ELECTRONICALLY FILED OCT 06, 2020 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-2112

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES PAUL VANDERMARK,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE WILLIAM P. KELLY (SRCR326685 TRIAL & COMBINED SENTENCING), JEFFREY D. FARRELL (SRCR327909 TRIAL), & GREGORY D. BRANDT (AGCR329728 PLEA), JUDGES

APPELLEE'S BRIEF

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ROUTING STATEMENT

Because this case involves the application of existing legal principles, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

James Paul Vandermark appeals three separate cases. In the first case, SRCR326685, Vandermark was found guilty by a jury of willful injury causing bodily injury in violation of Iowa Code section 708.4(2). SRCR326685 Order Following Verdict; App. 88–90. In the second, SRCR327909, Vandermark was found guilty by a different jury of assault causing bodily injury in violation of Iowa Code section 708.2(2). SRCR327909 Order Following Verdict; App. 99–101. And in the third case, AGCR329728, Vandermark pleaded guilty to harassment in the first degree in violation of Iowa Code section 708.7(2). AGCR329728 Order Accepting Plea; App. 112–14. Vandermark stipulated to his prior felony convictions, and he received a habitual offender enhancement in SRCR326685. SRCR326685 T.Tr. Vol.II 55:9–64:4; Combined Sent. Order; App. 115–20. At a combined sentencing hearing, the court sentenced Vandermark to incarceration not to exceed 15 years for the willful

injury (with a three-year mandatory minimum), one year for the assault, and two years for the harassment. Combined Sent. Order; App. 115–20. The court ordered the 15-year and one-year sentences to be served consecutively for a total term of incarceration not to exceed 16 years. Combined Sent. Order; App. 115–20.

On appeal, Vandermark raises four claims: (1) the court erred in granting the State's motion to amend the trial information in SRCR326685, (2) the court abused its discretion in denying his request to continue trial in SRCR326685, (3) the evidence in SRCR326685 was insufficient to establish that Vandermark had the specific intent to inflict a serious injury, and (4) the court abused its discretion in ordering that the two sentences be served consecutively. The State disagrees with each of Vandermark's claims of error.

Course of Proceedings

In SRCR326685, Vandermark was originally charged with assault causing bodily injury. SRCR326685 Trial Info.; App. 45–47. Prior to trial, the State moved to amend the charge to willful injury causing bodily injury. SRCR326685 Mot. to Amend; App. 51–52. The State additionally provided notice it sought the habitual offender enhancement. SRCR326685 Notice Re: Habitual Offender; App. 53–

54. Vandermark resisted the State's motion to amend. SRCR326685 Resistance to Amend.; App. 57–64.

Immediately before the commencement of trial, the court held a hearing on the State's motion to amend. *See* SRCR326685 T.Tr. Vol.I 4:8–44:18. During that hearing, Vandermark again resisted the motion and he requested a continuance of the trial. The court ultimately granted the State's amendment and denied a continuance. SRCR326685 T.Tr. 44:14–:18; SRCR326685 Order Granting Amend.; App. 65–67. Trial commenced and the jury found Vandermark guilty as charged. *See* SRCR326685 Order Following Verdict; App. 88–90. Following a post-trial colloquy, Vandermark additionally stipulated to his prior felony convictions. SRCR326685 T.Tr. Vol.II 55:9–64:4. Vandermark moved for new trial and in arrest of judgment. SRCR326685 Mot. New Trial; App. 102–07. The court denied his motions. Combined Sent. Order p.1; App. 115.

In SRCR327909, the State originally charged Vandermark with assault causing bodily injury. SRCR327909 Trial Info.; App. 47–48. Prior to trial, the State moved to amend the charge to willful injury causing bodily injury. SRCR327909 Mot. to Amend; App. 95–96. Vandermark did not resist the amendment. Following a jury trial,

Vandermark was found guilty of the lesser-included offense assault causing bodily injury. SRCR327909 Order Following Verdict; App. 99–101.

In AGCR329728, Vandermark was charged with two counts of harassment in the first degree. AGCR329728 Trial Info.; App. 49–50. Pursuant to a plea agreement, Vandermark pleaded guilty to a single count. AGCR329728 Written Plea; App. 108–11.

On November 22, 2019, sentencing was conducted simultaneously for all three cases. Combined Sent. Order; App. 115–20. Vandermark was sentenced to a total term of incarceration not to exceed 16 years, with a three-year mandatory minimum. Combined Sent. Order; App. 115–20. He filed a notice of appeal on December 20, 2019. Combined Notice of Appeal; App. 121.

