IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. ETHAN L. DAVIS, Defendant-Appellant.	)))))))))	S.CT. NO. 19-0453

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR APPANOOSE COUNTY
HONORABLE MYRON L. GOOKIN, JUDGE (JURY TRIAL & SENTENCING)

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On April 7, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Ethan Davis, No. 6848848, Iowa State Penitentiary, 2111 330th Avenue, PO Box 316, Fort Madison, IA 52627.

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ROUTING STATEMENT

Under Division II, guidance is requested on how trial courts should elect between two *equally correct* instructions on reasonable doubt. In Frei this Court held the 'firmly convinced' language of the old December 2006 model instruction is *one* legally correct formulation, but that defendants remained free to request other equally correct formulations. State v. Frei, 831 N.W.2d 70, 79 n.7 (Iowa 2013). Davis requests the Court now (1) confirm the current model instruction (containing additional 'hesitate to act' language) is an *equally correct* formulation; and (2) hold non-constitutional instructional error inhered where the trial court refused to honor Davis's timely request for the amplified language. See Porter v. Iowa Power & Light, 217 N.W.2d 221, 234-35 (Iowa 1974); Sergeant v. Challis, 238 N.W. 442, 446 (Iowa 1931) (timely request for amplified language must be honored). Clarification is also needed on (3) whether such choice of instruction is reviewed for errors at law or instead

involves a discretionary component. See Alcala v. Marriott Int'l, Inc., 880 N.W.2d 699, 707 (Iowa 2016).

Under Division IV, Davis claims the district court erred in submitting the deadlocked jury a further verdict-urging instruction over his request to simply direct them to reread the instructions given and continue deliberations – the course State v. Campbell, 294 N.W.2d 803, 814 (Iowa 1980) said should be "closely follow[ed]" in Iowa. Guidance is also needed on the question of how prejudice should be evaluated in such circumstance. Davis argues that, as with other preserved instructional errors, the burden should be on the State to prove harmlessness. No published Iowa decision appears to address the situation where the verdict-urging instruction was submitted over a defendant's request for the Campbell procedure.

Retention is appropriate to address these substantial issues of first impression. Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant, Ethan Davis, from his conviction, sentence, and judgment following a jury trial for Murder in the First Degree.

Course of Proceedings: On December 5, 2017, the State charged Davis with Murder in the First Degree, a Class A Felony in violation of Iowa Code section 707.2(1)(A) (2017). (Complaint; TI) (Conf.App. pp.4-5; App. pp.4-5).

A jury trial commenced February 5, 2019. (2/5/19_Tr.1:1-2:10). The dispute at trial centered on whether the State had met its burden of proof on the identity element. (2/14/19_Tr.14-15, 36:7-9, 37:22-38:2). Davis and the victim were wholly unknown to one another. A rifle owned and previously operated by Davis was apparently used in the shooting, and his fingerprints (in addition to an unidentified fingerprint or DNA profile belonging to at least one unknown third-party) were located on the rifle and on ammunition located near the crime scene. (1/12/19_Tr.21:16-22:12, 24:15-24, 30:2-14, 50:1-52:12,

58:15-19, 12821:2-129:5, 136:17-23, 137:25-16, 140:2-19, 157:14-158:5, 163:9-20). However, Davis insisted he had not wielded these items at the time of the murder, testifying they'd been stolen from his vehicle prior to the weekend of Ross's death. (2/13/19_Tr.70:6-13, 93:24-94:20, 101:9-103:25, 109:3-110:25, 115:1-119:18, 130:12-131:16, 135:10-136:21).

At trial, Davis objected to the reasonable doubt jury instruction. (2/5/19_Tr. 9:15-11:10, 37:5-16; 2/13/19_Tr. 143:12-144:14); (Prelim.Instruct.2; Final Instruct.7) (App. pp.6-7). The court sustained the State's objection to Davis's use of 'hesitate to act' language during closing argument. (2/14/19_Tr.53:9-24). Additionally, Davis objected to burden-shifting by the State, and the court overruled the objections. (2/12/19_Tr.57:22-58:7; 2/14/19_Tr.57:8-58:9).

The case was submitted to the jury on February 14, 2019 During its second day of deliberations, the jury indicated it was deadlocked. The court, over Davis's objection, responded by giving the jury an additional verdict-urging instruction.

Thereafter, the jury returned a February 15 verdict of guilt. (2/14/19_Tr.78:18-80:4; 2/15/19_Tr.3:1-7:22).

Davis filed Motion in Arrest of Judgment and for New Trial arguing: (1) the evidence was insufficient to support Davis's identity as the perpetrator; (2) the court erred in denying Davis's request for the current ISBA-approved model instruction on reasonable doubt, and in sustaining the State's objection to use of 'hesitate to act' language during Davis's closing argument; and (3) the court erred in issuing a verdict-urging instruction to the jury after it indicated it was deadlocked. (3/8/19 Def.Motion) (App. pp.10-12). The State resisted and, the court denied the motion. (3/15/19 Resist.) (App. pp.13-16) (Sent.Tr.2:16-6:15). The court entered judgment against Davis, sentencing him to life in prison without the possibility of parole. (Sent.Tr.14:18-15:9); (Judgment) (App. pp.17-25).

Davis filed a timely notice of appeal. (NOA) (App. p.26).

Facts: On Friday, November 24, 2017, between 10:00am and 1:30pm, Curtis Ross set out to bow hunt the Sandy

Branch area of Rathbun Lake. (2/6/19_Tr.183:18-184:4 186:6-187:1, 196:12-199:1). After a Snapchat exchange with a friend at 1:30pm, none of Ross's friends or family were able to make any further contact with him. (2/6/19_Tr.218:4-221:2; 2/8/19_Tr.107:9-108:4; 2/12/19_Tr.99:1-100:11, 122:9-11). At 1:00a.m. on Saturday, November 25, his friend reported him missing to law enforcement. A search commenced, and shortly after daybreak, law enforcement discovered Ross's naked body submerged in a creek. He had at least 10 gunshot wounds, 5 incise wounds, and 26 stab wounds—many of them more than 5 or 6 inches deep. (2/8/19_Tr.11:21-21:16, 23:25-25:16, 45:5-25, 50:1-24; 2/12/19_Tr.193:11-194:12,199:17-21, 204:1-6).

The Sandy Beach hunting ground is situated near the Appanoose/Wayne County line and is open to the public. It is a popular area for recreation in the fall, and Ross had previously talked about running into people there. His body was found on the Appanoose side of the county line. Northeast of the public hunting ground is private property

owned by L&W Quarry, and southwest of the public hunting ground is a private Wayne County farm property belonging to the parents of Defendant Ethan Davis. (2/6/19_Tr.210:22-211:5, 2/8/19_Tr.13:6-14:3,109:8-17, 150:11-24, 177:9-23; 2/11/19_Tr.6:17-9:5; 2/13/19_Tr.12:9-13:6, 21:15-21); (Exhib.5-6) (Ex. App. pp.7-8).

In November 2017, Davis resided at the family farm with his parents, Jamison and Tammy, and his brother, Evan. (2/13/19_Tr. 59:22-60:5). On the day Ross went missing, Davis "went and got his kid out of a crack house" in Seymour, Iowa, where his ex-girlfriend Shayla Stevens' new boyfriend lived. Davis had been carrying a licensed 9mm handgun, and while at the "crack house," he "fired a round in the air, grabbed his kid, and left." (2/11/19_Tr.61:23-62:25, 133:2-6; 2/13/19_Tr.13:7-13, 24:21-24, 61:6-17, 63:8-14, 67:8-16, 72:8-16, 74:17-18). After Stevens called 911 at 11:42a.m., law enforcement was on the lookout for Davis's vehicle – a distinctive orange Hummer with a very loud muffler and a missing rear windshield. (2/8/19_Tr.66:25-67:3, 72:2-8,

73:14-22; 2/11/19_Tr.34:11-15, 61:15-22; 2/13/19_Tr.70:3-18, 79:4-5).

Knowing he would likely be arrested in connection with the Seymour incident, Davis was anxious to get his child to a safe place. Having forgotten his cell phones at a cousin's house a few days earlier, he drove to the homes of various family members but no one was home. At around 1:00pm, he dropped the child off at a friend's house, asking the friend to call Davis's mother to pick up the child. (2/11/19_Tr.25:25-26:22, 56:4-10, 57:1-59:24, 64:18-22, 118:9-119:6, 133:7-12; 2/13/19_Tr.74:19-80:1).

Davis drove his Hummer to a somewhat remote location on his parents' property, parking it between a cornfield and timber line. Davis testified he hid out there because he knew he would eventually have to go to jail for the Seymour incident, but he was not ready to face it yet. His parents confirmed this was typical behavior for Davis--since he was a child he had often gone off by himself for a day or two to think

about things. (2/11/19_Tr.132:15-133:1; 2/13/19_Tr.39:13-18, 80:2-82:16, 86:1-9).

Davis remained in the Hummer until 5:00 or 6:00p.m. that evening before walking to the Jones Church, across the street east of the Davis farm. Davis remained at the church for several hours, praying and trying to come to terms with his situation, before walking back to the Hummer at around 11:00 or 11:30 p.m. (2/8/19_Tr.76:4-8, 81:6-82:2; 2/13/19_Tr.24:25-25:10, 40:19-41:11, 86:1-90:17, 97:10-98:1).

Davis slept in the Hummer Friday night, and when he woke early Saturday morning he walked to his parents' house to eat. He didn't see his parents, but found his cell phones on the dining table[1]. He sent a few quick text messages to his cousins, left the phones on the table and walked back to the Hummer. He left the phones because he knew his parents would be "blowing [his phone] up" with calls and texts, and he

[1] Davis's cousin had dropped them off at the house Friday evening. (2/11/19_Tr.27:20-28:12).

wasn't ready to face them or the situation yet. (2/13/19_Tr.90:18-92:11).

He remained at the parked Hummer until Saturday evening when he walked back to the house and called his cousins and parents, who joined him at the house. Davis openly told them what occurred in Seymour. With his family's encouragement, Davis decided to turn himself in. (2/13/19_Tr.24:6-20, 94:21-97:9, 137:9-18). He arrived at the Wayne County Sheriff's Office at 9:10 p.m. and was arrested for the Seymour incident[2]. (2/8/19_Tr.68:1-69:6, 71:25-72:19, 76:20-77:10). He thereafter remained in Wayne County jail. (2/12/19_Tr.83:19-24).

