IN THE SUPREME COURT OF IOWA
Supreme Court No. 21–0657

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DEONTE WB ELLISON,
Defendant-Appellant.

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

APPELLEE'S BRIEF

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ROUTING STATEMENT

Existing precedent addresses the two bases Ellison proposes for Supreme Court retention. The Court should transfer this matter to the Court of Appeals. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

A Dubuque County District Court jury convicted Deonte Ellison of voluntary manslaughter, a Class "C" felony. Iowa Code § 707.4 (2020). Ellison also pleaded guilty to being a felon in possession of a firearm, a Class "D" felony. *Id*. § 724.26(1). He contends that as to the voluntary manslaughter conviction, the instruction on justification was faulty and the instruction on the duty not to conceal evidence violated his right against self-incrimination.

The Honorable Michael J. Shubatt presided.

Course of Proceedings

The State accepts the defendant's statement of the procedural history of the case. Iowa R. App. P. 6.903(3).

Facts

When Curtis Smothers went to hug his daughter, he had one minute and twenty-two seconds to live. Def. Ex. 2 ~5:56:40–58:12.

This appeal concerns whether Deonte WB Ellison was justified in killing him.

Ellison was married to Vanessa Ellison and was the father of two of her children. Tr. Vol. 5, p. 104, l. 24–p. 105, l. 17. Vanessa had returned to Dubuque to "get on track" while Ellison remained Kalamazoo, Michigan. *Id.* p. 117, ll. 15–24, p. 120, ll. 13–23. Vanessa had two other children, one with "Norris Culver" and a daughter with Curtis Smothers. *Id.* p. 118, ll. 4–25.

Until Ellison shot Smothers, there had been no "bad blood" between the two. *Id.* p. 150, ll. 12–24. Ellison had, apparently, even facilitated child visitation for Smothers. *Id.* p. 205, ll. 9–15.

The same could not be said of other relationships among these four. Ellison and Culver (also called "Snake") had had conflicts. *Id.* p. 119, ll. 1–13. Culver discharged a weapon into a family gathering. *See id.* p. 118, ll. 4–25. And Ellison carried a handgun. *Id.* p. 146, ll. 22–24. Vanessa and Smothers had separated following an assault on her. *Id.* p. 107, l. 9–p. 108, l. 23. A no-contact order between them was in place. *Id.* p. 178, l. 15–p. 181, l. 6. Vanessa said Smothers assaulted her in 2017, a fact she related to Ellison. *Id.* p. 111, l. 20–p. 112, l. 6. She did not, however, tell Ellison about a

second incident where she claimed Smothers had taken their daughter to Chicago without her permission. *Id.* p. 109, l. 19–p. 111, l. 9.

On July 2, 2020, two groups of people would converge in front of apartments on Loras Avenue in Dubuque, Ellison in one group and Smothers in another. *Id.* p. 120, ll. 18–25. After some errands, Vanessa had Ellison, a friend named Delano DeShazer, and Cordaro Moon (the boyfriend of Ellison's sister, Daisy) come get her and three of her children. *Id.* p. 121, ll. 8–17, p. 123, ll. 8–17.

Meanwhile, Smothers had joined his friend Wendell Rogers and Jamison Vurciaga in Rogers' Dubuque apartment. Tr. Vol. 2, p. 80, l. 18–p. 87, l. 14, p. 85, ll. 3–5, p, 89, l. 2–p. 90, l. 21, p. 122, ll. 14–15. Vurciaga had felt unwell at work. *Id.* p. 123, l. 17–p. 124, l. 16. He and Smothers smoked marijuana. *Id.* p. 135, ll. 7–22. Smothers, for his part, talked about how he missed his children. *Id.* p. 85, l. 25–p. 86, l. 10. Rogers asked Smothers to come with him to buy alcohol. *Id.* p. 87, ll. 9–23. Vurciaga went along to get something to soothe his stomach. *Id.* p. 126, ll. 7–10.

Rogers would later describe Smothers' posture as threatening "sometimes." *Id.* p. 117, ll. 8–21, p. 118, ll. 3–17. He also

acknowledged Smothers could be "kind of aggressive" and once got into a fight. *Id.* p. 118, ll. 3–17, p. 120, ll. 5–22.

Near 6:00 pm, the two groups converged at Cordaro Moon's apartment on Loras Avenue in Dubuque. Ex. 1 ~5:55:18. Rogers and Vurciaga both recalled Smothers noticed his daughter, asked them to slow down, and got out. Tr. Vol. 2, p. 93, ll. 7–14, p. 128, ll. 4–6. Initially, they waited in the car looking at their phones. *Id.* p. 96, ll. 5–9, p. 128, ll. 6–12.

A surveillance video shows Smothers' daughter running to him and they hug for almost thirty seconds. Ex. 1 ~5:56:15–:40. In the video, Smothers takes her in hand as they walk to her younger brother whom he appears to greet with a fist-bump. *Id.* ~5:57:08–:17.