Facts

SRCR326685—Assault in hospital waiting room

On April 10, 2019, Edgar Rodriguez and his wife were at a hospital waiting for their son to see a doctor. SRCR326685 T.Tr. Vol.I 137:21–138:10. As Rodriguez sat in a waiting room chair on his phone, Vandermark entered the hospital and approached him. SRCR326685 T.Tr. Vol.I 139:19–141:23, 159:1–160:1. Vandermark

made a brief remark to Rodriguez and then immediately swung his fists into Rodriguez's face, striking him between seven to ten times as Rodriguez tried to cover his head to protect himself. SRCR326685 T.Tr. Vol.I 141:17–142:8, 152:17–153:8, 159:1–160:1. A witness went to alert the hospital's security, and when Vandermark saw this he left. SRCR326685 T.Tr. Vol.I 160:1–:6, 174:3–:18. Rodriguez received marks all over his face and head, including a black eye, and he testified that he still feels as if his nose is crooked. SRCR326685 T.Tr. Vol.I 143:4–145:23, 152:17–153:8.

SRCR327909—Assault on a bicyclist

On May 15, 2019, Christopher Baum was riding his bicycle home in a bike lane on Grand Avenue in downtown Des Moines. SRCR327909 T.Tr. Vol.I 92:24–93:14. As he continued down the bike lane, he heard honking coming from a vehicle behind him. SRCR327909 T.Tr. Vol.I 93:20–94:7. The driver of the vehicle—Vandermark—pulled alongside Baum and shouted obscenities towards him, including "stupid faggot." SRCR327909 T.Tr. Vol.I 94:1–:16. Vandermark drove the vehicle very close to Baum giving him the impression that the car would run him over or knock him down. SRCR327909 T.Tr. Vol.I 94:20–:25. Baum was scared and he

took a photo of the car. SRCR327909 T.Tr. Vol.I 94:19–95:2. Vandermark briefly drove off, but he returned, again pulling alongside Baum. SRCR327909 T.Tr. Vol.I 95:3–:7, 96:11–:19. Vandermark then spit on Baum twice. SRCR327909 T.Tr. Vol.I 96:16–:19.

Baum slowed down in an attempt to get away from Vandermark. SRCR327909 T.Tr. Vol.I 97:23–98:1. But Vandermark stopped the car on the street alongside the bike lane and he exited the vehicle. SRCR327909 T.Tr. Vol.I 98:2–:17. Baum attempted to veer away from Vandermark to the opposite side of the street, but Vandermark crossed the street in front of traffic and blocked Baum against a car, making Baum come to a stop. SRCR327909 T.Tr. Vol.I 98:2–:24, 117:2–118:6. Vandermark screamed at Baum, "you're a stupid faggot. I should kill you. Why are you taking a picture of my car?" SRCR327909 T.Tr. Vol.I 98:16–:22. He then punched Baum in the face causing Baum to fall to the ground hitting his head. SRCR327909 T.Tr. Vol.I 99:3–:5, 118:10–:14, 121:18–:20. Vandermark then returned to his vehicle and left. SRCR327909 T.Tr. Vol.I 99:4–:6, 118:10–:14.

AGCR329728—Death threat

In his written plea of guilty, Vandermark admitted that on July 16, 2019, he called Mindy Brown and stated that he "was going to kill her," and that he did so with the specific intent to annoy or alarm her. AGCR329728 Written Plea; App. 108–11.

ARGUMENT

I. The Court did Not Err in Granting the State's Motion to Amend the Trial Information.

Preservation of Error

The State partially contests error preservation. On appeal, Vandermark raises three challenges to the amendment of the trial information in case number SRCR326685: (1) the amendment was not a "correction" of the original trial information, (2) the amendment prejudiced his substantial rights, and (3) the amendment charged a wholly new and different offense. Appellant's Br. pp.14–18. Although the State would agree that Vandermark resisted the amendment of the trial information (including the arguments that the amendment charged a wholly new and different offense and that it prejudiced Vandermark's substantial rights), the State disputes that Vandermark preserved error for his argument that the amendment was not permissible because it was not a "correction." *See*

SRCR326685 Resistance to Amend.; App. 57–64. This argument was not presented to the district court in Vandermark's resistance, during the hearing before trial, nor even in the motion for new trial. The claim cannot be raised for the first time on appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