On Monday November 27, police investigating Ross's death spoke to a witness who said he'd been in the L&W Quarry maintenance shed Friday afternoon when he'd heard

[2] On that matter Davis was found guilty of Assault Causing Bodily Injury and acquitted of Burglary and Willful Injury. (2/8/19_Tr.71:25-72:19).

three rounds of rapid-fire gunshots around 2:30 or 3:00p.m. (2/11/19_Tr.41:6-42:3, 43:18-48:1, 49:9-51:11).

Ross's blood was found in two separate areas on the west bank of the creek. A smaller area was at the shoreline, while the larger area was in tall grass about twenty feet away. The larger area contained bone fragments, two 5.56 caliber spent shell casings, a metal bullet tip, and a camouflaged elastic strap/tie from a zipper to a hunting jacket or backpack. The two areas were connected by a trail of blood suggesting Ross was dragged from the larger to smaller blood area and dumped in the water. (2/8/19_Tr.56:12-60:17, 74:1-7, 93:17-94:3, 96:1-20, 131:21-134:1; 2/11/19_Tr.75:20-77:3, 82:23-86:5, 2/12/19_Tr.129:13-136:8); (Exhib.3) (Ex. App. p.5).

Six 5.56 caliber spent shell casings were found – two in the large blood area and four on a nearby hilltop. (2/8/19_Tr.136:5-137:9, 146:15-25, 219:13-220:18). 5.56 caliber ammunition is very similar to .223-caliber ammunition, except that 5.56-caliber ammunition bears a green-painted steel tip. Though originally marketed to the

military, 5.56 ammunition is now fairly common and can be purchased at any sporting goods store. (2/8/19_Tr.28:20-23, 163:12-20, 209:1-11, 237:21-238:10, 240:2-6).

On Monday November 27 (after Davis was already in Wayne County jail), investigators found a military-style ammo can inside an abandoned refrigerator on the hunting ground. The can contained loose rounds of 9mm, .22, .223, and 5.56 caliber ammunition, an AR-style polymer magazine, and five dimes. Davis's fingerprints were on the can; but the refrigerator was neither seized nor tested, and it later went missing from the hunting ground. (2/8/19_Tr.135:1-14, 159:3-164:11, 173:9-174:6, 176:3-177:3; 2/12/19_Tr.20:5-23:15, 52:13-53:14, 54:5-10); (Exhib.35-36, 39-40) (Ex. App. pp.12-13, 16-17). Police also found six magazines of varying sizes in a concrete culvert on the hunting grounds. (2/8/19_Tr.95:2-21, 135:15-20, 164:12-170:19); (Exhib.43-45) (Ex. App. pp.20-22). Two magazines bore Davis's fingerprints, one of which was still unopened and empty inside its plastic packaging. The unopened magazine containing

Davis's fingerprint also contained a second print left by some other unidentified person. Of the six magazines in the culvert, only two could be used in an AR-15 rifle and neither of those contained Davis's fingerprints. (2/12/19_Tr.23:16-24:24, 30:2-22, 37:9-15, 50:1-52:12, 53:15-54:7, 58:15-19); (Exhib.3-4) (Ex. App. pp.5-6). None of these items found in the refrigerator or the culvert were found to bear Ross's blood, DNA, or fingerprints. (2/12/19_Tr.37:17-19).

On November 29, an AR-15 rifle purchased by Davis in 2015 was found lying in the grass underneath a hay mower on the Davis family farm, some 300 yards from the residence. The officer who found the rifle could not say how long it had been left laying there, but noted there was no weathering apparent on the rifle at all. Ross's DNA was found on two areas of the rifle, and ballistics testing indicated all six spent shell casings found at the crime scene had been fired from that particular rifle. Bullet fragments retrieved from Ross's body could also have been fired from that class of weapon, but it could not be determined if they came from that particular

rifle. Davis's fingerprints were on the rifle but his DNA was not, and multiple areas of the rifle contained DNA mixtures from at least 3 separate contributors. (2/8/19_Tr.191:5-12, 199:9-200:23, 221:16-25, 223:15-225:25, 230:3-15, 234:6-21, 238:11-239:11; 2/12/19_Tr.30:23-34:22, 36:1-13, 136:17-142:14, 144:15-18, 155:12-163:20; 2/14/19_38:1-39:1, 52:7-19).

That same day, officers found another military-style ammo can outside the garage on the Davis property. This can contained several hundred rounds of .223 and 5.56 ammo and a black magazine. (2/12/19_Tr.68:1-69:19); (Def.Exhib.H-I) (Ex. App. pp.50-51). They also found a camouflage backpack containing numerous magazines, a tactical vest containing a magazine of green-tipped AR-15 ammunition, and an empty gun case on the property near a grain silo. (2/12/19_Tr.47:6-48, 69:23-72:13); (Exhib.75, 77) (Ex. App. pp.46, 48). Davis's father testified the ammo can had not been there Sunday, November 26, and that it had appeared sometime Monday afternoon. (2/13/19_Tr.44:1-53:2).

Police discovered a large number of distinctive footprints near the culvert. The prints were left by a specialized barefoot-style shoe that separates the toes. Similar prints were also located in the area between Ross's truck and the crime scene. No such shoes were ever located or linked to Davis. (2/8/19_Tr.46:1-5, 48:5-49, 73:5-13, 174:7-175:20; 2/11/19_Tr.131:23-132:9).

A cart-tire impression and boot print were left near where Ross's body was dumped into the water. Again, nothing similar was found in Davis's possession or at the family farm. (2/8/19_Tr.74:20-75:11; 2/11/19_Tr.100:3-102:12; 2/12/19_Tr.40:25-41:15). Nor was any knife that could be tied to the stabbing ever found on the Davis property. (2/11/19_Tr.98:9-10, 111:21-112:2, 113:20-114:2; 2/12/19_Tr.72:14-16, 105:2-13, 150:23-151:6; 2/13/19_Tr.100:20-101:8).

Davis acknowledged he owned a number of firearms and quite a bit of ammunition, mostly for target shooting. After target shooting, he would collect back the spent shell casings

to reload and reuse. He stored much of his ammunition loose, inside green military-style ammo cans. His guns and ammunition were kept in various locations, including in his parents' residence and in whatever vehicle he was driving at the time. (2/11/19_Tr.109:13-111:20, 112:3-113:18; 2/13/19_Tr.83:2-85:14). When his Hummer was seized by law enforcement[3], it was found to contain a number of firearm components, numerous spent shell casings, and numerous unfired ammunition (including .223 caliber rounds and 9mm rounds). (2/11/19_Tr.92:22-94:11, 95:5-96:12, 99:10-19).

Davis testified he had previously purchased or gifted several guns to his ex-girlfriend, Shayla Stevens, when they'd been together. These included the AR-15 rifle with scope (Exhibit 130), which Davis had purchased for Stevens in 2015. (2/13/19_Tr.92:19-25, 107:8-108:16).

[3] The location of the Hummer was determined to be about 2 ½ miles from the crime scene, though longer by road. (2/8/19_Tr.33:5-34:7).

Stevens initially kept the guns Davis bought for her after they broke up in the summer of 2017. Later, Davis learned Stevens "was trying to sell [the guns] to a bunch of addicts" and felons, and he retrieved them from her, including the AR-15 rifle. Davis put the rifle in the far back of his Hummer vehicle, where he left it stored along with multiple military-style ammo cans, magazines, and tactical gear. He insisted he did not remove the rifle or other items from the Hummer. The rear windshield of the Hummer was broken and taped with plastic, and he testified the rifle and other items must have been stolen out of the back of the Hummer without his knowledge. He did not realize the items were missing until they were found in various locations by law enforcement during their investigation into Ross's death. (2/13/19_Tr. 70:6-13, 93:24-94:20, 101:9-103:25, 109:3-110:25, 115:1-119:18, 130:12-131:16, 135:10-136:21).

Davis and Ross did not know one another. However, the State theorized that Davis encountered Ross while 'hiding out' following the Seymour incident and killed him, either

mistaking him for law enforcement or to avoid the possibility Ross could report Davis's whereabouts. (2/13/19_Tr.114:22-25; 2/14/19_Tr.63:17-64:23, 68:18-22, 73:12-74:1).

Davis denied stepping foot in the public hunting grounds that weekend. He noted that the items linked to him were found in fairly conspicuous locations where law enforcement would certainly look. He suggested that someone may have planted those items to implicate him or to deflect responsibility away from the actual perpetrator or the killing. (2/13/19_Tr.97:10-100:19, 101:9-20, 111:16-113:1, 130:12-131:24, 133:24-134:18; 2/14/19_Tr.41:13-18, 42:21-23, 43:2-8).

Despite what must have been a gruesome and messy scene, no blood or DNA belonging to Ross was found in Davis's vehicle or on any of Davis's clothing or shoes. (2/8/19_Tr.143:19-22; 2/12/19_Tr.149:19-150:22). Neither Davis's prints or DNA were in Ross's vehicle, but unidentified third-party fingerprints were. (2/12/19_Tr.41:19-43:23, 54:21-55:7, 146:19-21). Ross was dragged some 20 feet, but

the 197-pound Davis was significantly smaller than the 270-pound Ross. (2/8/19_Tr.112:22-113:17; 2/14/19_Tr.51:3-7). None of Ross's missing clothing, hunting gear, or cell phone ever found in Davis's possession. (2/8/19_Tr.116:21-117:9). To the contrary, phone ping information indicated that when Ross's phone last received or transmitted data at 3:31 p.m. Friday, it had been within 4.2 miles of the Seymour cell tower. The Davis farm (located 7 to 7 ½ miles away from that tower) would not fall within this range. (2/8/19_Tr.18:12-17, 34:8-39:13, 78:2-79:10, 116:7-20; 2/12/19_Tr.112:3-113:1; 2/13/19_Tr.41:19-43:20; 2/14/19_Tr.53:3-8).

According to the ballistics examiner, none of the more than 100 spent shell casings found inside the Hummer, had been fired from the AR-15 rifle, lending credence to Davis's claim that he had not used that rifle for quite some time. (2/8/19_Tr.240:24-243:21; 2/13/19_Tr.84:18-23, 92:19-94:2). Indeed, the only casings found to have been fired out of that AR-15 rifle were the 6 casings at the scene of Ross's shooting, none of which were found to contain Davis's

fingerprints or DNA. (2/8/19_Tr.243:14-21; 2/12/19_Tr.38:8-15, 40:17-24). Nor were Davis's prints or DNA found anywhere else at that actual "crime scene" location where Ross was shot, stabbed, and then dragged into the creek.

