional fact does not taint any otherwise valid deductions with reasonable doubt. Conversely, it would be contradictory and illogical to conclude that a rational fact-finder could determine that circumstantial evidence had proven identity beyond a reasonable doubt, while simultaneously holding that relying on identity as a basis for a subsequent inference had contaminated that "stacked inference" with reasonable doubt.

The panel opinion held that Ernst's specific intent could not be inferred from the circumstantial evidence in this case, because "[t]his is not a case where there is direct evidence of forced entry and who committed it followed by circumstantial evidence pointing to an intent to commit a crime after entering." *See* SlipOp. at *9. Under *O'Connell*,

that is a distinction without a legally significant difference. If evidence supported the inference that Ernst forced open the door to the garage, and if a jury could conclude that no reasonable doubt remained as to that critical fact, then it was *proven*. It is not marked with an asterisk or otherwise discounted because it was proven through inference from circumstantial evidence. As long as substantial evidence supports that inference, jurors may choose to rely on that inference as though they were deciding to credit eyewitness testimony on those same facts.

Consider *State v. Lilly*, where the Iowa Supreme Court found that substantial evidence supported conviction for aiding and abetting first-degree robbery. Lilly argued that he was not the person who had dropped Evans off at the bank before the robbery; alternatively, Lilly argued that the evidence was insufficient to establish that he knew that Evans was going to rob the bank or use a dangerous weapon. *See State v. Lilly*, 930 N.W.2d 293, 308–09 (Iowa 2019). The court found circumstantial evidence, including testimony about the driver's build and features of the vehicle that dropped Evans at the bank, supported an inference that Lilly was the driver. *See id.* at 308. Then, the court held that each of the knowledge-related elements had been proven by circumstantial evidence about what the driver would have known—and

the strength of those inferences was not diminished by the fact that Lilly's identity had *also* been proven by circumstantial evidence. *See id.* at 308–09. To the contrary, "[a]ssuming the jury found Lilly had driven Evans to the scene of the robbery, it was entitled to conclude he knew about the handgun" and other measures that Evans took to prepare for the robbery, before stepping out of the car. *See id.* There was no mention of "stacked inferences"—nor should there have been. Instead, once the court found that jurors could decide that there was no reasonable doubt regarding the inference that Lilly was the driver, they could use that conclusion to draw further inferences about what Lilly would have known and assented to, from circumstantial evidence showing what the driver would have been able to observe:

> Evans had a mask around his neck before entering the bank. . . . Evans pulled the mask over his face upon entering the bank. Evans was also wearing gloves and tape on his hands to cover distinguishing tattoos. There is no evidence showing Evans putting on the gloves or applying the tape inside or outside the bank. Thus, a jury could infer he was wearing them while still in the vehicle, even though it was late June. . . . Witnesses testified to seeing Evans carrying a cinch-bag when he exited the vehicle.
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> [. . .]
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> . . . [I]t is rational to conclude [the drop-off driver] would have seen the gun in the car, just as he would have seen the mask around Evans's neck, the gloves, the tape covering his tattoos, and the cinch-bag he was carrying.

See id. It simply did not matter that these inferences were "stacked."

The panel opinion cites a string of opinions where identity and forced entry were proven by direct evidence, and where specific intent was subsequently inferred from circumstantial evidence. *See* SlipOp. at *9 (citing *State v. Lambert*, 612 N.W.2d 810, 813–14 (Iowa 2000); *State v. Finnel*, 515 N.W.2d 41, 42–43 (Iowa 1994); *State v. Olson*, 373 N.W.2d 135, 136–37 (Iowa 1985); *State v. Erving*, 346 N.W.2d 833, 835–36 (Iowa 1984)). But none of those cases stand for the false proposition that circumstantial proof of identity and forced entry are disfavored or provide weaker support for inferences on specific intent. To the contrary, *Erving* recognized that "in the great majority of cases of unlawful breaking and entering, the act is done with intent to steal." *See Erving*, 346 N.W.2d at 836 (quoting *State v. Allnutt*, 156 N.W.2d 266, 271 (Iowa 1968)). This common-sense inference is so strong that proof of forced entry, in itself, qualifies as circumstantial evidence of specific intent to commit theft. The best illustration of this principle is *State v. Santee*, where the homeowners returned from a matinee to find the defendant in their kitchen. He improvised an explanation that he came to help with yard work (which he was not equipped for, and which they did not request). The Iowa Court of Appeals held that the jury could draw the obvious inference from Santee's break-in:

> Based on the circumstantial evidence, a rational trier of fact could infer Santee intended to commit theft in the Robinson home. . . . Disregarding Santee's explanation, the jury was left with an unknown and uninvited man standing in the Robinson kitchen in the middle of the afternoon with a crescent wrench. A rational trier of fact could reasonably infer Santee entered the Robinson home to commit a theft.