Standard of Review

Because Rule 2.4(8)(a) provides that the district court "may" amend the trial information, that decision is generally reviewed for abuse of discretion. *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997). Review shifts to correction of errors at law for questions concerning prejudice to the defendant's substantial rights or whether the amendment charged a wholly new and different offense. *Id.*

Merits

Iowa Rule of Criminal Procedure 2.4(8) permits a court to grant the amendment of an indictment (and specifically a trial information through rule 2.5(5)). However, an "[a]mendment is not allowed if substantial rights of the defendant are prejudiced by the amendment, or if a wholly new and different offense is charged." Iowa R. Crim. P. 2.4(8)(a). Vandermark asserts that the State's amendment to the trial information both constituted a wholly new and different offense and

that Vandermark's substantial rights were prejudiced. The State disagrees.

A. The amendment did not charge a wholly new and different offense.

On appeal, Vandermark claims that the amendment constituted a wholly new and different offense for two reasons. First, he alleges there was an "extreme disparity of punishment." Appellant's Br. p.15. Second, Vandermark claims there was an added intent element. Appellant's Br. p.16–18. The State disagrees with both arguments.

Before addressing the specifics of Vandermark's argument it is necessary to dissect two challenges that Vandermark is attempting to improperly merge to show an "extreme disparity." The State modified the charge against Vandermark in two ways. First, the State amended the charge from assault causing bodily injury to willful injury causing bodily injury. *See* SRCR326685 Mot. to Amend; App. 51–52. Second, the State simultaneously provided notice that it sought the habitual offender sentencing enhancement. *See* SRCR326685 Notice Re: Habitual Offender; App. 53–54. In his brief, Vandermark attempts to combine the two modifications by overstating the disparity in punishment resulting from the amendment to the trial information. He claims that the "punishment

went from 1 years maximum jail to 15 years maximum prison." Appellant's Br. p.16. And while Vandermark is correct that the total potential term of incarceration did increase to 15 years, he is incorrect in relying on that number for conducting the wholly-new-and-different-offense analysis.

The primary reason that the term of incarceration was increased to 15 years was the result of the addition of the habitual offender enhancement. *See* Iowa Code § 902.8. But the habitual offender enhancement is not a wholly new and different offense, nor is it even an offense. As the Iowa Supreme Court has explained, "Iowa Code section 902.8 (1983), a recidivist law, does not define a separate crime but merely constitutes a predicate for enhanced punishment." *State v. Berney*, 378 N.W.2d 915, 919 (Iowa 1985), *overruled on other grounds by State v. Bruce*, 795 N.W.2d 1, 3 (Iowa 2011); *accord State v. Brothern*, 832 N.W.2d 187, 193 (Iowa 2013). Thus, Vandermark's citation to the 15-year punishment is no more than a red herring, and this Court should decline to consider the addition of the habitual offender enhancement when conducting the wholly-new-and-different-offense analysis.

The Court considers numerous factors when determining whether an amended charge constitutes a wholly new and different offense. In *State v. Sharpe*, the Iowa Supreme Court considered whether the offenses had different elements and whether there was a "great disparity in punishment." 304 N.W.2d 220, 223 (Iowa 1981). In *State v. Brisco*, the Iowa Court of Appeals additionally considered whether the amended charge involved the same "base prohibition" and whether "the amended trial information contained the same times, dates, and places of the alleged offenses." 816 N.W.2d 415, 418–19 (Iowa Ct. App. 2012); *accord State v. Ruiz*, No. 18-1260, 2019 WL 3729562, at *1 (Iowa Ct. App. Aug. 7, 2019) ("The statute charged remained the same; the witnesses remained the same; the originally filed minutes of testimony supported the amended charges. Although the timeframe alleged in the amended counts differed from the original count, Ruiz was alerted to the source and nature of the evidence against him.").

First, the State notes that little was changed by the amendment. The district court noted that both charges fall within the same code chapter and that the elements were "substantially similar." SRCR326685 T.Tr. Vol.I 34:4–35:8; *cf. State v. Abrahamson*, 746

N.W.2d 270, 275 (Iowa 2008) (recognizing whether two offenses appear in different code chapters is a relevant consideration when determining if they are different offenses). "Both [charges] are talking about assaults. We are talking about bodily injury." SRCR326685 T.Tr. Vol.I 43:3–:8. The court also recognized that "[t]he time, date, place, defendant, person who was assaulted, all of those are same and those allegations have not changed," and that Vandermark was accordingly on notice from the beginning as to what the State was alleging. SRCR326685 T.Tr. Vol.I 35:9–:11, 43:8–:11. Thus, the same base prohibition was involved—an assault that resulted in bodily injury—and the details of the offense were not changed.