Ellison's wife and sister described a more sinister encounter. Daisy Ellison—the Defendant's sister—said that Smothers "got up behind Deonte aggressive." Tr. Vol. 5, p. 98, l. 2–p. 99, l. 1. She said Ellison kept telling Smothers to "get back" but was met with, "nigga, I kill you." *Id.* (These were statements she had not related to law enforcement after the shooting. *Id.* p. 101, ll. 18–22.)

Vanessa said that Smothers said nothing to her the "entire time" which is to say roughly forty-seven seconds. *Id.* p. 145, ll. 1–4; Ex. 1 5:56:40–5:57:27. She described Smothers as "so angry," looking at her "with disgust almost" and using an angry posture Tr. Vol. 5, p. 133, l. 20–p. 134, l. 15. Ellison, in her recollection, said to Smothers, "You funny. What's up? What you been on?" *Id.* p. 142, ll. 20–23.

Meanwhile in his vehicle, Rogers looked up from his phone to see Smothers and Ellison arguing. Tr. Vol. 2, p. 96, ll. 5–9. He told Vurciaga they needed to help because it looked like numerous people were about to "jump" Smothers. *Id.* p. 97, ll. 2–16. Vurciaga, for his part, heard arguing and yelling, but had turned away when he heard two gunshots. *Id.* p. 129, ll. 3–23. Rogers, somewhat differently, saw the two men trading blows until, "all of a sudden I seen the guy pull out — … a pistol." *Id.* p. 97, ll. 17–21. After one shot rang out, he claimed Smothers said, "Are you going to shoot me in front of my daughter?" *Id.* p. 99, ll. 13–21. Then Ellison did. *Id.* p. 99, l. 22–p. 100, l. 7.

The surveillance video shows Ellison address Smothers after he (Smothers) greeted the little boy. Def. Ex. 1 ~5:57:27. Three seconds

later a confrontation begins and seven seconds after that Ellison shoves Smothers. *Id.* ~5:57:27–:37. Ellison puts some objects (Vanessa said it was a lemonade and phone) on a car. *Id.* ~:41. Then he punches Smothers. *Id.* ~:47. Smothers hits back and fists fly. *Id.* ~:47–:51.

Daisy appears to intervene while Rogers and Vurciaga approach. *Id.* ~:55. But Ellison hits Smothers once more. *Id.* ~5:58:00. After hitting Smothers yet again, Ellison raises his arm straight out at Smothers. *Id.* ~:58:05. Ellison backs up, in between two cars, following Daisy and Delano Deshazer into the street. *Id.* ~:58:10–:12. Ellison appears to hit Smothers with his left hand (which Smothers returns in kind) then shoots him. *Id.* ~:12–:15. He continued to follow Daisy and Delano. *Id.* (He would flee into the apartment building across the street. Tr. Vol. 3, p. 140, l. 21–p. 141, l. 14.)

Smothers staggered backwards before lurching and falling forward, with no apparent effort to break the fall, never to move again. *Id.* Everyone but Rogers and Vurciaga scattered. Def. Ex. 1 ~5:58:15–6:00:21. A few seconds later, bystanders and a police officer arrive. *Id.*

Two witnesses would later describe how they saw one man shoot another man twice. Tr. Vol. 3, p. 110, l. 6–p. 112, l. 1, p. 121, l. 25–p. 125, l. 17.

Vanessa did not discuss it with police, but she thought she would see Ellison again. Tr. Vol. 5, p. 148, l. 24–p. 149, l. 7. Indeed, she was with Ellison several days later when U.S. Marshals apprehended him. Tr. Vol. 2, p. 154, ll. 18–21; Tr. Vol. 3, 48, l. 3–p. 49, l. 11. He had, by that time, shaved off his dreadlocks. *Id.* Vol. 3, p. 46, ll. 3–20.

The medical examiner confirmed Smothers had marijuana in his system but could not say how it would have affected him. *Id.* p. 50, ll. 1–25. And he concluded that Smothers died of single gunshot to the chest. Tr. Vol. 5, p. 39, ll. 17–20, p. 49, l. 3–19, p. 57, ll. 6–14.

ARGUMENT

I. Section 704.1(3) governed the defense of reasonable use of force when Ellison shot Smothers. The district court properly instructed on it.

Preservation of Error

The State does not contest error preservation. Iowa R. App. P. 6.903(3); *see* Tr. Vol. 6, p. 7, l. 1–p. 23, l. 25.

Standard of Review

> Challenges to jury instructions are generally reviewed for correction of errors at law. … "We review the trial court's instructions 'to determine whether they correctly state the law and are supported by substantial evidence.'"

State v. McCall, 754 N.W.2d 868, 871 (Iowa Ct. App. 2008) (citations omitted). The Court reviews *de novo* a challenge that an instruction rests upon an unconstitutionally vague statute. *State v. Newton*, 929 N.W.2d 250, 254 (Iowa 2019).

Merits

No one enjoys the prerogative to employ an out-of-date statutory defense. So, even though Ellison claimed he was not asserting "stand your ground," the district court properly instructed on the use of reasonable force according to Iowa Code section 704.1 (2019). Likewise, the term "illegal activity"—in the statute and jury instructions—is not unconstitutionally vague.