In urging reasonable doubt existed, the defense also emphasized various items of evidence found by the State but never followed-up on, tested, or tied to Davis. (2/8/19_Tr.112:19-21, 236:7-237:11, 240:16-243:21; 2/11/19_Tr.13:15-14:11, 18:20-20:17; 2/12/19_Tr.44:12-49:25, 58:13-14, 114:19-120:5, 151:17-21; 2/14/19_Tr.39:4-9, 43:23-49:25, 51:16-52:4); (Def.Exhib.B, N) (Ex. App. pp.49, 52).

ARGUMENT

I. The evidence was insufficient to establish Davis's identity as the perpetrator.

A. <u>Preservation of Error</u>: Error was preserved by Davis's motions for judgment of acquittal challenging his identity as the perpetrator. (12/13/19_Tr.3:9-5:1, 139:11, 141:1-24).

If error was not preserved, Davis requests this issue be considered under an ineffective assistance of counsel framework. State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

B. Standard of Review: Preserved sufficiency-of-the-evidence challenges are reviewed for correction of errors at law. State v. Petithory, 702 N.W.2d 854, 856 (Iowa 2005).

Ineffective-assistance claims are reviewed de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). To prevail on an ineffective-assistance claim concerning sufficiency of the evidence, a defendant need only establish that a properly made "motion [for judgment of acquittal] would have been meritorious." State v. Schories, 827 N.W.2d 659, 664 (Iowa 2013).

C. Discussion: The burden is on the State to prove every fact necessary to the offense. State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976). To be upheld, a jury's verdict must be supported by substantial evidence, meaning evidence which would convince a rational finder the defendant is guilty beyond a reasonable doubt. State v. Hopkins, 576 N.W.2d

374, 377 (Iowa 1998); State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). The evidence must raise a fair inference of guilt on every element and do more than create speculation, suspicion, or conjecture. State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). Such evidence must be viewed in the light most favorable to the State, but consideration must be given to all of the evidence rather than just the evidence supporting the verdict. Petithory, 702 N.W.2d at 856-57. Ultimately, evidence that allows two or more inferences to be drawn, without more, is insufficient to support guilt. State v. Truesdell, 679 N.W.2d 611, 618–619 (Iowa 2004).

The evidence presented at trial was insufficient to establish that Davis was the perpetrator of the homicide. The evidence at the scene indicated the victim was shot, stabbed, stripped of his clothing, and dragged some twenty feet into the creek. (2/8/19_Tr.57:16-23; 2/11/19_Tr.76:20-23, 82:23-83:21; 2/12/19_Tr.193:11-194:4,199:17-21, 204:1-6). The victim would have bled heavily, and the perpetrator would necessarily have come into significant contact with Ross's

blood. Yet, no blood was ever located on any of Davis's clothing or shoes (even after an exhaustive search of both the Davis farm and the crime scene) nor anywhere in or on Davis's vehicle. (2/8/19_Tr.143:19-22; 2/12/19_Tr.149:19-150:22). Nor was any of the victim's clothing, the hunting gear he would have been carrying (including a camo backpack, its contents, a ladder, climbing sticks), nor his cell phone ever located in Davis's possession. (2/6/19_Tr.188:19-190:15, 191:24-192:15; 2/8/19_Tr.29:4-7, 116:21-117:9). Further, while Ross was stabbed or cut over thirty times, no secondary cuts from slippage of the knife were reported on Davis's hands or body. (2/8/19_Tr.76:12-77:10; 2/12/19_Tr.72:17-73:23, 83:15-19).

In addition, the State conceded Davis had no connection with Ross whatsoever. Given the lack of any connection to the victim, Davis had no motive harm him. The State suggested Davis may have had a motive to kill Ross to prevent him from reporting Davis's presence in the woods. (2/13/19_Tr.114:22-25). But Ross did not know and would not have recognized

Davis even if he saw him, nor would he have been aware of the Seymour incident or of the fact that any search may even be underway for Davis in connection with it. The State suggested the possibility that Ross might subsequently chance upon a law enforcement officer who might ask him if he'd seen anyone in the woods could have motivated Davis to kill the stranger, but such possibility is too remote and speculative to inspire such a brutal attack on Ross. (2/14/19_Tr.64:13-23, 73:23-74:1). Moreover, Davis ultimately turned himself in on the Seymour incident the very next night. It doesn't make sense that Davis would brutally murder Ross merely to avoid being taken into custody on an incident which he ultimately turned himself in on the very next night.

Ultimately, the evidence tying Davis to the homicide was that his rifle fired the shell casings found at the scene, and that his fingerprints (though not DNA) were found on that rifle and items dumped in different locations. This evidence, though, is insufficient to establish, beyond a reasonable doubt, that Davis was the killer. The evidence established

only that Davis had wielded the items at issue *at some time in the past*, not that he had wielded those items *at the time of and in connection with the attack on Ross*.

Iowa law has no bias against circumstantial evidence. See Iowa R. App. P. 6.904(3)(p). But like direct evidence, circumstantial evidence must raise a fair inference of culpability. If circumstantial evidence does no more than create speculation, suspicion, or conjecture, it is insufficient. See State v. Clarke, 475 N.W.2d 193, 197 (Iowa 1991). Trace evidence like fingerprints or DNA, establish only the source of the trace evidence, not that such source is the *perpetrator* of the crime. See e.g., Richard Lempert, *Some Caveats Concerning DNA As A Criminal Identification Evidence: With Thanks to the Reverend Bayes*, 13 CARDOZO L. REV. 303, 316, n. 34 (1991) ("…[T]he question of whether the defendant is the source of the evidence DNA is not the same of whether the defendant is guilty of a crime. . . . [T]he defendant may be the source of crime scene DNA although he is innocent of the crime.").

Courts must remain wary of jurors misconstruing or misusing the conclusions that can be properly drawn from such evidence. See Gregory Simon, *Is Identity Enough to Convict?: An Analytic Framework to Determine Whether the Mere Presence of DNA Is Sufficient Evidence to Infer Guilt Beyond A Reasonable Doubt*, 36 WHITTIER L. REV. 371, 372 (2015). As acknowledged by the fingerprint expert, fingerprinting analysis can only detect *who made contact with* the item at some time in the past – it cannot determine *when the fingerprint was left*, nor which of multiple fingerprints were left first or last. (2/12/19_Tr.29:16-30:1, 44:6-11, 55:12-23, 59:11-18). Similar limitations were noted concerning DNA evidence. (2/12/19_Tr.141:1-19, 154:17-155:7).

In People v. Arevalo, the California Court of Appeals concluded "standing alone, a defendant's DNA on an object is insufficient evidence to support a conviction absent any facts showing the defendant's contact with the object could only have occurred during the commission of the crime." People v.

Arevalo, No. G047523, 2014 WL 1435071, *1 (Cal. Ct. App. 2014). The same is true for fingerprints.

In the present case, Davis acknowledged having purchased and previously handled the rifle at issue. However, he urged that he was not the one who used it against Ross. He testified that the rifle, as well as the ammo can and magazines from the refrigerator and culvert, had been stolen from his Hummer at some point in the month-and-a-half before Ross's death. (2/13/19_Tr.93:24-94:16, 102:8-103:20, 115:1-119:18, 130:12-131:16, 135:10-136:21). Davis did not know who might have stolen the items, but testified that he'd initially retrieved the rifle back from Stevens because she was planning to sell it to felons or drug addicts. (2/13/19_Tr.94:17-20, 101:19-102:2, 109:3-110:20). The State's own forensic examination found unidentified third-party DNA (in addition to Davis's fingerprints[4]) on the rifle, confirming that someone else also handled the rifle.

[4] Davis's DNA was not located on the rifle.

(2/12/19_Tr.128:21-129:5, 136:17-23, 137:25-138:16, 155:16-163:20). An unidentified print (in addition to Davis's fingerprint) was also found on a magazine from the culvert. (2/12/19_Tr.50:1-52:12, 58:15-19).

Under these circumstances, the presence of Davis's fingerprints on the items at issue (the rifle and unfired ammunition) established only that he'd previously handled those items – not that he had handled those items at the time of the crime against Ross. The evidence was insufficient to establish Davis's identity as the perpetrator of the murder. Davis's conviction must be reversed and remanded for judgment of acquittal.

II. The district court erred in submitting the old model instruction on reasonable doubt (the Frei instruction) over Davis's request for the current model instruction containing additional "hesitate to act" language.

A. Preservation of Error: During trial, Davis objected to the court's submission of the old Iowa model instruction on reasonable doubt containing only "firmly convinced" language (the Frei instruction), over the current revised such instruction

containing additional "hesitate to act" language. Davis's objections were overruled by the court. (2/5/19_Tr. 9:15-11:10, 37:5-16; 2/13/19_Tr. 143:12-144:14); (Prelim. Instruct.2; Final Instruct.7) (App. pp.6-7). Error was preserved.

B. Standard of Review: The older reasonable doubt instruction submitted by the court in this case has been held to be constitutionally adequate. State v. Frei, 831 N.W.2d 70, 75 (Iowa 2013), (overruled on unrelated grounds by Alcala v. Marriott Int'l, Inc., 880 N.W.2d 699 (Iowa 2016)). Nevertheless, *non-constitutional instructional error* can inhere in a trial court's ruling concerning jury instructions, even though the submitted instructions are technically *constitutionally adequate*. State v. Hanes, 790 N.W.2d 545, 550 (Iowa 2010) (discussing harmless error standard for constitutional instructional error versus for nonconstitutional instructional error).

Although the "firmly convinced" language in the submitted Frei instruction is a legally correct explanation of

reasonable doubt, the same is *also true* of the additional "hesitate to act" paragraph added into the current model instruction and requested by Davis. It is not entirely clear what standard of review applies to a district court's election between two competing reasonable doubt instructions, *where both are correct statements of law*.

"Iowa law requires a court to give a requested jury instruction if it correctly states the applicable law and is not embodied in other instructions." Alcala, 880 N.W.2d at 707. "The verb 'require' is mandatory and leaves no room for trial court discretion." Id. Thus, absent a discretionary component, review of alleged instructional error is for correction of errors at law. Id. Any discretionary component, however, is reviewed for an abuse of discretion. State v. Plain, 898 N.W.2d at 811, 816 (Iowa 2017); State v. Williams, 929 N.W.2d 621, 633 & n.6 (Iowa 2019).