Second, there was not a "great disparity in punishment" as Vandermark alleges. Assault causing bodily injury is a serious misdemeanor punishable incarceration up to one year. Iowa Code § 903.1(1)(b). Willful injury causing bodily injury is a class "D" felony punishable by incarceration not to exceed five years. Iowa Code § 902.9(1)(e). This four-year increase is not a "great disparity." The great disparity noted by the Court in *Sharpe* resulted from the original punishment of 25 years' incarceration being amended to life

imprisonment. 304 N.W.2d at 223. In contrast, in *State v. Maghee*, the Court found an amendment did not constitute a wholly new and different offense even though it increased the punishment from 10-years to 25-years. 573 N.W.2d at 5–6; *accord Brisco*, 816 N.W.2d at 419. The four-year increase in punishment here was significantly less than the 15-year increase found permissible in *Maghee*, and it did not amount to a "great disparity."

Third, there was no additional element resulting from the amendment. In *Sharpe*, the Court recognized murder in the first degree includes additional elements not contained in the elements for murder in the second degree, thus making the amendment in that case improper. 304 N.W.2d at 223; *see* Iowa Code §§ 707.2–.3. Vandermark claims this case is like *Sharpe* because an element was added because of the amendment: specific intent to cause serious injury. Appellant's Br. pp.17–18. The State does not agree this was an "additional intent element missing from the original charge." Appellant's Br. p.18. The Iowa Supreme Court has been clear that specific intent is an element of assault. *E.g., State v. Fountain*, 786 N.W.2d 260, 265 (Iowa 2010) ("[T]he crime of assault includes a specific intent element."). And while Vandermark cites the model

jury instructions for assault causing bodily injury to show that such a specific intent element is missing, he fails to recognize that the official comments for the jury instructions on assault specifically recognize that "the Supreme Court has repeatedly held that assault under Iowa Code sections 708.1(2)(a) and (b) contains specific intent components and therefore Iowa Criminal Jury Instruction 200.2 (Specific Intent) should be given." Iowa State Bar Ass'n, Iowa Criminal Jury Instr. 800.1 cmt. (June 2019). Thus, contrary to Vandermark's position, the inclusion of a specific intent element in willful injury was not an additional element because specific intent was already an element of the original charge. And even to the extent the specific intent element was modified or slightly different in the willful injury context, minor differences do not render a charge *wholly* new and different. *E.g.*, *Maghee*, 573 N.W.2d at 5 (finding amendment to drug charge with different weight threshold permissible); *Sharpe*, 304 N.W.2d at 223 (recognizing amendment charging different alternative permissible); *Brisco*, 816 N.W.2d at 419 (finding amendment proper even though "the amended trial information charged a different subparagraph of section 124.401 and a different controlled substance"). The elements

were not so different as to render the amended charge a wholly new and different offense.

The State's amendment did not charge a wholly new and different offense. The district court did not err in concluding the amendment was permissible. This Court should affirm.

B. Vandermark's substantial rights were not prejudiced.

The State first notes that Vandermark's entire prejudice-to-the-defendant argument (beyond partially quoting the rule on permitting amendments) comprises two conclusory sentences not supported by authority or citations to the record. Appellant's Br. p.15. Vandermark's inadequate briefing on his claim that he was prejudiced should be deemed a waiver of that claim. It simply is not the duty of this Court to "speculate on the arguments [the appellant] might have made and then search for legal authority and comb the record for facts to support such arguments." *State v. Olds*, No. 14-0825, 2015 WL 6510298, at *8 (Iowa Ct. App. Oct. 28, 2015) (quoting *Hyler v. Garner*, 548 N.W.2d 864, 876 (Iowa 1996)). "[P]assing reference to an issue, unsupported by authority or argument, is insufficient to raise the issue on appeal." *State v. Louwrens*, 792 N.W.2d 649, 650 n.1 (Iowa 2010); *see Baker v. City of Iowa City*,

750 N.W.2d 93, 102-03 (Iowa 2008) (recognizing a conclusory statement without argument leaves an issue waived); Iowa R. App. P. 6.903(2)(g)(3) (requiring citations to authority and the parts of the record or an issue may be deemed waived).

