IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 19-1919

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TYJUAN LEVELL TUCKER,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY,
HONORABLE WILLIAM P. KELLY

DEFENDANT-APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE IOWA COURT OF APPEALS DECISION FILED JANUARY 12, 2022

Andrew Dunn
Jessica Donels
Parrish Kruidenier Dunn
Gentry Brown Bergmann &
Messamer, L.L.P.
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: adunn@parrishlaw.com
ATTORNEYS FOR APPELLANT

Louis S. Sloven
Assistant Attorney General
Office of the Attorney General
Hoover State Office Building,
2nd Floor
Des Moines, Iowa 50319
Telephone: (515) 281-5976
Facsimile: (515) 281-8894
Email:
louis.sloven@ag.iowa.gov
ATTORNEY FOR APPELLEE

QUESTIONS PRESENTED

1. Was the evidence sufficient to support the jury's finding of guilt?

2. Whether the district court erred in determining that the underrepresentation of African-Americans in the jury pool was not due to "systemic exclusion"?

3. Whether the district court erred in excluding Tucker's settlement documents?

4. Whether the district court erred in excluding the unedited version of the body cam video?

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STATEMENT SUPPORTING FURTHER REVIEW

Further review is warranted under Iowa R. App. P. 6.1103(1)(b). For issue one, the court of appeals has entered a decision that conflicts with other decisions of this court. For issue two, this question raises issues of "broad public importance" that the Iowa Supreme Court should determine, namely, what burden is appropriate to place on indigent defendants in proving Iowa's systemic exclusion of African-

Americans from the jury pool. Issues three and four involve issues of a defendant's ability to put on a defense, and therefore implicate important constitutional rights.

BRIEF

I. Background Facts & Proceedings

Tucker was charged by trial information with one count of possession of marijuana with the intent to deliver, in violation of Iowa Code § 124.401(1)(d), a Class D Felony. (App. p. 4). Because this was Tucker's third such offense, the lesser-included offense of possession of marijuana was also a Class D Felony under Iowa Code § 124.401(5). (App. p. 4). On June 2, 2019, an amended TI was filed alleging that Tucker was a habitual offender under Iowa Code §§ 902.87 and 902.9(1)(c). (App. p. 9).

A. Jury Selection

Tucker went to trial. The case initially came to trial on June 3, 2019. However, before the jury could be selected, Tucker's counsel objected to the composition of the jury pool under *State v. Plain*, 898 N.W.2d 801 (Iowa 2017) and *State v. Lilly*, 930 N.W.2d 293 (Iowa 2019). (Tr. Jury Trial Cont., June

3, 2019, 19:20-20:10). Tucker is African-American. (*Id.* at 29:15-18). On June 3, 2019, the percentage of African Americans on the jury pool was 1.27 standard deviations below the percentage of African Americans overall in Polk County. (*Id.* at 22:17-23:13). The court granted a continuance to permit defense counsel to obtain evidence as to the third prong under *Lilly*: whether the disparity between the expected percentage and the actual number of African Americans on the jury was a result of system exclusion of African Americans from the jury pool. (App. p. 12).

When the parties reconvened on August 18, 2019, Tucker's counsel again objected to the composition of the jury. (TT1 22:19-35:3). The jury pool was again "more than one standard deviation below the average level, given the prevalence of African-Americans among Polk County residents who were eligible for jury service." (*See* Op. at 4, noting this prong is undisputed). However, Tucker did not have an expert available to provide evidence as to the third prong under *Lilly*. His trial counsel explained:

> MR. MACRO: Judge, that is what's in – another inherent problem with the Supreme Court's handling of this issue. I guess I should say that with all due respect because I don't know what a jury pool is going to look like until I get here.
>
> The reality of this, I do not have the ability to hire experts under a court-appointed case until I have a basis to do it. So it causes some inherent, practical problems for an indigent defendant.
>
> With that said, Judge, I am prepared to make an argument solely based upon the fact that we use two sources for our jury pool. We use – voter registration and driver's license, I think, are the two that we use in Iowa.
>
> The problem with only using two of those is the statistical analysis shows that minorities sign up for licenses at a lower rate and also register to vote at a lower rate. So we do have a systematic problem.