On the one hand, because the topic of reasonable doubt is mandatory rather than merely a discretionary or cautionary instruction, it would appear that the Alcala rule would apply

and the giving of additional legally correct language requested by the defendant would be mandatory rather than discretionary. Compare In re Winship, 397 U.S. 358, 364 (1970) ("the reasonable-doubt standard is indispensable"), and State v. Parkin, 299 N.W. 917, 919 (Iowa 1941) (contrasting "essential" reasonable doubt instruction with subsequent cautionary instruction); with Plain, 898 N.W.2d at 816 ("Iowa law permits – but does not require – cautionary instructions that mitigate the danger of unfair prejudice.").

On the other hand, it may be that the court's election between the parties' two competing instructions, where both are technically correct statements of law, injects a discretionary component into the trial court's decision of which to select. See State v. Tabor, No. 10-0475, 2011 WL 238427, at *3 (Iowa Ct. App. Jan. 20, 2011) ("Trial courts have a rather broad discretion in the language that may be chosen to convey a particular idea to the jury.") (quoting Stringer v. State, 522 N.W.2d 797, 800 (Iowa 1994)). Any such discretionary component would be subject to review for an

abuse of discretion rather than for correction of errors at law. Plain, 898 N.W.2d at 811, 816. The circumstances under which an abuse of discretion will be found include those found here, where the court's reason for declining the equally correct instruction is merely the fact that it has not been explicitly considered and approved by the Iowa Supreme Court. Id.

C. Discussion: Over Davis's objection, the trial court employed the old reasonable doubt instruction contained in the December 2006 version of the Iowa State Bar Association model instructions:

> The burden is on the State to prove Ethan Landon Davis guilty beyond a reasonable doubt.
>
> A reasonable doubt is one that fairly and naturally arises from the evidence in the case, or from the lack or failure of evidence produced by the State.
>
> If, after a full and fair consideration of all the evidence, you are firmly convinced of the defendant's guilt, then you have no reasonable doubt and you should find the defendant guilty.
>
> But if, after a full and fair consideration of all the evidence in the case, or from the lack or failure of evidence produced by the State, you are not firmly convinced of the defendant's guilt, then you have a reasonable doubt and you should find the defendant not guilty.

(Prelim.Instruct.2; Final Instruct.7) (App. pp.6-7). See Iowa Criminal Jury Instruct. 100.10 (Dec. 2006).

The court declined Davis's request to submit the current ISBA instruction, which is identical except that it inserts the following as a new third paragraph:

> A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

Iowa Criminal Jury Instruct. 100.10 (June 2009-June 2019). A slightly different version of this additional paragraph had originally been added to the model instruction in 2007, and it was then modified to its current form in March 2009. It has since remained unchanged, with the same language in place to this day. Iowa Criminal Jury Instruct. 100.10 (June 2007, June 2009, June 2019).

At the time of the preliminary instructions, the court explained its rejection of Davis's requested instruction as

follows: “I’m hung up on the Frei case”, “the one case we've got where the Supreme Court said the old reasonable doubt instruction is confirmed and approved. And so I hang my hat on that, and that's the instruction that I generally use.” (2/5/19_Tr.9:18-24). The court stated “I still give the old instruction, because it does have the imprimatur of the Iowa Supreme Court. So your request [for the current stock instruction] is overruled, and I will use the older instruction that is sported by the Frei case.” (2/5/19_Tr.10:20-11:1). When asked by defense counsel if the court believed the current stock instruction to be a misstatement of the law, the court responded:

> THE COURT: It is not a misstatement of the law, but I don't believe it's been confirmed by the Iowa Supreme Court, and therefore the jury is still out in terms of whether it's truly a correct statement of the law.

(2/5/19_Tr.11:2-10).

When again addressing the matter in connection with the final jury instructions at the close of the evidence, the court similarly explained:

> […] As I indicated when we talked about this when it was used as a part of the preliminary instructions, this iteration of the reasonable doubt instruction, although it may not be the current Iowa State Bar Association stock instruction on reasonable doubt, is confirmed in State versus Frei, F-r-e-i, I think, as a correct statement of the law in terms of reasonable doubt.
>
> The current version of the stock instruction on reasonable doubt has not been tested by the Supreme Court. And so at this point, I still continue to use the older instruction which has been approved by the Iowa Supreme Court. So that's the basis for why I'm using the instruction that I'm using.

(2/13/19_Tr.143:10-144:14).

1). Error:

While not held to be mandatory, our Supreme Court has repeatedly stated that "trial courts should generally adhere to the uniform instructions." State v. Mitchell, 568 N.W.2d 493, 501 (Iowa 1997); State v. Becker, 818 N.W.2d 135, 143 (Iowa 2012) (overruled on unrelated grounds by Alcala, 880 N.W.2d at 708). Further, "Iowa law requires a court to give a requested jury instruction if it correctly states the applicable law and is not embodied in other instructions." Alcala, 880

N.W.2d at 707. "The verb 'require' is mandatory and leaves no room for trial court discretion." Id.

Our Supreme Court has also repeatedly held that, "where the instruction given contains a correct statement of the law but is not as explicit or well amplified as the party may desire…, error cannot be based upon the alleged deficiency in this respect *in the absence of a request for additional instruction made before they are given the jury*…." State v. Brown, 172 N.W.2d 152, 160 (Iowa 1969) (emphasis added). That is, "a correct instruction, but not as explicit as counsel would like to have it, is sufficient, *in the absence of a request for amplification*." Sergeant v. Challis, 238 N.W. 442, 446 (Iowa 1931) (emphasis added).

But what about where, as here, there *has been* a request for amplification, which request was denied by the court below? In Porter v. Iowa Power & Light, 217 N.W.2d 221, 234 (Iowa 1974), our Supreme Court held "it was reversible error for trial court to refuse plaintiff's requested instruction which would have amplified [or further explained a particular]

concept", *even though* that concept was otherwise technically "covered by the substance of [other instructional language] which was submitted." Specifically, the trial court there refused Plaintiff's request for additional instructional language which – though technically "covered by the substance of [one of the negligence] specification[s]" that *was* submitted – "would have amplified" or further explained "[that] negligence specification". Porter, 217 N.W.2d at 234. Because the additional language (1) "would have amplified" or further explained "the negligence specification", and (2) "stated a correct principle of law, applicable to the facts, and not covered by other instructions", the Supreme Court held the trial "court erred in refusing to give it." Id. at 235.

The same is true here concerning the additional language requested by Davis. Because such additional language both (1) "stated a correct principle of law", and (2) "would have amplified" or further explained the important concept of reasonable doubt in a manner "not covered by [the] other

instructions", the trial court "erred in refusing to give it." See Id.

a) Correct Statement of Law:

The Iowa Supreme Court has not adopted an *exclusive* or definitive formulation of proper language for a reasonable doubt instruction. Robert R. Rigg, *Proof Beyond a Reasonable Doubt: Jury Instructions*, 4 Iowa Prac., Crim. L. § 1:4 (2017-2018 ed.). Frei held that an instruction submitting only the "firmly convinced" formulation or explanation is not constitutionally deficient or an incorrect statement of the law. Frei, 831 N.W.2d at 75-79. But Frei also made explicit that this was not the *only* correct formulation, and that defendants remained free to request other equally correct formulations. Frei, 831 N.W.2d at 79 n.7.

The 'firmly convinced' language in the submitted instruction is a legally correct formulation or explanation of reasonable doubt. Id. at 75-79. However, the same is *equally* true of the additional 'hesitate to act' language included in the current model instruction.

Such 'hesitate to act' language is included in the Eighth Circuit's model instruction on reasonable doubt, and has been repeatedly approved by the United States Supreme Court as a "common sense benchmark for just how substantial such a doubt must be". Victor v. Nebraska, 511 U.S. 1, 20-21 (1994)); Tabor, 2011 WL 238427 at *2 & n.1 (citing Eighth Cir. Model. Crim. Jury Inst. 3.11). Among jurisdictions that provide instructions on reasonable doubt, "[t]he 'hesitate to act' instruction is the most popular of the reasonable doubt varieties." R. Jason Richards, *Reasonable Doubt: An Overview and Examination of Jury Instructions in Colorado*, Colo. Law., August 2004, at 85, 86.

Similar 'hesitate to act' language has also long-been approved by our own Iowa Supreme Court as a correct statement of the law. See e.g., State v. Pierce, 65 Iowa 85, 197-98 (1884); State v. McGranhan, 206 N.W.2d 88, 91-92 (Iowa 1973). Indeed, a former version of Iowa's model reasonable doubt instruction 501.11 had set forth multiple explanations of the concept (including both 'firmly convinced'

and 'hesitate to act' formulations) and was approved by our Court in McGranahan. Subsequently, in State v. McFarland, 287 N.W.2d 162, 163 (Iowa 1980), our Court recognized McGranahan had already approved the old uniform instruction "with its three distinct standards" or explanations of reasonable doubt, such that a reasonable doubt instruction containing *any of those three approved formulations* (including the 'firmly convinced' formulation at issue in McFarland) would also be legally correct.

Like the instruction approved in McGranahan, the current uniform instruction incorporates multiple formulations of the crucial concept of reasonable doubt – *both* 'firmly convinced' *and* 'hesitate to act' formulations. Both explanations are correct statements of law, and the giving of both together certainly does not render the instruction incorrect. See McGranahan, 206 N.W.2d at 91-92 (approving old model instruction 501.11, containing three formulations of reasonable doubt, including both 'firmly convinced' and 'hesitate to act').

b). Provided amplified or more detailed explanation:

Given that the reasonable doubt concept is central to the criminal trial process but notoriously difficult to explain, a defendant is certainly warranted in seeking instructional language to provide a more detailed explanation of that term to the jury. Even courts have struggled with the concept. Frei, 831 N.W.2d at 77. Indeed, "[m]ost people require considerable explanation, example, and parallel articulation to grasp the basic contours of [the] difficult concept" of reasonable doubt. *Acquitting the Guilty: Two Case Studies on Jury Misgivings and the Misunderstood Standard of Proof*, 2 Crim.L.F. 1, 38 (1990).

A review of other model instructions demonstrates that it is common for instructions to provide multiple explanations of a particular legal concept. See e.g., (Instruct.18) (App. p.8) ("Willful" means "intentional", "by fixed design or purpose", "not accidental"; and "To Deliberate" means "to weigh in one's mind", "to consider", "to contemplate", or "to reflect.") (modeled after ISBA, Crim'l Jury Instruction 700.5). This paints a more complete picture, allowing jurors to more fully and precisely

grasp what is meant by the term, and ensuring that each juror (with their varied background and understanding) will in fact accurately understand the concept or standard of proof at issue. State v. Ambrose, 861 N.W.2d 550, 561 (Iowa 2015) ("an instruction is not repetitive if it serves to clarify a concept or build on a point of law for the jury.").