If this Court nevertheless considers the prejudice claim, the State submits it fails on the merits. The Iowa Supreme Court in *Maghee* explained that "[a]n amendment prejudices the substantial rights of the defendant if it creates such surprise that the defendant would have to change trial strategy to meet the charge in the amended information." 573 N.W.2d at 6 (citing *State v. Fuhrmann*, 257 N.W.2d 619, 624 (Iowa 1977)). On appeal, Vandermark's claim that his substantial rights were prejudiced does not allege that the State's amendment amounted to a surprise or even that it required a change in trial strategy. Appellant's Br. p.15. Instead, Vandermark's sole claim of prejudice in his brief is the fact that Vandermark would be facing an increased term of incarceration if found guilty. Appellant's Br. p.15. However, the same was true in *Maghee*, where the amendment resulted in the defendant facing a potential sentence of 25 years instead of 10 years. 573 N.W.2d at 5. But despite this 15-year increase, the Court still found the defendant was not prejudiced

by the amendment. *Id.* at 6. Thus, the mere fact that an amendment results in a different or increased punishment is insufficient to show that the defendant's substantial rights were prejudiced. The State additionally notes that Vandermark was aware of the State's amendment before trial and he still rejected a plea offer and to proceed with the jury trial. SRCR326685 T.Tr. Vol.I 13:19–18:25 (rejecting pre-trial plea agreement before court granted amendment with enhancement); *cf. Brothern*, 832 N.W.2d at 196 (holding that an enhancement may prejudice substantial rights of a defendant if it is added during trial and "the defendant had no prior notice of the State's plan to amend and would have pled guilty had he or she known of that plan before trial").

Vandermark has failed to show his substantial rights were prejudiced. He has failed to show that the court erred in granting the motion to amend the trial information. This Court should affirm.

II. The Court did Not Abuse its Discretion by Denying Vandermark's Request for a Continuance of Trial.

Preservation of Error

In his resistance to the State's motion to amend the trial information, Vandermark included a request for a continuance based on his claim of untimely notice of a State's witness. SRCR326685

Resistance to Amend. pp.2–4 ("[A] continuance of the matter would be the appropriate remedy."); App. 58–60. At the pre-trial hearing on the State's motion to amend, Vandermark again requested more time to prepare. SRCR326685 T.Tr. Vol.I 10:19–11:4, 23:2–:9, 26:1–:4. The court denied his request for a continuance. SRCR326685 T.Tr. Vol.I 44:17–:18. The State does not contest error preservation.

Standard of Review

A district court's decision to deny a motion to continue is reviewed for abuse of discretion. *State v. Clark*, 814 N.W.2d 551, 560 (Iowa 2012) (citing *State v. Artzer*, 609 N.W.2d 526, 529 (Iowa 2000)).

Merits

Under the rules of criminal procedure, continuances "shall not be granted except upon a showing of good and compelling cause." Iowa R. Crim. P. 2.9(2). "[A] trial court has 'very broad' discretion in ruling on a motion for continuance." *State v. LaGrange*, 541 N.W.2d 562, 564 (Iowa Ct. App. 1995) (citing *State v. Sieren*, 111 N.W.2d 249, 250 (Iowa 1961)). "The trial judge must sense whether a given continuance motion stems from a legitimate need, or from a wish to delay. From its closer vantage point, the trial court can better sort

through these matters than an appellate court can." *State v. Teeters*, 487 N.W.2d 346, 348 (Iowa 1992). The denial of a request for a continuance will not be "reversed on appeal unless an injustice has resulted." *State v. Leutfaimany*, 585 N.W.2d 200, 209 (Iowa 1998) (citing *State v. Grimme*, 338 N.W.2d 142, 144 (Iowa 1983)).

Vandermark asserts that the district court erred in denying his motion to continue. He specifically asserts that he was entitled to a continuance because of the surprise of the amended charge and an allegedly late notice of a State's witness. The State disagrees and submits Vandermark has failed to show the district court abused its discretion.

Vandermark's request for continuance was based on three distinct rationales. First, Vandermark claimed he received late notice of a witness. *See* SRCR326685 T.Tr. Vol.I 10:19–11:2. Second, Vandermark claimed he was surprised by the addition of the habitual offender enhancement. *See* SRCR326685 T.Tr. Vol.I 11:2–:4. Third, Vandermark claimed he needed additional time to prepare a defense against an allegation of a serious injury. *See* SRCR326685 T.Tr. Vol.I 20:10–21:10, 24:14–:25. The court considered and rejected each of these rationales, essentially concluding that Vandermark's request

was not truly based on an essential need for additional time to prepare.