State v. Santee, No. 98–731, 1999 WL 1072661, at *1 (Iowa Ct. App. Nov. 23, 1999); *see also State v. Showens*, No. 06–0025, 2006 WL 3803027, at *3 (Iowa Ct. App. Dec. 28, 2006) ("Showens's intent to commit a theft is also supported by the permissible inference drawn from his attempted entry into Bierman's apartment."). If jurors were not permitted to rely on that intuitive inference from forced entry, it would become impossible to prosecute failed or aborted burglaries. *See State v. Rockingham*, No. 15–0978, 2016 WL 6652350, at *6 (Iowa Ct. App. Nov. 9, 2016) ("The intent to commit theft is not negated simply because nothing was stolen."); *accord Erving*, 346 N.W.2d at 836 (citing *Allnut*, 156 N.W.2d at 271).

The panel opinion held that the proof of Ernst's specific intent was "based on suspicion, theory, and conjecture." *See* SlipOp. at *10. But jurors are permitted to rely on common sense and experience to infer specific intent from circumstantial evidence—and that includes the common-sense inference of a would-be burglar's probable intent.

> . . . It is the [S]tate's contention that an unexplained breaking and entering of a dwelling house in the nighttime is sufficient to sustain a verdict that the breaking and entering was done with intent to commit larceny. This is the general rule and is sustained and supported by the weight of authority. . . .
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> [. . .]
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> To hold otherwise would permit one who breaks and enters a home in the dead hours of the night, but whose presence is detected before he has had time to do anything to indicate his intent, and who flees from the house upon his detection, to go unpunished. The general rule is that in the absence of explanation, the jury may infer from the fact of his breaking and entering that his intent was to commit larceny. In ascertaining the intent, the jury may take into consideration all the other facts and circumstances disclosed by the evidence, and bearing upon that question.

State v. Woodruff, 225 N.W. 254, 255–57 (Iowa 1929); *accord State v. Morelock*, 164 N.W.2d 819, 822 (Iowa 1969) ("[A]n intent to steal may be inferred from the actual breaking and entering of a building which contains things of value or from an attempt to do so."). Here, the evidence supported the same common-sense inference. And it was bolstered by evidence that Ernst may have had reason to believe that nobody would be home during the day, and then further bolstered by Ernst's denials and his attempts to fabricate alibis (which showed that Ernst knew that telling the truth about where he was and what he did would not exonerate him). *See* State's Ex. 39, at 11:11–12:10; *accord Odem*, 322 N.W.2d at 47 (explaining significance of false denials).

The original panel opinion held the evidence was not sufficient to support the inference of Ernst's specific intent to commit a theft because it was not "inconsistent with any other rational hypothesis." *See* Opinion (4/15/20), at *8–9. But it did not identify any other rational hypothesis that the State failed to disprove. Even after the State's petition for rehearing asked for clarification, the amended panel opinion still gave no explanation. *See* SlipOp. at *8–10. It might have been possible for Ernst to argue that he was there to vandalize his parole officer's home, to intimidate her or retailiate against her. But Emily testified that she had an "[c]ordial" relationship with Ernst and with members of Ernst's family, and the record contained nothing to contradict that. *See* TrialTr.V1 159:3–162:9; TrialTr.V1 164:3–25. Indeed, that total absence of animus was the basis for the trial court's ruling that partially granted Ernst's motion for judgment of acquittal, on the intent-to-commit-assault alternative for first-degree burglary and all lesser included offenses. *See* TrialTr.V3 53:8–54:11. The State does not have the burden of disproving all other rational hypotheses; it only has the burden of providing evidence that supports a finding on each element beyond a *reasonable* doubt. *See Bentley*, 757 N.W.2d at 262 (quoting *Jackson v. Virginia*, 443 U.S. 307, 326 (1979)) (noting

that prosecution does not have "an affirmative duty to rule out every hypothesis except that of guilt"). Even so, the absence of any other plausible explanations helps strengthen the specific-intent inference.