(TT1 27:15-28:8). Counsel also referred the court to Paula Hannaford-Agor's article[1] analyzing the shortcomings in Iowa's jury list compilation methods and suggested methods for improving the representativeness of Iowa's jury lists. (*Id.* at 28:9-22). The court concluded Tucker failed to meet his burden under *Lilly*. (*Id.*at 33:10-35:3). As jury selection proceeded, the

[1] Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims must be Expanded*, 59 DRAKE L.R. 761 (2011).

sole African-American juror assigned to Tucker's case was excused for cause (over Tucker's objection), and an all-white jury was seated. (TT1 77:25-91:7).

B. Evidence at Trial

The arresting officers, Brian Joseph and Ryan Garrett, testified that they were working on the "Summer Enforcement Team," or "SET," when they encountered Tucker. (TT2 27:10-11). Garrett noticed Tucker sitting in his car in the parking lot of a 24-hour Burger King on MLK Drive and Hickman Ave, between 10:30 and 10:42 p.m. at night on July 28, 2018. (*Id.* at 47:21-48:12, 66:13-16). The officers observed an exchange between Tucker and an unidentified woman next to his car. (*Id.* at 48:16-17). The officers weren't able to tell who was buying or who was selling, or event what was exchanged, just that there was a "hand in the window." (*Id.* at 59:5-18).

The officers followed Tucker's vehicle out of the parking lot after watching it cut off a black SUV. (*Id.* at 49:3-18, 50:2-9). Eventually, they pulled him over. (*Id.* at 50:7-15). During a search of Tucker's person and vehicle, they found an ounce of

marijuana, $650 in cash, and a flip phone. (*Id.* at 57:25-58:6; 61:4-8, 62:21-25; *see also* State's Ex. 3, 4).

An edited version of Garrett's bodycam video was admitted as State's Ex. 2. (TT2 53:25-54:12, Ex. 2). Although the State described the recording as "edited down for brevity," the tape was actually edited to exclude statements referring to the fact that Tucker was previously shot by a law enforcement officer in an unrelated incident. (TT3 12:25-13:8). The portions that were omitted included the statements: "He's the one that Johnetta shot," and officers discussing Tucker's prior run-ins with law enforcement. (*Compare* State's Ex. 2, App. p. 29 *with* Court's Ex. 4, unedited body camera footage).

The State used exhibit 2 to argue that Tucker reacted badly to the police because he was distributing, rather than just purchasing, marijuana. In an offer of proof, Tucker explained that his dramatic reaction to the police was based on the prior shooting, and not his illicit activities:

> To answer your question, Mr. Tucker believes it is relevant to show why he's being stopped, the problems he has with law enforcement, and things of that nature.

> So it – normally I would suggest that we don't play those types of things in front of a jury because I'm concerned about the prejudicial effect on them.
>
> And in essence, Judge, normally the defendant says to a the Court: Judge, I don't want them to know I got shot by a police officer. They could take that the wrong way, that I'm a bad person. Mr. Tucker doesn't believe that. He believes it would be helpful for his case because he wants them to know the entire story. And that's what he wants.
>
> And I think it's his desire to let the jury see what occurred, start to finish, and let them decide if he committed a crime. That's his intention. So we do think it's relevant. It's Mr. Tucker's intention to have it played in its entirety.

(TT3 6:6-25). Tucker also argued for admission under Iowa R. Evid. 5.106(a), but the court denied permission to show the jury the entire video. (*Id.* at 17:15-22).

Garrett testified that there was nothing unlawful about Tucker being parked at the Burger King, as that was a 24-hours location. (TT2 66:13-67:3). Garrett testified that when Tucker drove away and he pulled Tucker over and searched him, his first thought was that Tucker had *purchased* the marijuana, not that he was distributing it. In fact, he was recorded stating "I'm pretty sure he just bought it." (*Id.* at 68:19-69:6). The amount of marijuana found on Tucker was consistent with personal

use. (*Id.* at 69:7-10; 69:25-70:5, 165:21-24). The most common indicia of distribution was not present upon searching Tucker's car: there was no drug packaging of any kind, no scales, no drug notes. (*Id.* at 70:13-23, 71:6-10, 71:24-72:2). Finally, Tucker's cell phone was seized and examined, and there was no evidence that he was using the phone to arrange sales of marijuana. (*Id.* at 163:3-11).