A. The State must prove the defendant was not justified according to the law in effect at the time.

Though it has common-law roots, the Code governs self-defense. *State v. Gibbs*, 941 N.W.2d 888, 901 (Iowa 2020); *State v. Dunson*, 433 N.W.2d 676, 677 (Iowa 1988). Individuals may use "reasonable force" upon a "reasonable belie[f] that such force is

necessary to defend oneself or another from any actual or imminent used of unlawful force." Iowa Code § 704.3. The Code defines reasonable force. *Id.* § 704.1.

As part of that definition, the Legislature first adopted a "middle ground" between a "retreat to the wall" rule before a person could use that reasonable force and "on the other extreme, that one need never retreat when he can stand and defend himself." 4 John L. Yeager & Ronald L. Carlson, *Iowa Practice: Criminal Law and Procedure* § 82, p. 22 (1979). Iowa Code section 704.1 at the time provided,

> Reasonable force, including deadly force, may be used even if an alternative course of action is available if the alternative entails a risk to life or safety, or the life or safety of a third party, or requires one to abandon or retreat from one's dwelling or place of business or employment.

Iowa Code § 704.1 (2015).

In 2017, the Legislature modified this middle-ground rule. *State v. Lorenzo Baltazar*, 935 N.W.2d 862, 870 (Iowa 2019). The Legislature revised the rule to state: "A person who is not engaged in illegal activity has no duty to retreat from any place where the person is lawfully present before using force as specified in this chapter." 2017 Iowa Acts (87 G.A.) ch. 69, § 37 (codified at Iowa Code

§ 704.1(3)). Put another way, a person who is "engaged in illegal activity" has "the implied duty to retreat pursuant to the new stand-your-ground provision." *Lorenzo Baltazar*, 935 N.W.2d at 872.

The district court has a duty to instruct fully and fairly on the law regarding all issues raised by the evidence. Iowa R. Crim. P. 2.19(5)(f); Iowa R. Civ. P. 1.924; *State v. Stallings*, 541 N.W.2d 855, 857 (Iowa 1995). The Court reviews jury instructions "to decide if they are correct statements of the law and are supported by substantial evidence." *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996). "The district court has a duty to instruct fully and fairly on the law regarding all issues raised by the evidence." *Id.* The district court is not required to give an instruction unless the evidence supports it. *State v. Predka*, 555 N.W.2d 202, 214 (Iowa 1996). "As long as a requested instruction correctly states the law, has application to the case, and is not stated elsewhere in the instructions, the court must give the requested instruction." *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996).

In assessing Ellison's challenge, the court avoids a minute, technical, or hypercritical analysis. *State v. Jacoby*, 260 N.W.2d 828, 835 (Iowa 1977). No instruction to a jury has ever been drawn up

with such "perfect clearness and precision" that a lawyer "in the seclusion and quiet of his office with a dictionary at his elbow cannot extract some legal heresy of more or less startling character." *Henneman v. McCalla*, 148 N.W.2d 447, 546-47 (Iowa 1967).

Here, the court instructed on Ellison's claim that "he was justified in using reasonable force." Jury Instr. No. 27; App. 22. It instructed on the nature of reasonable force as defined in Iowa Code section 704.1. Furthermore, it made clear the "State must prove beyond a reasonable doubt that the defendant's use of force was not justified." *Id.*; App. 22; *State v. Shanahan*, 712 N.W.2d 121, 134 (Iowa 2006); *Stallings*, 541 N.W.2d at 857.

Then, the Court instructed that a "person who is not engaged in illegal activity has no duty to retreat from any place where the person is lawfully present before using force as described in these instructions." Jury Instr. No. 28; App. 23; *see* Iowa State Bar Ass'n, Iowa Crim. Jury Instr. No. 400.2 (2020). The defendant's use of force was not justified if the State proved any of the following were true:

> 1. The defendant did not have a reasonable belief that it was necessary to use force to prevent an injury or loss.

> 2. The defendant used unreasonable force under the circumstances.
>
> 3. The defendant was engaged in illegal activity in the place where he used force, he made no effort to retreat, and retreat was a reasonable alternative to using force.

Jury Instr. No. 29; App. 24; *see* Iowa State Bar Ass'n, Iowa Crim. Jury Instr. No. 400.3 (2020).

Ellison argues "that because he did not assert a stand your ground defense, the pre-amendment jury instructions should have been used." Appellant's Pr. Br. p. 29. Under those instructions (which did not include the term "illegal activity"), he believes the jury would have found his actions justified. *Id.* pp. 30–32. Several flaws mar this argument.