Further, research confirms that differently worded "alternative jury instructions, [though] each legally accurate statements of the same rule", can have differing and difficult to predict "decision effects" that impact the ultimate outcome reached by the jury. Darryl K. Brown, *Regulating Decision Effects of Legally Sufficient Jury Instructions*, 73 S. Cal. L. Rev. 1105, 1113 (2000). Thus, even though a submitted instruction is legally correct and constitutionally adequate, use of a differing but equally correct instruction can nevertheless generate a different outcome. Id. "Although two [reasonable doubt] instructions may be fungible in terms of their legal content (both are constitutional and sufficiently describe statutory law), they may nonetheless evoke

significantly different responses from the jurors who interpret and apply them". Id. at 1110.

How then should a trial court elect between two alternatively-worded but equally correct instructions requested by the parties? Some suggest that, because neither instruction is wrong as a matter of law and because the potential 'decision effects' of each alternative are unknown, the defendant (whose liberty at stake) should be permitted to elect between the alternatives. See Id. at 1124-29 (should defer to defendant's choice between correct reasonable doubt instructions); Wright v. U.S., 588 A.2d 260, at 262 (D.C. Cir. 1991) (deference to defendant's choice of transition instruction); Ambrose, 861 N.W.2d at 557 n.1 ("[s]ome courts have chosen to allow the defendant to make the choice between the acquittal-first and the unable-to-agree instructions"). Analogous principles supportive of deference to the defendant's election have been expressed in Iowa criminal caselaw. See e.g., State v. Kimball, 176 N.W.2d 864, 869 (Iowa 1970) (defendant entitled to elect whether instruction

prohibiting inference from his failure to testify is given); In re Det. of Spears, No. 07-1601, 2009 WL 1066769, *5 (Iowa Ct. App. April 22, 2009) ("Where the significant deprivation of a person's liberty is at stake, as here, we think it is more prudent to err on the side of caution."); State v. Gathercole, 877 N.W.2d 421, 433 (Iowa 2016) ("Although the district court did not abuse its discretion in this case, we encourage courts to resolve doubts about whether information published midtrial requires a poll requested by a party in favor of granting a poll.").

Ultimately, this Court need not resolve whether a defendant's choice of instruction should always control. Here, deference to Davis's request for the more detailed/amplified instruction was required under the already-well-established rule in Iowa that, even where the court's instruction is legally correct and constitutionally adequate, a party's timely request for amplified or more detailed instructional language must nevertheless be honored if such additional language (1) stated a correct principle of law and (2) "would have amplified" or

further explained the concept in a manner "not covered by [the] other instructions". Porter, 217 N.W.2d at 234-35. See also Challis, 238 N.W. at 446 ("a correct instruction, but not as explicit as counsel would like to have it, is sufficient, in the absence of a request for amplification.").

Because the requested additional language satisfies this standard, the trial court "erred in refusing to give" defendant's amplified instruction. Porter, 217 N.W.2d at 234-35.

c). Erroneous whether reviewed for errors at law or for abuse of discretion:

Because the requested additional language satisfied the above standard, submission of the requested legally correct and amplifying instructional language was *mandatory* and not discretionary. Porter, 217 N.W.2d at 234-35; Alcala, 880 N.W.2d at 707. Error at law is established.

Even if the choice of instruction is viewed as discretionary rather than mandatory, however, error is also established under an abuse-of-discretion standard.

The court's reason for declining Davis's language was merely that such instruction had not yet been formally "confirmed by the Iowa Supreme Court, and therefore the jury is still out in terms of whether it's truly a correct statement of law." (2/5/19_Tr.11:2-10). See also (2/5/19_Tr.10:20-11:1; 2/13/19_Tr.144:10-14). But the mere fact that requested language has not as yet been formally approved in an Iowa Supreme Court decision does not establish a proper basis for the court's refusal to submit it. See Plain, 898 N.W.2d at 817; Williams, 929 N.W.2d at 633. Moreover, contrary to the district court's belief, similar language *has* in fact been approved by the Iowa Supreme Court. See e.g., Pierce, 65 Iowa at 197-98; McGranhan, 206 N.W.2d at 91.

2) The error was not harmless:

Preserved instructional error requires reversal unless the State proves it was harmless. Hanes, 790 N.W.2d at 550-51.

The error cannot be deemed harmless in the present case. The jury clearly struggled with the question of whether Davis's guilt had been established beyond a reasonable doubt

– deliberating for seven hours over two days, reporting a deadlock, receiving a verdict-urging instruction from the court, and only then ultimately returning its guilty verdict four hours later. Scientific study demonstrates that alternative jury instructions, though each legally equivalent and accurate statements of the same rule, can nevertheless impact the outcome reached by the jury. Brown, 73 S. Cal. L. Rev. at 1110-13. Under the unique circumstances of this case, the State cannot establish that the jury would still have ultimately returned a guilty verdict if the amplified reasonable doubt instruction requested by Davis had been submitted. A new trial is required.

III. Whether the district court erred in preventing Davis from using "hesitate to act" language in urging the jury to find reasonable doubt during closing argument?

A. <u>Preservation of Error</u>: After the reading of the final jury instructions, defense counsel sought to utilize 'hesitate to act' language in urging the jury to find reasonable doubt during closing argument. The court sustained the State's objection, limiting defense counsel to using only "firmly

convinced" language in argument. (2/14/19_Tr.53:9-24). See also (3/8/19 Def. Motion p.1 ¶5; 3/15/19 Resist, p.2 ¶5b) (App. pp.10-11, 14-15). Error was preserved.

B. Standard of Review: A trial court's ruling limiting closing argument is reviewed for an abuse of discretion. State v. Melk, 543 N.W.2d 297, 301 (Iowa Ct. App. 1995). Where error is established, reversal is required unless the error was harmless. Id.

C. Discussion: The district court erred by prohibiting defense counsel from using 'hesitate to act' language when arguing that reasonable doubt existed.

The absence of specific language in an instruction does not preclude the attorneys from using such legally correct language or explanation in arguing the case to the jury. See e.g., State v. Simpson, 528 N.W.2d 627, 632 (Iowa 1995) ("Specific instructions on particular inferences are not necessary in order for counsel to be able to argue the inference and the jury to consider it.") (overruled on other grounds by State v. Webb, 648 N.W.2d 72 (Iowa 2002)); State v. Marsh,

392 N.W.2d 132, 134 (Iowa 1986); State v. Gillespie, 163 N.W.2d 922, 927 (Iowa 1969). Nor does the use of such language in a written powerpoint presentation shown during argument alter this result. Burnett v. State, No. 14–1128, 2016 WL 530130, *4 (Iowa Ct. App. Feb. 10, 2016).

As argued above, the 'hesitate to act' formulation of the reasonable doubt standard is a legally correct statement of the law. Even though the language was not submitted in the jury instructions, counsel should nevertheless have been free to use 'hesitate to act' language in urging the jury, during closing argument, to conclude the State had not proven Davis guilty beyond a reasonable doubt.

For the same reasons discussed above in Division II, this error was not harmless. The State cannot establish the (initially-deadlocked) jury would still have returned a guilty verdict if Davis had been free to use hesitate-to-act language when urging reasonable doubt during closing argument. A new trial is required.

IV. The district court erred in giving the deadlocked jury a supplemental verdict-urging instruction, rather than following Davis's request for the procedure State v. Campbell holds should be "closely followed" in Iowa.

A. Preservation of Error: Error was preserved by the district court's submission of the additional verdict-urging instruction over Davis's timely objection and requested alternative response. (2/15/19_Tr.3:1-6:22).

B. Standard of Review: Though generally challenges to jury instructions are reviewed for correction of errors at law, if the giving of an instruction is discretionary rather than mandatory, review is instead for an abuse of discretion. Alcalav. Marriott Int'l, Inc., 880 N.W.2d 699, 707 (Iowa 2016); State v. Williams, 929 N.W.2d 621, 633 & n.6 (Iowa 2019). See also State v. Campbell, 294 N.W.2d 803, 809 (Iowa 1980) ("the trial judge has considerable discretion in determining whether the verdict-urging instructions should be given").

Preserved instructional error requires reversal unless the State can prove the error was harmless. State v. Hanes, 790 N.W.2d 545, 550-51 (Iowa 2010).

C. Discussion: The jury commenced deliberations February 14, 2019 at 12:26 p.m. The jury was recessed at 4:19 p.m., and reconvened at 8:30 a.m. February 15. (2/14/19_Tr.78:18-80:4). At 11:21 a.m., after deliberating a total of about seven hours, the jury informed the court attendant it was deadlocked. (2/15/19_Tr.3:1-12, 5:2-10).

During a record made outside the presence of the jury, the court announced its intention to respond with a supplemental Allen-type charge modeled after the one given in State v. Parmer, No.13-2033, 2015 WL 2393652, at *6 (Iowa Ct. App. May 20, 2015). Davis objected, arguing: (1) the giving of the additional instruction would "have a coercive effect on jurors"; (2) the court's proposed instruction had not been approved by the Iowa Supreme Court; (3) the legitimate aspects of the court's proposed instruction were covered by the final instructions the jury had already received "urging them to set things aside and work through the evidence"; and (4) the court should "instead request that they reread the instructions, which has the similar information, and to

continue deliberations." (2/15/19_Tr.3:1-4:24). Despite Davis's argument, the court called the jury back into the courtroom, confirmed it was deadlocked, and submitted to it a verdict-urging instruction:

> THE COURT: All right. Please have a seat.
>
> I'm going to instruct you further. You've been deliberating on this case now for a considerable period of time, yesterday afternoon and most of this morning, and the Court deems it proper to advise you further in regard to the desirability of agreement, if possible.
>
> The case has been exhaustively and carefully tried by both sides and has been submitted to you for decision and verdict, if possible. It's the law that a unanimous verdict is required, and while this verdict must be the conclusion of each juror and not mere acquiescence of the jurors in order to reach an agreement, it is still necessary for all jurors to examine the issues and questions submitted to them with candor and fairness and with proper regard for, and deference to, the opinion of each other.
>
> A proper regard for the judgment of others will greatly aid us in forming our own judgment. So each juror should listen to the arguments of the other jurors with a disposition to be convinced by them, and if the members of the jury differ in their views of the evidence, such difference of opinion should cause them to scrutinize the evidence more closely and to reexamine the grounds of their problem.