Regarding the $650 found in the console, this was from a recent legal settlement, and not the sale of marijuana. Tucker submitted evidence that he had received a $6,800 settlement, leaving him with $3,923.68 after his attorneys' fees and medical bills were paid. (App. p. 112). However, Tucker was prevented from putting this documentary evidence before the jury as a discovery sanction. (TT2 15:13-15). As a result, he had to take the stand himself to explain the source of the cash. (*See, e.g.* TT2 115:4-12 (the court: "I think Mr. Macro makes a good point in that Mr. Tucker is allowed to present his defense. There's nothing that prohibits Mr. Tucker from testifying about the settlement. But to submit those documents that were not complied with under a court order or the rules would appear to

be – it would impact our whole process of authentication, identification, and preparation that goes into these cases."), TT3 44:3-47:11 (Tucker's testimony)).

Ultimately, the jury found Tucker guilty as charged. Judgment entered on November 11, 2019, and this appeal followed.

II. The Evidence was Insufficient to Convict Tucker of Possession with Intent to Distribute.

The Court of Appeals erred in finding there was substantial evidence to support Tucker's conviction. On review for sufficiency of the evidence, a verdict will be upheld

> if substantial evidence supports it. Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. Substantial evidence must do more than raise suspicion or speculation. We consider all record evidence, not just the evidence supporting guilt, when we make sufficiency of the evidence determinations. However, in making such determinations, we also view the evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably by deduced from the record evidence.

State v. Williams, 695 N.W.2d 32, 27 (Iowa 2005) (citation omitted).

Tucker was found possessing a little under one ounce of marijuana, and $650 cash. When officers first observed Tucker, they believed he was purchasing, rather than selling, marijuana. One ounce of marijuana is consistent with personal use. The marijuana was wrapped in one package, rather than separate packages for resale. *See, e.g. State v. Grant*, 722 N.W.2d 645, 648 (Iowa 2006) (evidence was sufficient to show intent to distribute where a personal use quantity of methamphetamine had been packaged in smaller baggies for apparent redistribution). The state's law enforcement witnesses agreed that typical indicia of distribution was missing in this case: there were no scales, no wrappers, no packaging, no drug notes or ledgers, and no communication on Tucker's cell phone arranging sales. The only evidence consistent with an intent to distribute was the $650 cash, but Tucker had a reasonable explanation for it. *C.f. State v. Adams*, 554 N.W.2d 686, 694 (Iowa 1996) (large amounts of *unexplained* cash are consistent with intent to distribute).

While all reasonable inferences must be drawn in favor of the state, the presence of cash and a user quantity of marijuana

does no more than raise a suspicion of intent to distribute. Reasonable inferences cannot be used to paper over massive gaps in the state's case. Further review should be granted so that the verdict can be reversed, and the case dismissed.

III. The District Court Erred in Finding that Tucker Did Not Prove Systemic Exclusion of African-Americans from the Jury Pool

The Court of Appeals erred in rejecting Tucker's jury-pool claim. Although Tucker did not put forth expert evidence, he met the requirements of *Lilly* and *Plain*.

"The Sixth Amendment [and Article I, § 10] right to an impartial jury entitles the criminally accused to a jury drawn from a fair cross-section of the community." *Lilly*, 930 N.W.2d at 299. A defendant can establish a fair cross-section violation by demonstrating:

> (1) That the group alleged to be excluded is a "distinctive" group in the community: (2) that the representation of this group in venires form which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Plain, 898 N.W.2d at 822 (citing *Duren v. Missouri*, 439 U.S. 357, 364 (1979)). African Americans are a distinctive group in the community. Under the test established in *Lilly*, the jury pool form which Tucker's jury panel was drawn did not reasonably represent the proportion of African Americans in Polk County. Under Article I, § 10,[2] Tucker made it to the third step of the analysis under *Lilly*, and that is the only step at issue in this appeal.