As an initial matter, "stand your ground," at least in Iowa, is more a slogan than a statement of law. *See* https://www.washingtonpost.com/news/post-nation/wp/2017/04/12/iowa-lawmakers-passed-the-states-most-expansive-gun-rights-bill-ever/ (reporting on criticism of House File 517's "Stand Your Ground" provision) (last accessed March 22, 2022). To an extent, Iowa has always had notion of "stand your ground" by virtue of its "Castle Doctrine." *See* https://legaldictionary.net/stand-your-ground-law/

("The meaning of Stand Your Ground Law is rooted in home defense. For this reason, another name for it is the Castle Doctrine...."') (last accessed March. 22, 2022); 4 Yeager & Carlson, *Iowa Practice: Criminal Law and Procedure* § 82, at p. 22 (noting Iowa's modified approach between "retreat to the wall" and never retreat). Thus, one must turn to section 704.1 itself to understand what Iowa's self-defense law requires. *See, e.g.*, *State v. Kehoe*, 804 N.W.2d 302, 312–13 (Iowa Ct. App. 2011) (observing statute, not title, defines elements of offense).

Ellison's preferred jury instruction did not exist in section 704.1 at the time of his crime. House File 517 amended Iowa Code section 704.1 (2015). 2017 Iowa Acts (87 G.A.) ch. 69, § 37. Iowa Code section 704.1(3) became effective July 1, 2017. Iowa Const. Art. III, § 26; *Sampson v. City of Cedar Falls*, 231 N.W.2d 609, 615 (Iowa 1975). The shooting occurred on July 2, 2020. Section 704.1(3) provided, "[a] person who is not engaged in an illegal activity has no duty to retreat from any place where the person is lawfully present." The instructions Ellison wanted were "outdated" based on the Legislature's removal of "alternative course of action" from the statute. *Lorenzo Baltazar*, 935 N.W.2d at 869.

It is true, of course, that the Legislature "changed—but did not eliminate—the implied duty to follow an alternative course of action." *Id.* at 870. Neither did it structure section 704.1(3) to relieve the State of the burden showing the defendant engaged in illegal activity and failed to retreat before using force. And a defendant cannot not unilaterally relieve the State of its burden. *See Old Chief v. United States*, 519 U.S. 172, 186–87 (1997) ("the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it."). Thus, claiming one is not asserting "stand your ground" does not alter the nature of the defense the State must disprove.

Moreover, the trial court adhered to the uniform instructions on justification, as it should. *See State v. Mitchell*, 568 N.W.2d 493, 501 (Iowa 1997) (observing trial courts should generally adhere to uniform instructions). And the Supreme Court is "slow to disapprove of the uniform instructions." *State v. Ambrose*, 861 N.W.2d 550, 560 (Iowa 2015). This instruction was a correct statement of the law.

Finally, disclaiming "stand your ground" does Ellison little good. In essence, he resorts to the pre-2017 duty to retreat. Under

his proposed instruction, the State would prevail if it showed *any* "alternative course of action was available" to him. *See* Appellant's Pr. Br. p. 30. Several alternatives come to mind, but two stand out: break it off and say he did not wish to fight. Instead, according to Vanessa, Ellison first said, "You funny. What's up? What you been on?" and then nothing. Tr. Vol. 2, p. 137, l. 106; Tr. Vol. 5, p. 142, ll. 20–23. Daisy testified her brother was *not* silent, but rather told Smothers, "get back." Tr. Vol. 5, 98, l. 2–p. 99, l. 1. Yet, Ellison hit Smothers again after Daisy separated them. Given Ellison kept hitting Smothers, the State's proof was better that Ellison chose to continue the fight.

Ellison argues that Smothers was the aggressor. Appellant's Pr. Br. pp. 30–31. This is beside the point under the instructions he proposes. The jury need not have agreed with Ellison. It enjoys the prerogative, to believe all, part, or none of a witness's testimony. *State v. McPhillips*, 580 N.W.2d 748, 753 (Iowa 1998); *State v. Phanhsouvanh*, 494 N.W.2d 219, 223 (Iowa 1992); *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). The evidence does not necessarily support Ellison's grim view of the event. After all, he was the first to belittle Smothers. Tr. Vol. 5, p. 142, ll. 20–23. Ellison shoved

Smothers first, put his drink away, then punched Smothers. Def. Ex. 1 5:57:37–:47. After Daisy appears to have broken up the fight, Ellison starts it again with a punch. *Id.* 5:57:55–:58.

In any case, the instructions here made the State's path narrower. It had to prove *retreat* was a reasonable alternative and Ellison made no effort toward it. Jury Instr. No. 29; App. 24. In this, Ellison's best point still fails to show the instructions were prejudicial. It is true that at the time he shot Smothers, there were cars to either side, and there was a road behind him. But the road was no obstacle to Daisy and Delano Deshazer. Def. Ex. 1 5:58:10. And he followed that path after shooting Smothers. So, Ellison could have left without resort to deadly force.

Ellison's proposed instruction was out of date, lacked legal support, and offered no better than the instructions the court gave.

B. Going "armed with any dangerous weapon with intent" adequately describes the illegal activity triggering a duty to retreat.