> Your duty is to decide the issues of fact which have been submitted to you, if you can conscientiously do so.
>
> In conferring, you should lay aside all mere pride of opinion and should bear in mind that the jury room is no place for espousing and maintaining in a spirit of controversy either side of a cause. The aim ever to be kept in view is the truth as it appears from the evidence, examined in the light of the instructions of the Court.
>
> So you will again retire to the jury room, examine your differences in the spirit of fairness and candor, and try to arrive at a verdict. So I am advising you to please continue to review the evidence, review the jury instructions that have been provided to you, and continue your deliberations.
>
> So at this time I'll have the court attendant return you to the jury room.

(2/15/19_Tr.4:25-6:22). The jury returned to the jury room at 11:33 a.m. Approximately four-and-a-half hours later, the jury returned a guilty verdict. (2/15/19_Tr.6:21-7:22).

1). Psychological Research Confirming Coercive Impact of Supplemental Verdict-Urging Instructions

A supplemental instruction given to the jury following deadlock is called an Allen-type charge, verdict-urging instruction, or dynamite instruction. U.S. v. Bailey, 468 F.2d 652, 666 (5th Cir. 1972), modified on reh'g, 480 F.2d 518 (5th

Cir. 1973); Campbell, 294 N.W.2d at 808. Though originating with language used in Allen v. United States, 164 U.S. 492 (1896), there are many variations on this charge resulting from decades of "judicial improvisation." Campbell, 294 N.W.2d at 809 n.3.

Courts have recognized that giving such supplemental instruction following the jury's indication of deadlock is problematic because: (1) it carries an inherent risk of forcing or coercing a verdict, and (2) "appellate courts are ill-equipped to detect the existence or gauge the extent of" coercive impact in the resulting verdict. State v. Czachor, 413 A.2d 593, 595-96 (N.J. 1980).

"The charge is used precisely because it works, because it can blast a verdict out of a jury otherwise unable to agree that a person is guilty." Bailey, 468 F.2d at, 666. The impact of an Allen-charge on a holdout juror has been described:

> The majority think he is guilty; the Court thinks I ought to agree with the majority so the Court must think he is guilty. While the Court did tell me not to surrender my conscientious convictions, he told me to doubt *seriously* the correctness of my own

> judgment. The Court was talking directly to me, since I am the one who is keeping everyone from going home. So I will just have to change my vote.

State v. Voeckell, 210 P.2d 972, 980 (1949) (Udall, J., dissenting). Scientific study has confirmed this concern, even with variations in the language used. Samantha P. Bateman, *Blast It All: Allen Charges and the Dangers of Playing With Dynamite*, 32 U. Haw. L. Rev. 323, 333-41 (2010).

Psychological research reveals a "basic truth: no matter how 'neutral' or sanitized judges render their Allen charges, those charges nonetheless exert an impermissible form of pressure on deliberating jurors." Id. at 323. Experiments indicate minority-position voters in deadlocked juries given a supplemental verdict-urging instruction "were more likely to capitulate." Id. at 335-336. Submission of such instruction is "perceived as selectively picking on the 'holdout' jurors in the minority position, many of whom remarked during the deliberations they felt singled out by the charge." Id. at 337. Minority-position jurors report feeling more pressure – both from the instruction itself, and from their fellow majority-

position jurors after receipt of the instruction. Id. In this way, submission of an Allen-type charge "tips the balance of power within groups, increasing the pressure felt by minority jurors and minimizing that felt by those in the majority." Id. at 338.

Empirical research also shows juries rarely deadlock as a result of one or two extreme individuals. Instead, the primary cause of hung juries is the "ambiguity of the case," not "an eccentric juror… refusing to play his proper role." Id. at 340. Studies of actual deliberating Arizona juries show the charge comes at an already low point during the deliberations and "plays upon already extant stressors to encourage those jurors to abandon their conscientious-held beliefs in order to appease the judge and their fellow jurors." Id.

Due to these well-recognized concerns about the coercive impact of verdict-urging instructions, a number of jurisdictions have banned or restricted use of the Allen charge, either exercising supervisory power or under the state constitution. See e.g. U.S. v. Fioravanti, 412 F.2d 407, 419-420 (3rd Cir. 1969); State v. Thomas, 342 P.2d 197, 200 (Ariz.

1959); State v. Flint, 761 P.2d 1158, 1164 (Idaho 1988); Czachor, 413 A.2d at 598 (N.J. 1980); Com. v. Spencer, 275 A.2d 299, 303-304 (Pa. 1971).

Some have advocated "the most neutral and simplistic of all possible supplemental instructions – 'please continue deliberating' – as the best, or at least the most practical and least problematic, alternative…." *Blast It All*, 32 U. Haw. L. Rev. at 324; See also George C. Thomas III & Mark Greenbaum, *Justice Story Cuts the Gordian Knot of Hung Jury Instructions*, 15 Wm. & Mary Bill Rts. J. 893, 910-20 (2007). A variation on this approach has been recommended by the ABA, wherein a more generally-worded instruction concerning proper deliberation (such as Iowa Criminal Instruction 100.18) is included with the *original* instructions submitted to the jury, rather than given for the first time following the jury's indication of deadlock. This ABA approach is employed in a number of other jurisdictions, and has been adopted by our Iowa Supreme Court as the one which should be "closely followed" in Iowa. See *Blast It All*, 32 U. Haw. L. Rev. at 358

("All of the states rejecting the Allen charge, with the exception of South Dakota, have adopted the alternative instruction set forth in section 5.4 of the American Bar Association's Standards Relating to Trial by Jury."); Campbell, 294 N.W.2d at 812.

2). Iowa Caselaw:

Iowa appellate courts have recognized that submission of a new verdict-urging instruction following the jury's expression of deadlock carries an inherent potential for coercion. Campbell, 294 N.W.2d at 811. In deciding whether a resulting guilty verdict can stand, "the ultimate test is whether the giving of a verdict-urging instruction forced or helped to force an agreement, or merely started a new train of real deliberation which ended the disagreement." State v. Quitt, 204 N.W.2d 913, 914 (Iowa 1973). Where the instruction "forced or helped to force an agreement", the resulting guilty verdict is the product of coercion and cannot stand. But where the instruction "merely started a new train of real deliberation which ended the disagreement", the resulting

verdict will be upheld. Id. In applying this test, courts consider the instruction "'in its context and under all the circumstances.'" State v. Piper, 663 N.W.2d 894, 912 (Iowa 2003) (quoting Lowenfield v. Phelps, 484 U.S. 231, 237 (1988)) (overruled on unrelated grounds by Hanes, 790 N.W.2d at 552).

In State v. Peirce, the Supreme Court reviewed Iowa caselaw on verdict-urging instructions, and noted that even "in cases where we sustained the verdict we have inclined to view such an instruction with disapproval". State v. Peirce, 159 N.W. 1050, 1053–54 (Iowa 1916) (partially overruled on unrelated grounds by State v. McLaughlin, 94 N.W.2d 303, 310 (Iowa 1959)). Nevertheless, the Court also recognized there "is no [Iowa] decision that such an instruction should *never* be given" or is always reversible error. Id. at 1054. After concluding submission of such charge (even using language approved by prior decisions) amounted to reversible error in that case, the Court emphasized the difficulty of conducting an after-the-fact evaluation of "whether the additional

instruction forced or helped to force an agreement" or instead "merely started a new train of real deliberation which ended the disagreement", in a manner that reliably ensures "safety to the rights of the parties." Id. at 1054-55. The Court thus concluded that, "though [the verdict-urging instruction's] wording is technically correct and has often been approved, [1] ***it will be better not to give it*** unless it be in an extreme case, and [2] we suggest that" even "when given it be in language less likely to have a coercive effect upon the mind of the average juror." Id. at 1055.

Subsequently in State v. Campbell, our Supreme Court again noted that, while "never… held per se erroneous by this court", prior Iowa Supreme Court opinions have "expressed misgivings about Allen-type charges". Campbell, 294 N.W.2d at 809. Nevertheless, "[d]espite this court's denunciations of Allen-type charges, reversal on grounds of its usage has been limited to cases where surrounding circumstances demonstrated prejudice." Id. The Campbell court rejected the defendant's invitation to apply "a standard of presumed

prejudice", instead concluding that whether the "potentially coercive" instruction was in fact "*prejudicially* coercive *in this case*... must be determined by an examination of the circumstances of this case...." Id. at 810-11 (emphasis added). Though finding certain aspects of the instruction given in that case to be erroneous, Id. at 810, the Court nevertheless affirmed the guilty verdict concluding "the effect of this misinformation upon a jury's deliberations is speculative" and "there was no evidence of possible coercion, other than the words of the instruction themselves" Id. at 811.

But it is difficult, if not impossible, for a defendant to establish actual prejudice – improper impact on the jurors' deliberations which forces the resulting guilty verdict – given that evidence concerning the inner workings of juror deliberations can neither be inquired into nor considered in evidence. See Ryan v. Arneson, 422 N.W.2d 491, 495 (Iowa 1988) (court may not admit evidence regarding deliberations); State v. Terrill, 241 N.W.2d 16 (Iowa 1978) (disregarding jurors' testimony given at post-trial hearing on defendant's

request for new trial based on coercive impact of verdict-urging instruction). As a result, the inquiry of whether the "surrounding circumstances demonstrated prejudice" generally devolves into (1) the unreliable and speculative practice of comparing the length of the jury's deliberation before and after the instruction, and speculating whether the difference indicates coercion or proper additional 'real' deliberations; or (2) granting relief only in the rare case where, by pure chance, a juror indicates he was coerced, but does so in a manner that avoids the evidentiary prohibition against inquiring into the substance of deliberations. See Peirce, 159 N.W. at 1054 (reversing after comparing pre- and post-instruction deliberation times, and concluding "this raises a presumption of prejudice"); Campbell, 294 N.W.2d at 811 (noting post-instruction deliberation times of as little as 41 minutes have been found to indicate 'real' additional deliberation rather than a coerced verdict); Middle States Utilities Co. v. Inc. Tel. Co., 271 N.W. 180, 184-85 (1937)

(reversing where, upon being polled, one juror initially replied it was not his verdict before ultimately agreeing to it).