First, Vandermark claimed that the State provided late notice of a witness. Iowa Rule of Criminal Procedure 2.19 states:

> If the prosecuting attorney does not give notice to the defendant of all prosecution witnesses (except rebuttal witnesses) at least ten days before trial, the court may order the state to permit the discovery of such witnesses, grant a continuance, or enter such other order as it deems just under the circumstances. It may, if it finds that no less severe remedy is adequate to protect the defendant from undue prejudice, order the exclusion of the testimony of any such witnesses.

Iowa R. Crim. P. 2.19(3). The State filed a notice of an additional witness—the clerk of court or their designee—seven days before trial was scheduled to begin. *See* SRCR326685 Notice Re: Habitual Offender; App. 53–54. At first glance this would appear to be untimely because it was less than ten days before trial. However, the district court identified the flaw in Vandermark's argument: the late-noticed witness was only to be called to address Vandermark's prior convictions for the habitual offender enhancement, and Vandermark could have a second trial on that issue. SRCR326685 T.Tr. Vol.I 24:1–:2 ("But wouldn't we have a separate trial on the habitual

offender anyway?"). In fact, the court specifically resolved the matter on that ground:

> The Court also finds that the habitual offender enhancement will be tried at a later date. That enhancement will be moot if the defendant is found not guilty. It will also give the defense a chance to defend that habitual offender enhancement when or if we set that for trial at a later date.

SRCR326685 T.Tr. Vol.I 44:8–:13 *see* Iowa R. Crim. P. 2.19(9) (authorizing a second trial on the matter of prior convictions). This in effect granted Vandermark a limited continuance specifically so he would have time to prepare for the late-noticed witness. And beyond that, Vandermark conceded that "[d]iscovery of [the clerk of court] is probably not necessary," undermining the need for any continuance even if one was otherwise appropriate. SRCR326685 T.Tr. Vol.I 10:25–11:2. The court did not abuse its discretion in denying a continuance for the entire trial proceeding. Finally, even if the late-noticed witness was an issue warranting a continuance, Vandermark waived the issue by waiving a trial on the habitual offender enhancement and stipulating to his prior offenses. *See* SRCR326685 T.Tr. Vol.II 55:9–64:4.

Second, Vandermark claimed he was surprised by the addition of the habitual offender enhancement, and he notes that a continuance is the ordinary remedy for surprise. SRCR326685 T.Tr. Vol.I 11:2–4; *see* Appellant's Br. pp.19–20. However, as explained above, even if Vandermark was surprised by the addition of the enhancement, the court resolved the matter by noting that the separate habitual offender proceedings could be conducted at a second trial on a later date, in effect granting a continuance on that specific matter. *See* SRCR326685 T.Tr. Vol.I 44:8–:13. The court did not abuse its discretion in denying a continuance for the entire trial proceeding. And, again, even if the habitual offender enhancement created a surprise, Vandermark waived the issue by waiving a trial on the issue and stipulating his prior convictions. *See* SRCR326685 T.Tr. Vol.II 55:9–64:4.

Third, Vandermark claimed he needed additional time to prepare in response to the State's amendment of the charge. Specifically, he claimed he needed additional time to "defend[] against a serious injury," including seeking an expert witness on serious injuries and deposing the victim on the nature of his injuries. SRCR326685 T.Tr. Vol.I 20:10–21:10, 24:14–:25. The problem with

Vandermark's argument is that both the original charge and the amended charge only alleged a bodily injury. *See* SRCR326685 Trial Information; SRCR326685 Am. Trial Information; App. 45–46, 55–56. The State simply did not charge, or allege, that a serious injury occurred and any preparation on such a matter would have been irrelevant. But even beyond that, to ease any concerns Vandermark may have had, the State expressly agreed that even if evidence came in showing a serious injury occurred, the State would not request to amend the charge to conform to the evidence. *See* SRCR326685 T.Tr. Vol.I 31:9–:23. Thus, Vandermark's request for a continuance was meritless because it did not matter if the victim's injuries could qualify as a serious injury. The court did not abuse its discretion in denying his request for more time to prepare.

III. The Evidence Presented at Trial in Case Number SRCR326685 was Sufficient to Establish Vandermark's Specific Intent to Cause a Serious Injury.