Ellison contends that Jury Instruction 29 was vague insofar as, in accordance with Iowa Code section 704.1(3), it employed the phrase "illegal activity." To the contrary, the court properly specified that with respect to Jury Instruction 29, "illegal activity" meant "to go

armed with any dangerous weapon with the intent to use that weapon against another without justification." Jury Instr. Nos. 29, 29A; App. 24, 25. Neither the phrase nor the instructions the court employed violated principles of due process.

Article I, section 9 of the Iowa Constitution and the Fourteenth Amendment to the United States Constitution prohibit the enforcement of vague statutes. A statute is impermissibly vague where it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill v. Colorado*, 530 U.S. 730, 732 (2000).

Ellison did not argue below and does not argue on appeal that one constitutional provision requires a different analysis or result than the other. Iowa R. App. P. 6.903(2)(g)(3) (stating failure to cite authority in support of an issue may be deemed a waiver of that issue); *King v. State*, 797 N.W.2d 565, 571 (Iowa 2011); *see State v. Piper*, 663 N.W.2d 894, 913-14 (Iowa 2003) (overruled on other grounds by *State v. Hanes*, 790 N.W.2d 545, 550 (Iowa 2010) and declining to undertake party's research and advocacy). The Court should, therefore, employ established due process principles and apply substantive federal standards. *Nguyen v. State*, 878 N.W.2d

744, 755 (Iowa 2016); *State v. Taylor*, 830 N.W.2d 288, 291–92 (Iowa 2013); *State v. Nail*, 743 N.W.2d 535, 539 (Iowa 2007). Mere citation to an applicable state constitutional provision does not generally warrant an independent state constitutional analysis. *State v. Lowe*, 812 N.W.2d 554, 566 (Iowa 2012).

When considering vagueness challenges, Iowa courts apply an "avoidance theory"—the Court presumes the statute is constitutional and utilizes "any reasonable construction" to uphold it. *Nail*, 743 N.W.2d at 539–40. This requires a defendant challenging the vagueness of a statute to "refute 'every reasonable basis' upon which a statute might be upheld." *Id.* (quoting *State v. Seering*, 701 N.W.2d 655, 661 (Iowa 2005)). Vagueness challenges rise or fall on the pertinent case law, not the subjective expectations of a particular defendant. *See, e.g.*, *Kolender v. Lawson*, 461 U.S. 352, 370 (1983).

Ellison preserved an "as applied" challenge and sticks to it on appeal. Appellant's Pr. Br. p. 35; Tr. Vol. 6, 11, ll. 9–p. 23, l. 25. When considering a "vague-as-applied" challenge, the Court considers whether a defendant's conduct "clearly falls 'within the proscription of the statute under any construction.'" *State v. Musser*, 721 N.W.2d 734, 745 (Iowa 2006). A statute satisfies due process if

prior judicial decisions, statutes, the dictionary, or other generally accepted usage reasonably describe the prohibited conduct. *State v. Gonzalez*, 718 N.W.2d 304, 310 (Iowa 2006).

Ellison offers several points on "illegal activity." He suggests the Court should think of section 704.1(3) like felony murder, requiring the "illegal activity" to be independent of the act causing death. Appellant's Pr. Br. pp. 36–38. But the illegal activity should also not be too independent of the act causing death. *Id.* p. 37. Neither, if it is independent of the act causing death, should it "intertwine[]" with the act causing death. *Id.* p. 38. He proposes also that the statute "does not say a person is prohibited from asserting a justification defense," giving the example of a retreating shoplifter who kills a violent shopkeeper with a single punch. *Id.* pp. 39–40.

But this is an "as-applied" challenge. Ellison's retreating-shoplifter example informs a facial challenge. He was not a shoplifter. Rather, the pertinent "illegal activity" was going armed with a dangerous weapon with intent to use it without justification. *See* Iowa Code § 708.8; *see* Jury Instr. No. 29A; App. 25. Inasmuch as that crime is well-established, the vagueness concern diminishes.

Ellison's complaint that the illegal activity here was "intertwined" with the shooting perplexes. In *Lorenzo Baltazar*, the defendant argued "the implied duty to retreat involves only those activities germane to the use of force." 935 N.W.2d at 871. That is, the "illegal activity" must prove germane to the use of force. One would think a defendant should *prefer* the State carry the burden to show the "illegal activity" intertwined with the use of force.

Indeed, this is very much like what disqualified Lorenzo Baltazar from asserting justification. There, the Court concluded that the possession of a handgun "directly related to the shooting death," disqualifying him from asserting justification. *Id.*

Turning more closely to this challenge, going armed with intent requires possession of a dangerous weapon with specific intent to use it against another and movement from one place to another. Iowa State Bar Ass'n, Iowa Crim. Jury Instr. No. 800.15; *State v. Pearson*, 804 N.W.2d 260, 265 n.1 (Iowa 2011); *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Movement of even a few feet suffices. *See Pearson*, 804 N.W.2d at 265 n.1 (movement across kitchen).