There is one actual difference between direct evidence and circumstantial evidence: direct evidence functions by affirmatively proving a fact in dispute (if believed), while circumstantial evidence proves up related facts that logically eliminate other explanations (or facts that diminish the reasonableness of other explanations) until a reasonable fact-finder could determine that the target inference is the best explanation remaining. *See Jackson*, 443 U.S. at 325 (finding the circumstantial evidence was sufficient proof of premeditation because competing theory of self-defense "would have required the trial judge to draw a series of improbable inferences from the basic facts"). This necessarily requires fact-finders to compare each inference of guilt to any other potential explanations for the circumstantial evidence, and then determine which explanations are reasonable and which are not. *See Holland v. United States*, 348 U.S. 121, 137–38 (1954) (explaining that, in determining whether guilt is proven beyond reasonable doubt by inference, a jury "must use its experience with people and events in weighing the probabilities" that each competing inference is correct).

Here, on the issue of identity, jurors needed to determine whether there were any reasonable alternative explanations that could compete with the inference that Ernst pried open that door. That inference of identity was the only reasonable explanation for the presence of that Crown Victoria that matched the unique markings on Ernst's car, on that dead-end road, on the day that somebody pried open that door. *See* TrialTr.V1 163:6–21; TrialTr.V2 16:2–18:5; TrialTr.V2 34:19–36:22. Cell phone location data, together with camera footage that showed when Ernst left Dubuque and when he returned, further diminished the reasonableness of any theory that it was someone else's car. *See* TrialTr.V3 4:25–14:25; TrialTr.V3 16:12–24:14. Potential alternative explanations involving innocuous activity were undermined by Ernst's false denials, and by the fact that were no alternative destinations on that street, after he passed Midwest Injection. *See* TrialTr.V3 15:1–17; State's Ex. 39 at 1:50–2:30, at 6:55–7:15, and at 11:11–12:10; *see also State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993); *Odem*, 322 N.W.2d at 47. From that circumstantial evidence, rational jurors could infer that Ernst was the person who pried open the garage door, and that none of the alternative explanations could give rise to reasonable doubt on the issue of identity because they were comparatively improbable.

The panel opinion expressed reservations about the sufficiency of the circumstantial evidence to establish identity—it refused to hold that evidence was sufficient, and instead it "assum[ed] that to be so" before proceeding to specific intent. *See* SlipOp. at *8–9. But when it analyzed sufficiency of the evidence to prove specific intent, it did *not* assume that a reasonable fact-finder could determine Ernst's identity was proven beyond a reasonable doubt. To the contrary, it "stacked" its concern about specific intent with its lingering doubts on identity. *See* SlipOp. at *9–10. But the evidence was either sufficient to support inference of identity beyond a reasonable doubt, or it was insufficient—there is no middle ground. If it was insufficient, then Ernst should win on that sufficiency challenge, without any further analysis. But if the circumstantial evidence *was* sufficient to prove identity, any further analysis must accept that reasonable inference as "established." *See State v. Shumpert*, 554 N.W.2d 250, 253 (Iowa 1996) (citing *State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995)). Because the sufficiency of the evidence to support an inference of identity and forced entry is a separate question from the sufficiency of the evidence to support an inference of specific intent, it is improper to treat them as a "stack"—each link in the inferential chain must be analyzed separately.

After accepting that identity and forced entry were shown by sufficient proof to enable a rational fact-finder to call them "proven" beyond a reasonable doubt, *then* the question is whether there was sufficient evidence to support an inference that Ernst acted with the specific intent to commit theft when he pried open that garage door. Again, assessing inferences from circumstantial evidence necessarily involves comparing all potential explanations and determining which of them are reasonable, in light of other evidence and common sense. Iowa courts have stated that "[t]he requirement of proof beyond a reasonable doubt is satisfied if it is more likely than not the inference of intent is valid." *See Lambert*, 612 N.W.2d at 813–14 (citing *Finnel*, 515 N.W.2d at 42). This is a statement of a standard of review, not a burden of proof at trial. Juries are still instructed that specific intent, like any other element, must be proven beyond a reasonable doubt. But when reviewing a ruling on the sufficiency of the evidence, it is proper to affirm a conviction when *the reviewing court* determines that an inference of specific intent was more likely to be accurate than not accurate, after accepting all other reasonable inferences that favor the verdict and after narrowing the question to that unique inquiry. *See Olson*, 373 N.W.2d at 136–37.