Preservation of Error

Vandermark moved for judgment of acquittal raising the same ground now argued on appeal. SRCR326685 T.Tr. Vol.II 3:23–4:24. The court denied his motion. SRCR326685 T.Tr. Vol.II 6:22–9:4. The State does not contest error preservation.

Standard of Review

"Sufficiency of evidence claims are reviewed for a correction of errors at law." *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012) (citing *State v. Keopasaeuth*, 645 N.W.2d 637, 639–40 (Iowa 2002)).

Merits

A challenge to the sufficiency of the evidence does not allow a reviewing court to weigh evidence or determine that the jury weighed the evidence incorrectly. "In determining the correctness of a ruling on a motion for judgment of acquittal, we do not resolve conflicts in the evidence, pass upon the credibility of witnesses, or weigh the evidence." *State v. Hutchison*, 721 N.W.2d 776, 780 (Iowa 2006) (citing *State v. Williams*, 695 N.W.2d 23, 28 (Iowa 2005)). Instead, "review on questions of sufficiency of the evidence is to determine if there is substantial evidence to support the verdict of the jury." *State v. Martens*, 569 N.W.2d 482, 484 (Iowa 1997) (citing *State v. Monk*, 514 N.W.2d 448, 451 (Iowa 1994)). This occurs when "a rational trier of fact" viewing the State's evidence in the most favorable light "could have found that the elements of the crime were established beyond a reasonable doubt." *Keopasaeuth*, 645 N.W.2d at 640 (citing *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994)).

Specific intent is "seldom capable of direct proof, but may be shown by reasonable inferences drawn from facts established." *State v. Chatterson*, 259 N.W.2d 766, 769–70 (Iowa 1977). Proof of specific intent can be "established by circumstantial evidence and by inferences reasonably to be drawn from the conduct of the defendant and from all the attendant circumstances in light of human behavior and experience." *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992) (quoting *State v. Erving*, 346 N.W.2d 833, 836 (Iowa 1984)).

Vandermark claims there was not sufficient evidence establishing that he had specific intent to inflict a serious injury in case number SRCR326685. *See* Appellant's Br. pp.26–28. The State disagrees.

The State first submits that Vandermark's argument is premised on a flawed analysis. He primarily argues that the victim did not receive a serious injury as a result of Vandermark's numerous punches to his face. *See* Appellant's Br. pp.26–27 (citing "no medical evidence of a serious injury"). But this argument is irrelevant because the jury was only required to find that Vandermark *intended* to inflict a serious injury, not that he succeeded in his attempt. *See*

SRCR326685 Jury Instr. No. 21; App. 80. The jury did not have to find a serious injury, only a bodily injury. SRCR326685 Jury Instr. No. 21; App. 80.

The evidence showed that Vandermark arrived at the hospital and immediately confronted the victim who was on his phone while sitting in a chair in the hospital's waiting room. SRCR326685 T.Tr. Vol.I 139:19–141:23, 159:1–160:1; *see also* State's Ex. 3 (hospital video). Vandermark made a brief remark and then immediately swung his fists into the victim's face and head approximately seven to ten times. SRCR326685 T.Tr. Vol.I 141:17–142:8, 152:17–153:8, 159:1–160:1. When a witness went to get hospital security Vandermark stopped his assault and fled. SRCR326685 T.Tr. Vol.I 160:1–:6, 174:3–:18; *see also* State's Ex. 3 (hospital video). The victim received marks all over his face and head, including a black eye, and he testified that he still feels as if his nose is crooked. SRCR326685 T.Tr. Vol.I 143:4–145:23, 152:17–153:8; *see also* SRCR326685 State's Exs. 1–2; App. 91–94. Officer Brandon Eivins testified that a serious injury could result from punches to the head or face, including potential injuries to eyesight, hearing, airway, or brain. SRCR326685 T.Tr. Vol.I 187:12–188:5.

In the light most favorable to the State, Vandermark's repeated punches to the victim's face and head demonstrated a specific intent to cause a serious injury. *Cf. State v. Anderson*, 308 N.W.2d 42, 47 (Iowa 1981) (finding that head trauma, including trauma because of blows to the head, created a substantial risk of death). This Court should reject Vandermark's argument and affirm.

IV. Vandermark has Failed to Show the Sentencing Court Abused its Discretion.

Preservation of Error

The normal rules of error preservation do not apply to a direct appeal of a sentence. *See State v. Cooley*, 587 N.W.2d 752, 754 (Iowa 1998). Error is inherently preserved.