Ellison had a weapon. He went from the cars to the steps of the apartment, and back to the cars. The suddenness and his

continuation of the fight, the jury might conclude, reflected his intent to use the gun if things got out of hand. Ellison had the confidence of one who brings a gun to a fistfight. That is, he went armed with the intent to use a dangerous weapon without justification. He was engaged in "illegal activity" when he fired on Smothers. More colloquially, section 704.1(3) governs because Ellison was in the wrong when he pulled gun.

Because there was no error, it is not necessary to dwell on the constitutional harmlessness of the jury instruction. But a few points deserve mention. As noted above, removing "illegal activity" would only shift the focus to the State's proof of Ellison's failure to retreat. Jury Instr. No. 29; App. 24. Ellison's preferred instruction would allow the State to prevail with proof of *any* "alternative course of action." *See* Appellant's Pr. Br. p. 30. The victim's statement suggests one. Instead of the alleged, "get back," Ellison could have said, "Stop. I'm sorry. Let's not fight in front of our children." Instead, when Smothers asked if Ellison would shoot him in front of his daughter, Ellison did.

The district court committed no error.

II. The right against self-incrimination does not prevent a jury from considering a person's duty to neither conceal nor destroy physical evidence.

Preservation of Error and Standard of Review

The State does not contest error preservation or the nature of review. Iowa R. App. P. 6.903(3); *see* Tr. Vol. 6, p. 7, l. 19–p. 8, l. 22, p. 23, l. 22–p. 24, l. 16, p. 25, l. 14–p. 26, l. 8.

Merits

The protection against self-incrimination concerns testimonial statements. It does not extend so far as the duty to refrain from destroying physical evidence. As such, Iowa Code section 704.2B(2) is constitutional. And the district court could instruct the jury that it might consider the duty to not conceal or destroy evidence as it relates to the justification defense.

The United States Constitution protects a person from being "compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. The Iowa Constitution contains no similar, "express provision prohibiting self-incrimination." *State v. Benson*, 230 N.W. 1168, 1171–72, 300 N.W. 275, 277 (Iowa 1941). The Iowa Supreme Court recently stated the Due Process Clause in Article I,

section 9 implies such a right. *Gibbs*, 941 N.W.2d at 906–07 (citing *State v. Height*, 117 Iowa 650, 659–61, 91 N.W. 935, 938 (1902)).[1]

Ellison did not specify the source of his self-incrimination claim, as he acknowledges on appeal. Appellant's Pr. Br. p. 43. Nor does he suggest now that Iowa's Due Process Clause requires an analysis or result different from that under the Fifth Amendment. As such, the Court should employ established principles. *See* Iowa R. App. P. 6.903(2)(g)(3) (stating failure to cite authority in support of an issue may be deemed a waiver of that issue); *Nguyen*, 878 N.W.2d at 755 (Iowa 2016) (employing established federal principles in the absence of a reason to do otherwise); *Piper*, 663 N.W.2d at 913-14 (declining to undertake party's research and advocacy). Mere citation to an applicable state constitutional provision does not generally warrant an independent state constitutional analysis. *Lowe*, 812 N.W.2d at 566.

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[1] To be precise, *Height* expressed a belief that were there "no such specific provision anywhere, the same result *would* have been reached under the general guaranty of due process of law." 91 N.W. at 938 (emphasis added). But "[w]e have, however, in our state constitution an express guaranty against any proceeding ... such as that resorted to by the officers in this case.... It is provided by article 1, § 8," the search and seizure clause. *Id.* Thus, *Height* is, more accurately, the source of a right against unreasonable searches and seizures.

Courts now understand that the right against self-incrimination relates to compelled testimony, rather than physical evidence. *See Fisher v. United States*, 425 U.S. 391, 407–09 (1976) (stating the "express or implicit declarations" in *Boyd v. United States*, 116 U.S. 616 (1886) "have not stood the test of time. . . . It is also clear that the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a Testimonial Communication that is incriminating"); *see also Schmerber v. California*, 384 U.S. 757, 760–65 (1967) (blood tests are non-testimonial and do not violate the Fifth Amendment right against self-incrimination).

At the risk of gilding the lily, state courts considering their own constitutions have concluded that real evidence—such as a blood test—does not trigger right-to-silence protections. *See, e.g.*, *Hill v. State*, 366 So.2d 318, 322 (Ala. 1979); *State v. White*, 426 P.2d 796, 797–98 (Az. 1967); *Cox v. People*, 735 P.2d 153, 156–57 (Colo. 1987); *State v. Durrant*, 188 A.2d 526, 528 (Del. 1963); *Washington v. State*, 653 So.2d 362, 364–65 (Fl. 1994); *People v. Rolfingsmeyer*, 461 N.E.2d 410, 412 (Ill. 1984); *Standish v. Dep't of Rev.*, 683 P.2d