Speculation centering on pre- and post-instruction deliberation times is particularly unreliable. While even short periods of post-instruction deliberation have been held to demonstrate an absence of coercion, in reality *either* short *or* long additional deliberation times can support coercion. Short post-instruction deliberations may suggest minority-position jurors merely gave in to the majority. But long post-instruction deliberations may show it simply took that long to wear down the minority jurors, rather than signaling a new train of 'real deliberations' resulting in genuine and unpressured agreement among the jurors. See e.g., Id. at 184-85 (after verdict-urging instruction, jury deliberated for seven additional hours before returning verdict; nevertheless, when polled one juror replied it was not his verdict). The latter possibility is no more speculative than the former.

Perhaps in recognition of these realities, the Campbell Court went on to set forth a procedure trial courts should

"closely follow" in future concerning verdict-urging instructions – namely, that an instruction similar to Iowa Criminal Instruction 100.18 should be given with all other instructions at the conclusion of trial, rather than later submitting a supplemental verdict-urging instruction once the already-deliberating jury has indicated deadlock. Campbell, 294 N.W.2d at 814.

The Campbell Court noted: (1) it had "previously applauded a similar instruction [to what is now model instruction 100.18] as 'not subject to the abuses said to attend the giving of an 'Allen' charge'"; (2) "[s]uch an instruction has… been adopted as a replacement for the Allen charge in seventeen jurisdictions and as an acceptable alternative to that charge in four others"; (3) the instruction "conforms to section 5.4(a) of the ABA Standards Relating to Trial by Jury" which "has… received strong praise from commentators"; and (4) use of the instruction would direct the jury to proper considerations without introducing "extraneous, irrelevant and potentially coercive factors" such as "the expense of trial or the

possibility of retrials" into deliberations. Campbell, 294 N.W.2d at 812. The Campbell Court thus stated: "As a matter of guidance to the trial bench, ***we advise that this instruction [similar to Iowa Criminal Instruction 100.18] be closely followed."*** Id. (emphasis added). "We also recommend, in accordance with the ABA standard, that the instruction be given at the conclusion of the trial, with the other instructions given to the jury before any deliberations have begun." Id. "If it later appears that the jury cannot reach an agreement, the trial court may repeat the instruction before requiring continued deliberations." Id.

> The principal reason for giving the instruction as part of the main charge to the jury is that it lessens the possibility of any coercive impact the instruction might have. After the jury is deadlocked, it is particularly vulnerable to suggestions as to how it should proceed. The evidence, law and arguments have already failed to convince the jurors what the verdict should be. This is the crucial stage when the jury looks to the bench for advice on how to solve their dilemma.

Id. at 813 (internal quotation marks and citations omitted).

The procedure requested by Davis here was precisely the procedure the Campbell Court advised should be "closely

followed" in Iowa. Id. at 812. Iowa Criminal Jury Instruction 100.18 was properly submitted to the jury with the final instructions given before the start of deliberations. (Final.Instruct.25) (App. p.9). When the jury later deadlocked and the court announced its intention to give a supplemental verdict-urging instruction, Davis objected and requested the court instead direct the jury to reread the instructions already given and continue deliberations. (2/15/19_Tr.3:1-4:24).

3). Application of Principles to Present Case:

i). *Error:*

Error is established. Our Supreme Court has said "it would be better not to give [a supplemental verdict-urging instruction] unless it be in an extreme case." Peirce, 159 N.W. at 1055. This was not such "extreme case." This was the jury's first indication of deadlock, and the jury had deliberated seven hours – a simple direction to continue deliberations would have sufficed.

More critically, the procedure requested by Davis was precisely the procedure Campbell directed should be "closely

followed" in Iowa. No published Iowa decision appears to address the circumstance where the district court submitted a new verdict-urging instruction over Defendant's request to instead follow a Campbell-type procedure.[5] Regardless of whether review is for errors at law or an abuse of discretion, the district court's submission of the supplemental verdict-urging instruction and its refusal to instead follow the course set forth in Campbell *despite Davis's explicit request to do so*, necessarily amounted to error.

ii). Prejudice:

Error in the submission of a jury instruction will not warrant reversal if not prejudicial. Past Iowa decisions have generally required defendants to point to circumstances affirmatively demonstrating prejudice resulted from

[5] While an unpublished Court of Appeals decision does appear to have affirmed in such situation, that opinion makes no reference to Campbell's admonition to "closely follow" model instruction 100.18, and the underlying briefs indicate the point was not argued by that defendant on appeal. See State v. Power, No.13-0052, 2014 WL 2600214, at *4-5 (Iowa Ct. App. June 11, 2014).

submission of a verdict-urging charge. See e.g., Peirce, 159 N.W. at 1054; Campbell, 294 N.W.2d at 810-11. But, as discussed above, no published Iowa decision appears to address the situation where the additional verdict-urging instruction was submitted over a defendant's request for the Campbell procedure. It would appear that where, as here, error was preserved, the proper standard of prejudice would be harmless-error-review – placing the burden on the State to prove the instruction harmless, rather than on the defendant to prove prejudice. See State v. Hanes, 790 N.W.2d 545, 550-51 (Iowa 2010).

But regardless of where the burden is placed, reversible error is established here.

First, empirical research demonstrates verdict-urging charges, "no matter how 'neutral' or sanitized", exert impermissible and coercive pressure on minority jurors. *Blast It All*, 32 U. Haw. L. Rev. at 323. Second, no intervening jury question and court response occurred between the verdict-urging instruction and the verdict, as might indicate the jury

was struggling with a particular legal question which, once resolved by the court, generated true juror unanimity. Compare Armstrong v. James & Co., 136 N.W. 686, 688 (Iowa 1912) (further juror question and supplemental duress instruction between the verdict-urging instruction and ultimate return of a guilty verdict). Third, the evidence was not overwhelming. Compare State v. Mulhollen, 155 N.W. 252, 254 (Iowa 1915) (guilty verdict after verdict-urging instruction stands "if for no other" reason than the fact the evidence was overwhelming). The weaknesses in the State's case are described above and the jury clearly struggled to reach a verdict. And unlike in cases where the jury's struggle to reach a unanimous verdict may only be a struggle in selecting between greater and lesser offenses or in resolving only one of multiple counts, this case involved a single count and no lesser-included offenses. Thus the jury's struggle was necessarily whether defendant was guilty or not guilty.

Further, the language of the instruction supports its coercive impact. The instruction called the jury's attention to

the significant time and effort put into the case[6], directly linked these considerations to "the desirability of agreement"[7], and repeatedly emphasized that the duty of the jury is to reach a verdict[8]. See 38 A.L.R.3d 1281, §8(b) (Originally published in 1971) (collecting cases where court's "remarks stressing the desirability and importance of agreement by reference to the amount of time consumed by litigation were regarded as improper or found prejudicial"). Later language implies the failure to reach agreement arose from jurors' personal failings or intentional obstruction of proper deliberations – their "espousing and maintaining… a spirit of controversy" rather than seeking "the truth as it appears from the evidence", failure to show "[a] proper regard for the judgment of others",

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[6] (2/15/19_Tr.5:12-6:18) ("You've been deliberating on this case now for a considerable period of time, yesterday afternoon and most of this morning"), ("The case has been exhaustively and carefully tried by both sides….").

[7] (2/15/19_Tr.5:15-16).

[8] (2/15/19_Tr.5:17-20, 6:8-9) ("This case has been exhaustively and carefully tried… and has been submitted to you for decision and verdict…"), ("It's the law that a unanimous verdict is required…."), ("Your duty is to decide the issues of fact which have been submitted to you….").

and unwillingness "to listen to the arguments of the other jurors", etcetera.[9] See also 41 A.L.R.3d 1154, *Verdict–urging instructions in civil case admonishing jurors to refrain from intransigence, or reflecting on integrity or intelligence of jurors*, at §§ 7b, 8b, 9a, 10 (Originally published in 1972) (citing cases disapproving verdict-urging admonitions to refrain from pride of opinion, or allusions to incompetence/improper motives as cause of disagreement). Certainly, minority-position jurors, already sensitive to an understanding they are the 'cause' of the jury's disagreement and failure to discharge its duty, would be particularly impacted. *Blast It All*, 32 U. Haw. L. Rev. at 334-338.

An examination of the deliberation times also supports a finding of prejudice. This case involved only a single count with no lesser-included offenses. Still, the jury deliberated for approximately seven hours over the course of two days before indicating deadlock. After receiving the supplemental verdict-

[9] (2/15/19_Tr.5:19-18).

urging instruction, a guilty verdict was returned after a significantly shorter period of time – only four-and-a-half additional hours. See Peirce, 159 N.W. at 1055 ("jury deliberated longer before the additional instruction…, and reached verdict more quickly after"); Middle States Utilities, 271 N.W.2d at 184 (jury deliberated 22 hours before and 7 hours after). And that verdict was ultimately returned at 3:59 p.m., approaching the end of the day[10] when the jury would have had to acknowledge, and possibly face further admonishment from the court for, the failure to set aside their "pride" and "spirit of controversy" and do its job of returning a verdict. So too would the jurors be aware of the fact that, failure to return a verdict at that time would at minimum result in the expenditure of additional time and resources – not only by the jurors themselves but also by the court and the parties whom they had been reminded, had already expended "a considerable period of time" on the "exhaustively

[10] See e.g., (2/14/19_Tr.78:18-80:4) (the day before, on February 14, the jury was recessed at 4:19 p.m.).

and carefully tried" case. The significantly shorter deliberation time after the instruction and the timing of the jury's return of its verdict support a finding of prejudice.

Finally, the giving of the verdict-urging instruction must be evaluated "'in its context and under all the circumstances.'" Piper, 663 N.W.2d at 911-912 (quoting Lowenfield v. Phelps, 484 U.S. 231, 237 (1988)). Consideration of this matter in context with the other legal challenges raised on appeal (in particular the court's failure to give a further legally correct explanation of the crucial concept of reasonable doubt, limiting defense counsel's argument in discussing reasonable doubt, and the State's improper questions and argument impliedly shifting the burden to Davis), demonstrates non-harmlessness and/or satisfies any requirement of circumstances indicating prejudice. Reversal is required for a new trial.

V. Whether the State impermissibly shifted the burden of proof to the Defendant?

A. Preservation of Error: Error was preserved by defense counsel's timely objections to the State's questions and argument improperly shifting the burden of proof to defendant. (2/12/19_Tr.57:22-58:7; 2/14/19_Tr.57:8-58:9).