The panel opinion rejected the inference of specific intent, but refused to name an alternative intent-related inference that it found was more likely to be true (or equally likely to be true). *See* SlipOp. at *8–10. This is problematic because the panel would be incorrect to reject the inference of specific intent, unless it concluded that a competing inference was more likely or equally likely; its inability to identify such a competing inference that passed muster is a thread that, if pulled upon, causes the entire opinion to unravel. Note that "the mere possibility" that Ernst's act of prying open that door was "innocent of criminal intent[] does not demand an acquittal, for the jury must act on probabilities, not possibilities." *See State v. Jones*, 281 N.W.2d 13, 18 (Iowa 1979) (quoting *State v. Dunn*, 199 N.W.2d 104, 109 (Iowa 1977)). Inferential proof functions by disproving or discrediting alternative explanations—and when the panel reversed on the basis of *unnamed* alternative explanations, it skipped the most critical step in analyzing the sufficiency of circumstantial evidence: comparative assessment of the strength of the competing inferences offered and argued by the parties. Not only does this strongly suggest that the panel could not identify a reasonable competing inference, it leaves the State to guess what hidden theory it needed to disprove.

Whenever the foreseeable consequences of a preliminary act are to place the defendant in a position to subsequently accomplish a particular objective, it is reasonable to infer that the defendant acted with specific intent to further that objective. Iowa law permits jurors to make inferences "based upon the evidence given, together with a sufficient background of human experience to justify the conclusion." *See State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998) (quoting *Brewster v. United States*, 542 N.W.2d 524, 528 (Iowa 1996)). And the Iowa Supreme Court has noted that "in the great majority of cases of unlawful breaking and entering, the act is done with intent to steal." *See Erving*, 346 N.W.2d at 836 (quoting *Allnutt*, 156 N.W.2d at 271). This Court did not need empirical research or a survey of caselaw to support that statement—just common sense and human experience. *See id.*; *but see Woodruff*, 225 N.W. at 255–57 (providing extensive survey of then-existing caselaw). Jurors and reviewing courts may use common sense to determine whether an inference of specific intent from circumstantial evidence is reasonable, as Ernst's jury did here. Because that analysis is inherently comparative, it was enough to find that there was no better explanation for these facts than the inference that Ernst broke in to commit theft, then fled when he saw the truck.

Neither the original panel opinion nor the amended opinion explains what alternative inference would have competed with the natural, common-sense inference that Ernst pried open the door because he wanted to steal whatever property was inside. The State cannot identify any other reason why Ernst would drive so far out of Dubuque to pry open this particular garage door. Indeed, Ernst's brief did not ever identify any potential alternative explanation for why he might have pried open the door, nor lodge any real challenge to the sufficiency of the evidence to prove that specific-intent element. *See* Def's Br. at 33–58. The panel opinion recognized that the evidence suggested that Ernst had reason to believe that neither homeowner would be home during the day (which gave way to uncertainty when he opened the door and saw the red work truck, still parked inside). *See* SlipOp. at *6; TrialTr.V1 178:12–180:4; *accord* TrialTr.V4 15:3–17. Upon concluding that Ernst was the person who pried open the door, the jury made the natural inference, using logic and common sense, that Ernst did that because he intended to steal items that were left for the taking, and left when he lost confidence that nobody was home. To be sure, Ernst was free to offer evidence to sow doubt about that inference, and to posit alternative theories on specific intent—but this

record does not contain anything that would imbue an alternative theory with enough logical force that it would prohibit jurors from making the reasonable, common-sense inference that Ernst pried open this door with the intent to steal property. *See Erving*, 346 N.W.2d at 836 (quoting *Allnutt*, 156 N.W.2d at 271).

The panel opinion's criticism of "stacked inferences" conflicts with *O'Connell* and threatens to revive a defunct distinction between the weight to be afforded to facts proven by direct evidence and those proven by circumstantial evidence. The panel opinion stated that invalid principle in lieu of the sufficiency-of-the-evidence analysis that it needed to perform, which would have shown that the State's evidence was sufficient to support conviction because there was no reasonable alternative explanation for the circumstantial evidence showing that Ernst pried open the garage door, left as soon as the parked truck became visible, and then denied that he was involved (or even present). Even if some reasonable alternative explanation might have existed, the inference that Ernst had the specific intent to commit a theft was the *most* reasonable inference available, and that means jurors could decide that it was the *only* reasonable inference. Thus, this Court should reverse the panel and affirm this conviction.

CONCLUSION

The State respectfully requests this Court grant further review, reaffirm that there is no actual difference between the effect of proof by direct evidence and the effect of proof by circumstantial evidence, reverse the panel opinion, and affirm Ernst's conviction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This application complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.1103(4) because:

1. This application has been prepared in a proportionally spaced typeface using Georgia in size 14, and contains **5,048** words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(*a*).

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