1276, 1281 (Kans. 1984); *Newman v. Stinson*, 489 S.W.2d 826, 829 (Ky. 1972); *see also State v. Clark*, 851 So.2d 1055, 1081 (La. 2003) (rejecting claim that court-order to defendant to furnish blood and hair samples violated privilege against self-incrimination, such procedures constitute a search under article I, § 5 of the Louisiana Constitution); *Com. v. Brennan*, 438 N.E.2d 60, 64, 66–67 (Mass. 1982) ("We conclude that art. 12 of the Declaration of Rights applies only to evidence of a testimonial or communicative nature, and that neither a breathalyzer test nor field sobriety tests are communicative to the extent necessary to evoke the privilege."); *State v. Swayze*, 247 N.W.2d 440, 442–43 (Neb. 1976); *State v. Fisher*, 163 N.E.3d 628, 631–32 (Ohio Ct. App. 2020) ("While some states have interpreted the self-incrimination clauses in their own constitutions or the common law to protect affirmative acts such as the refusal to consent to blood or urine tests, Ohio has not done so."); *State v. Thomason*, 538 P.2d 1080, 1081–87 (Okla. Crim. App. 1975); *Com. v. Moss*, 334 A.2d 777, 779–80 (Pa. Super. Ct. 1975); *State v. Wright*, 691 S.W.2d 564, 566 (Tenn. Crim. App. 1984); *Olson v. State*, 484 S.W.2d 756, 770–72 (Tex. Crim. App. 1969); *Am. Fork City v. Crosgrove*, 701 P.2d 1069, 1075 (Utah 1985); *State v. Picknell*, 454 A.2d 711, 716 (Vt. 1982)

("[T]he overwhelming majority of state courts which have confronted the issue have held that the difference in phraseology neither enlarges nor narrows the scope of the privilege."); *Farmer v. Commonwealth*, 404 S.E.2d 371, 372 (Va. Ct. App. 1991); *State v. Foster*, 589 P.2d 789, 794 (Wash. 1979). *But see Elliot v. State*, 824 S.E.2d 265, 279–81 (Ga. 2019).

That is, statements might implicate self-incrimination protections. But not always. The State may both criminalize and comment on some statements to police. *See* Iowa Code § 719.3(1) (punishing one who "makes available false evidence or furnishes false information with the intent that it be used in the trial of that case"); *State v. Tate*, S.Ct. No. 11-1671, 2013 WL 261248, *5 (Iowa Ct. App. Jan. 24, 2013) (citing *State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993) and noting a "jury may consider false exculpatory statements as circumstantial evidence of guilt."). A prosecutor may comment on the defendant's failure to notify the authorities as part of evaluating her self-defense claim. *Shanahan*, 712 N.W.2d at 138. And some laws that compel statements promote legitimate regulatory purposes and therefore do not violate the right to remain silent. *Gibbs*, 941 N.W.2d

at 899 (citing examples such as admissions for sex offender treatment and motorist identification).

But without a valid regulatory justification, a statute that requires a person to notify police of some fact generally violates the right against self-incrimination. That is why, for example, the Iowa Supreme Court invalidated a jury instruction springing from Iowa Code section 704.2B(1). This Code section required one who used deadly force to "notify or cause to notify a law enforcement agency about the person's used of deadly force. …" Iowa Code § 704.2B(1). *Gibbs* held a jury instruction paraphrasing section 704.2B(1) violated a defendant's Fifth Amendment right against self-incrimination. 914 N.W.2d at 899–900.

But this case does not concern compelled statements. It concerns conduct or physical evidence. Section 704.2B(2) states,

> The person using deadly force shall not intentionally destroy, alter, conceal, or disguise physical evidence relating to the person's use of deadly force, and the person shall not intentionally intimidate witnesses into refusing to cooperate with any investigation relating to the use of such deadly force or induce another person to alter testimony about the use of such deadly force.

Iowa Code § 704.2B(2).

Authorities stretching back to *Schmerber* and *Fisher* show the right to silence does not apply to physical evidence. That provision has little to do with non-testimonial evidence such as blood samples, fingerprints, handwriting exemplars, demonstrations, or displays of physical characteristics. *See*, *e.g.*, *State v. Suddeth*, 306 N.W. 786, 787–88 (Iowa 1981) (concerning demonstrative evidence); *State v. Rauhauser*, 272 N.W.2d 432, 436 (Iowa 1978) ("The Fifth Amendment privilege against self-incrimination extends only to evidence of a testimonial nature. It does not protect an accused from the compulsory display of measurable or identifiable physical characteristics."); *State v. Heisdorffer*, 164 N.W.2d 173, 175 (Iowa 1969) ("The observation of defendant during [field sobriety] tests makes his actions real or physical evidence against himself, rather than testimonial evidence. Such tests are more nearly akin to the taking of blood samples, fingerprints or handwriting exemplars. Requiring defendant to furnish such evidence does not violate his privilege against self-incrimination.") (abrogated on other grounds in *State v. Vietor*, 261 N.W.2d 828, 832 (Iowa 1978)).

Likewise, the right to remain silent does not apply to conduct. Therefore, for instance, the State may impose negative consequences

on the defendant's failure to provide a blood sample. *See*, *e.g.*, *State v. Johnson*, 135 N.W.2d 518, 525 (Iowa 1965) (in blood sample case stating "[a]uthorities generally recognize a marked distinction between testimonial and nontestimonial evidence"); *Aguilar Olvera v. State*, No. 18–0930, 2019 WL 3943995, *4–5 (Iowa Ct. App. Aug. 21, 2019).