B. Standard of Review: A claim that the trial court erred in failing to sustain defense objections to the prosecutor's improper burden-shifting is reviewed for an abuse of discretion. State v. Lopez, No. 16-1489, 2018 WL 6719728, at *4 (Iowa Ct. App. Dec. 19, 2018) (citing State v. Coleman, 907 N.W.2d 124, 134 (Iowa 2018)).

C. Discussion: Davis's defense acknowledged his gun was used in the homicide, but denied he was the one who used it. Davis testified the gun and unfired ammunition found dumped in various locations had been stolen out of his Hummer prior to Ross's death. He also testified he'd only retrieved the gun from Stevens in the first place because she'd been trying to sell it to felons or "drug addicts". Unidentified

third-party fingerprint or DNA was located on the AR-15 rifle and one of the magazines found in the culvert; these could have been viewed by the jury to support the conclusion that some unidentified third party had wielded the gun when shooting Ross and had placed the ammunition in the refrigerator and culvert. Similarly, presence of unidentified third-party prints/DNA, on the rusted-out refrigerator or the various items found dumped in different location, could have further supported this defense theory; but the refrigerator was never seized or tested and a number of the other items collected by the State were never submitted for fingerprinting, DNA analysis, or other forensic testing. See (2/8/19_Tr.112:19-21, 236:7-237:11, 240:16-243:21; 2/11/19_Tr.13:15-14:11, 18:20-20:17; 2/12/19_Tr.44:12-49:25, 58:13-14, 114:19-120:5, 151:17-21; 2/14/19_Tr.39:4-9, 43:23-49:25, 51:16-52:4); (Def.Exhib.B, N) (Ex. App. pp.49, 52).

In cross-examining the State's fingerprint expert, defense counsel emphasized the various evidence located by the State

but not submitted for forensic testing. (2/12/19_Tr.44:12-p.55:7). During the State's redirect examination of the expert, the following exchange occurred:

> Q [BY PROSECUTOR]. All of the items that [Defense Counsel] talked about that were not examined by you, would they have been kept in evidence and been available to re-examine, if needed?
>
> [DEFENSE COUNSEL]: Objection. Irrelevant. Also a violation of burden of proof.
>
> [PROSECUTOR]: It's not. He brought this issue up as to what was not tested. He has opened this door.
>
> THE COURT: Overruled.
>
> Q. (By [PROSECUTOR]) Was it available to be re-examined if that is, in fact, what needed to be done?
>
> A. Yes, sir.

(2/12/19_Tr.57:22-58:7). The prosecutor's suggestion that Davis could have employed fingerprinting or forensic testing to himself examine the physical evidence he complained was left unexamined by the State was improper, and Davis's objection should have been sustained. This challenge is akin to Hanes

where the prosecutor was found to have improperly argued the defendant should have called certain witnesses, stating "[i]f there was anything the defense really wanted from either one of these individuals that they felt was beneficial or helpful to the defendant, they could have called them." State v. Hanes, 790 N.W.2d 545, 556 (Iowa 2010). In the present case, the prosecutor's questions clearly suggested Davis had an obligation to test any of the State's untested evidence which he felt may be beneficial or helpful to him. They were thus the substantial equivalent of the statement ruled improper in Hanes.

The burden-shifting implication was exacerbated during the State's closing argument:

> [PROSECUTOR]: Okay. Fine. He agreed with me that he was framed. All right. He didn't say, "No."
>
> *But Ethan Davis here was not framed. There is no corroboration, none, of any setup or frame job of Ethan Davis. Zero. No evidence. Only his testimony -- that's it – uncorroborated that he claims that somebody had it out for him.*
>
> *No person has ever been identified as having a motive to frame Ethan Davis. He didn't suggest a*

name. His folks didn't suggest a name. People that knew him didn't suggest a name.

Police didn't find anybody. There was nothing that was brought to them that would suggest that he was framed for Curt Ross's murder. Who would do it? Who would frame Ethan Davis? Give me a name.

MR. DUKER: Your Honor, I'm going to object. This shifts the burden of burden of proof away from the State and requires me to go forward and present another speculative theory about other individuals that, frankly, is not part of our burden.

THE COURT: Mr. Brown, I'm going to instruct you not to suggest that the burden ever shifts to the defendant from the State. And you may continue with your closing.

MR. BROWN: I don't believe that I'm doing that, Your Honor. This was -- this came up during the defendant's testimony, evidence he presented. That's what I intend to comment on.

THE COURT: All right. Comment on the evidence presented.

(2/14/19_Tr.57:8-58:9) (emphasis added). The district court warned the prosecutor not to lapse into suggesting the burden ever shift to defendant, but it did not sustain Defendant's objection, apparently agreeing with the State's view that the challenged statements were merely a proper "Comment on the evidence presented." This was error. While a prosecutor may

more generally reference "an absence of evidence supporting the defense's theory of the case", Hanes, 790 N.W.2d at 556, the line was crossed here where the prosecutor affirmatively stated or implied that Davis had the burden to identify an alternate perpetrator or prove someone had the motive to frame him. Compare State v. Jarrett, No.17-0091, 2018 WL 1099268, at *8 (Iowa Ct. App. Feb. 21, 2018) (was no shifting of burden where prosecutor pointed out "the evidence disclosed no motive for [sex-abuse complainant] to fabricate" but "*he did not affirmatively state or imply that the defendant had the burden to prove H.K. fabricated or had a motive to do so.*") (emphasis added).

Further, the State's burden-shifting during closing argument dovetailed with its earlier-challenged questions implying Davis had an obligation to forensically test any evidence left untested by the State which could possibly be helpful to him. Specifically, in arguing Davis had failed to identify an alternative perpetrator, the State emphasized the failure of the physical evidence to reveal such alternative

perpetrator. (2/14/19_Tr.57:10-20). However, as suggested by Davis, it was entirely possible that forensic testing of the untested items in State's evidence could have given rise to such alternative perpetrator – and this unresolved possibility could appropriately help generate reasonable doubt in the minds of the jury. See e.g., (Final Instruct.7) (App. p.7) (reasonable doubt may be found from the State's evidence, *or lack of evidence*). But by implying Defendant had an affirmative obligation to himself test the untested State's evidence, the prosecutor effectively shifted the responsibility for this lack of evidence from the State to Defendant – thereby evading the State's own burden to prove the evidence (or lack of evidence) generated no reasonable doubt of Defendant's guilt.

Further, the record demonstrates Davis was prejudiced by this improper burden-shifting, resulting in an unfair trial. Coleman, 907 N.W.2d at 141; State v. Graves, 668 N.W.2d 860, 869 (Iowa 2003). The jury would have understood the court's overruling of Davis's objection as indication that the

implications being made by the State were correct – that 1) Davis *did* have the burden to test any untested State's evidence possibly containing helpful information, and that 2) he *did* have the burden to provide an alternative perpetrator or person with motive to frame him. Given the closeness of this case, it cannot be concluded that the State's improper burden-shifting implications did not provide the tipping point leading the initially-deadlocked jury to return a verdict of guilt. Davis must be afforded a new trial.

VI. A nunc pro tunc order is necessary to bring the written sentencing order into conformance with the court's oral pronouncement concerning court costs and attorney fees.

A. Preservation of Error: Restitution is part of the criminal sentence. State v. Jose, 636 N.W.2d 38, 44 (Iowa 2001). Void, illegal, or procedurally defective sentences may be corrected on appeal even absent an objection below. State v. Lathrop, 781 N.W.2d 288, 292-93 (Iowa 2010); Iowa R. Crim. P. 2.24(5)(a) (2017).

Court cost and attorney fee obligations may be challenged on appeal if they have been made enforceable against the defendant. See State v. Albright, 925 N.W.2d 144, 160-62 (Iowa 2019). Here, the challenged court cost and attorney fee obligations were made immediately due and enforceable against Davis. See (Judgment pp.5-6) (App. 21-22) ("Notice Regarding Financial Obligations" providing that all financial obligations were due immediately, with collection efforts commencing if not paid in full by 30 days of the sentencing order); (Comb.Gen.Docket p.23) (App. p.28) ("Financial Summary" listing obligations "Due" and "Owed" from Davis, including various court cost and legal assistance obligations); (Comb.Gen.Docket p.22) (App. p.27) ("Judgment/Lien Detail" reflecting entry of March 18, 2019 "Judgment" for "Restitution + *Costs* + *Atty Fees*" against Defendant and in favor of the State of Iowa) (emphasis added). See also State v. McMurry, 925 N.W.2d 592, 596 (Iowa 2019) (reviewing "sentencing order together with the docket report from the clerk of court"); Iowa Code § 910.7A (providing that

restitution order creates "a judgment and lien", which then "may be enforced"). Accordingly, Davis may challenge such obligations on appeal.

B. Standard of Review: Restitution orders and challenges to the legality of a sentence are reviewed for correction of errors at law. Albright, 925 N.W.2d at 158; State v. Sisk, 577 N.W.2d 414, 416 (Iowa 1998).

C. Discussion: The court's oral pronouncement of sentence found Davis had no ability to pay restitution for court costs or legal assistance fees, and that neither would be imposed. (Sent.Tr.14:5-13, 15:23-16:10) However, the written sentencing order that followed: (1) directed Davis to pay court costs as certified by the clerk of court; and (2) recited that Davis had no ability to pay legal assistance fees, but nevertheless checked a box indicating he would be required to pay legal assistance fees in the amount approved by the state public defender office. See (Judgment p.4 ¶11) (App. pp.20-21).

Where there is a discrepancy between the oral pronouncement of sentence and the written judgement, the oral pronouncement governs. State v. Hess, 533 N.W.2d 525, 527-529 (Iowa 1995). Because the aspects of the sentencing order directing Davis to pay restitution for court costs and legal assistance fees (Judgment p.4 ¶11) (App. p.20-21) are in conflict with the court's oral pronouncement of sentence stating such obligations would not be imposed (Sent.Tr.15:23-16:10), this matter should be remanded for a nunc pro tunc order removing the court cost and attorney fee obligations from the written sentencing order. Id. at 529.

CONCLUSION

For the reasons set forth in Division I, Davis's conviction must be vacated, and this matter remanded for entry of a judgment of acquittal.

For the reasons set forth in Divisions II-IV, Davis must be afforded a new trial.

For the reasons set forth in Division V, the portion of the sentencing order assessing court costs and legal assistance

fees must be vacated and remanded for nunc pro tunc entry of a corrected sentencing order omitting such obligations.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $8.48, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

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

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/s/ Vidhya K. Reddy Dated: 4/7/2020

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