Standard of Review

"A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as the trial court's consideration of impermissible factors." *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998) (citing *State v. Wright*, 340 N.W.2d 590, 592 (Iowa 1983)). The defendant must overcome the presumption of regularity when challenging a court's sentence. *See State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983). "Sentencing decisions of the district

court are cloaked with a strong presumption in their favor." *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996) (citing *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995)).

Merits

Sentencing decisions are cloaked in a strong presumption in their favor, abuse of discretion will be found only when the sentencing court's discretion relied on grounds clearly untenable or to an extent clearly unreasonable. *See Loyd*, 530 N.W.2d at 713 (citing *State v. Johnson*, 513 N.W.2d 717, 719 (Iowa 1994)). It is the defendant's duty to overcome the presumption of regularity when challenging a sentencing decision. *See Pappas*, 337 N.W.2d at 494.

Before suspending a sentence, a sentencing court must consider the defendant's age, prior record of convictions, employment circumstances, family circumstances, mental health and substance abuse history, the nature of the offense, and "[s]uch other factors as are appropriate." *See* Iowa Code § 907.5(1). When imposing sentence, the court must also determine which sentencing option "will provide maximum opportunity for the rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others." *See id.* at § 901.5.

Section 901.5 of the Iowa Code provides that, "[a]fter receiving and examining all pertinent information," the court shall consider among a number of sentencing options, including a term of confinement or a suspended sentence of probation. Iowa Code § 901.5; *see State v. Thomas*, 659 N.W.2d 217, 221 (Iowa 2003) (citing Iowa Code § 907.3(3)) ("Following a plea or verdict of guilt, a court may, subject to exceptions, defer judgment, defer sentence, or suspend sentence."). The sentencing court determines which of the statutory options "is authorized by law for the offense," and "which of them or which combination of them, *in the discretion of the court*, will provide maximum opportunity for the rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others." Iowa Code § 901.5 (emphasis added). Besides considering "the societal goal of sentencing criminal offenders," the court must also consider "the nature of the offense, the attending circumstances, the age, character and propensity of the offender, and the chances of reform." *State v. Formaro*, 638 N.W.2d 720, 724-25 (Iowa 2002) (citing *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999)).

These sentencing determinations must be made on the record, and the court cannot base the sentencing decision only on a single sentencing factor. *See State v. Dvorsky*, 322 N.W.2d 62, 67 (Iowa 1982) (citing *State v. Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979)); *see also* Iowa R. Crim. P. 2.23(3)(d). While courts must state on the record the reasons relied upon for imposing a particular sentence, "[g]enerally, a sentencing court is not required to give its reasons for rejecting particular sentencing options." *Loyd*, 530 N.W.2d at 713–14. Further, merely because a court does not cite a particular factor does not mean the court did not consider it. *State v. Boltz*, 542 N.W.2d 9, 11 (Iowa Ct. App. 1995) ("[T]he failure to acknowledge a particular sentencing circumstance does not necessarily mean it was not considered.").

Vandermark alleges that the court abused its discretion in ordering the sentence in SRCR326685 (15 years) to be served consecutive to the sentence in SRCR327909 (one year). Appellant's Br. p.23. He specifically asserts that the court failed to "explain how consecutive sentences" would be "rehabilitative to the Defendant." Appellant's Br. p.23. The State disagrees that Vandermark has

overcome the presumption of regularity and shown an abuse of sentencing discretion.

The State first notes that Vandermark's argument is legally flawed. Although the sentencing court should consider the maximum opportunity for rehabilitation, the court does not have to explain every factor it considered. *See Boltz*, 542 N.W.2d at 11. Thus, even if the court did not expressly explain why consecutive sentences would be rehabilitative it does not mean the court did not incorporate that consideration into its analysis.

In any event, the record undermines Vandermark's argument because the court explicitly explained why it chose consecutive sentences for those two offenses, and the court indicated that rehabilitation was a primary consideration in its analysis. Sent. Tr. 35:2–37:21, 39:18–43:15. The court's explanation was thorough and contained a detailed discussion of the factors the court considered. *See* Sent. Tr. 35:2–37:21, 39:18–43:15; *see also* Combined Sent. Order p.3; App. 117. Vandermark has failed to show an abuse of discretion and this Court should reject his argument and affirm his sentence.

CONCLUSION

This Court should affirm James Paul Vandermark's convictions and sentences.

REQUEST FOR NONORAL SUBMISSION

Oral submission is unnecessary.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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