Indeed, the State may punish criminally one who "destroys, alters, conceals, or disguises physical evidence which would be admissible in the trial of another for a public offense[,]" if the person does so with the intent to prevent an apprehension or prosecution. Iowa Code § 719.3(1).

Iowa Code section 704.2B(2) does not criminally punish the destruction or concealment of evidence. That might only occur if the person does so to prevent an apprehension or prosecution. *See* Iowa Code § 719.3(1). But it does impose a duty. Iowa Code § 4.1(3)(*a*).

So, the next question is whether and how a court might instruct a jury on the duty to refrain from destroying or concealing evidence. *See Gibbs*, 941 N.W.2d at 897, n.2 (finding section 704.2B(1)'s duty to inform law enforcement violated the right to remain silent, but not deciding whether section 704.2B(2)'s physical evidence provision

violated the right to remain silent). In general, courts may instruct on behavior germane to the issues. For example, where relevant, a court may instruct on a defendant's flight from police or to avoid prosecution. *State v. Brokaw*, 342 N.W.2d 864, 865 (Iowa 1984). A court may instruct on a defendant's refusal to provide a breath or blood sample in operating while intoxicated cases, "because the refusal is conduct that shows a consciousness of guilt in the same manner as destruction of evidence, flight, or threats against witnesses." *State v. Kilby*, 961 N.W.2d 374, 377 n.4 (Iowa 2021) (quoting *Cox*, 735 P.2d at 158 (collecting cases)).

Turning more closely to the issue here, the court instructed the jury that,

> [a]fter using deadly force, the defendant had the duty to not intentionally destroy, alter, conceal, or disguise physical evidence relating to the defendant's use of deadly force. You may consider whether the defendant complied with this duty when you decide whether deadly force was justified.

Jury Instr. No. 32; App. 26.

The first sentence of the instruction correctly states the law. Iowa Code § 704.2B(2); *see* Iowa State Bar Ass'n, Iowa Crim. Jury Instr. No. 400.7 (2020). The entirety of the instruction does not go

so far as to direct the jury to find Ellison concealed or destroyed evidence. Neither did it direct the jury to draw an inference. It did not direct the jury to anything Ellison should have said.

Instead, the instruction relates to conduct and physical evidence, and even then, merely to allow the jury to consider the duty as it related to the justification defense. In all, the district court properly instructed the jury.

Because the instruction related to non-testimonial conduct, it is not necessary to dwell at length on the harmlessness of the instruction. But a few points merit discussion. Ellison asserts Smothers was the aggressor when the video shows he was not. Smothers had assaulted Vanessa in the past, but the video confirms a gleefulness at seeing his daughter and her brother. Testimony by disinterested witnesses such as Rogers that Smothers could appear threatening or aggressive related to events in the past. It is not until Ellison confronts Smothers that things took a darker turn. And, Ellison, the video shows, was never so much backing away as continuing the fight or attempting to gain space to draw his weapon.

Ellison argues Smothers intended a confrontation with him, or at least the meeting was intentional. Appellant's Pr. Br. p. 51. He

notes that Vanessa "was at KFC" while Vurciaga had left a KFC earlier that morning. *Id.* There was, of course, no testimony that the two ever crossed paths. But even if Smothers knew that Vanessa might be in town, there was no evidence of any bad blood between Smothers and Ellison. Tr. Vol. 5, p. 150, ll. 12–24.

Ellison sees blemishes in Rogers' testimony over his work schedule, what kind of alcoholic beverage he wanted to buy, and the number of shots he observed. Appellant's Pr. Br. p. 51. The relevance of this to a fight that began while he was in the car is difficult to see. And, as to whether he saw or did not see two shots, two unrelated witnesses testified there were two.

Ellison also invests meaning in Vurciaga's earlier statement to Officer Rosenthal that Smother's said, "Oh, shit, that's it." Appellant's Pr. Br. p. 52. Assuming Vurciaga did not misspeak after the jarring events of the evening, "it" lacks any tether. Ellison believes "it" refers to Vanessa, a hoped-for confrontation, and knowledge of a no-contact order violation. *Id.* But the record contains no testimony what "it" meant.

Finally, Ellison argues that Instruction 32 prejudiced him because there was no evidence he destroyed or concealed the weapon

and had no duty to reveal it by virtue of his right against self-incrimination. *Id.* For one thing, the instruction allowed the jury to consider whether he concealed evidence. For another, the jury could conclude, as he suggests, that he did not conceal or destroy the weapon. And lastly, the instruction does not say Ellison had duty to reveal physical evidence; only not to "destroy, alter, conceal, or disguise" evidence.

The district court committed no error to give instruction 32.

CONCLUSION

The Court should affirm the judgment.

REQUEST FOR NONORAL SUBMISSION

The State agrees this matter does not require oral submission.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: April 5, 2022

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