Under the "systematic exclusion" prong, the defendant must demonstrate that disparate representation of the distinctive group in the jury pool is a result of the court administration's jury management practices. *Lilly*, 930 N.W.2d at 307. Specifically: "run-of-the-mill jury management practices such as the updating of address lists, the granting of excuses, and the enforcement of jury summonses can support a systematic exclusion claim where the evidence shows one or

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[2] In *State v. Veal*, the Iowa Supreme Court noted that for claims brought exclusively under the Sixth Amendment, a greater standard deviation is needed before a defendant move on to step three of the *Duren* analysis. 930 N.W.2d 319, 328 (Iowa 2019). In light of *Veal*, Tucker is advancing a claim solely under the Iowa Constitution.

more of those practices have produced underrepresentation of a minority group." *Id.* at 308. Relying on the Hannaford-Agor article, Tucker put forth the following evidence of "systematic exclusion":

- Iowa uses two sources – voter registration and driver's licenses – to form the jury pool. (TT1 27:25-28:4).
- Minorities sign up for driver's licenses and register to vote at a lower rate than non-minorities. (*Id.* at 28:5-8).
- The Iowa Supreme Court has held that jury management practices – such as using only the above-two sources to form the jury pool – can amount to systematic exclusion for the purposes of Art. I, § 10 of the Iowa constitution. (*Id.* at 28:9-15, discussing the Iowa Supreme Court's adoption of Hannaford-Agor's argument that such jury management practices can result in systematic exclusion).
- Hannafor-Agor recommended looking at more sources to develop the jury pool list, including unemployment data, worker's compensation data, and other lists where lower income and minority names are more likely to appear. (*Id.* at 28:16-22).

This evidence met the standard put forth in *Lilly*. Tucker identified a "specific practice" that "leads to systematic underrepresentation of a distinctive group." *Lilly*, 930 N.W.2d at 308. If African Americans are less likely to be on the only two

lists that Polk County uses to form its jury pool, then African Americans are less likely to be in the jury pool. Alternative practices, such as using other data sources, can increase the likelihood that African Americans will appear on the jury pool.

Tucker's Article I, § 10 right to be tried by a jury drawn from a fair cross-section of the community was violated. Further review should be granted so that the conviction can be vacated, and the matter remanded for a new trial. *Lilly*, 930 N.W.2d at 308.

IV. The District Court Erred in Excluding Tucker's Settlement Documents

The Court of Appeals erred in finding that it was within the district court's discretion to exclude the settlement documents as a discovery sanction. Although Iowa R. Crim. P. 2.14(6)(c) provides that the court may "prohibit the party from introducing any evidence not disclosed," exclusion was not an appropriate sanction in this case because the documents were critical to rebutting the state's case.

First, the evidence – Court Ex. 3, a letter demonstrating the amount and source of the settlement – was relevant.

Evidence is relevant if it tends to make a fact in issue more or less likely. Iowa R. Evid. 5.401. All relevant evidence is admissible, unless excluded by another rule or statute. Iowa R. Evid. 5.401, 5.402. The state claimed that the cash in Tucker's car represented marijuana proceeds, indicating his intent to distribute rather than to merely possess the marijuana. The settlement letter was relevant because it credibly demonstrated a legitimate source for the cash.

The evidence was also reliable. The letter was printed on letterhead from an attorney's office in Des Moines, Iowa. (App. p. 112). It described the amount of the settlement, the payor, and the amounts of the settlement retained in payment of fees by Tucker's personal injury attorneys. (App. p. 112). Attached were various invoices explaining the source and division of the settlement. (App. p. 114-119). If given the opportunity, counsel would have been able to lay the foundation that the exhibit was a business record, of the type normally used for settling a client's account with a law firm after a personal injury settlement. Iowa R. Evid. 5.803(6). Tucker could have testified on the preliminary foundation issues without waiving his right

to testify or not testify under the Fifth Amendment. *See* Iowa R. Evid. 5.104(a) ("the court must decide any preliminary question about whether . . . evidence is admissible"); 5.104(d) ("By testifying on a preliminary question [i.e., foundation for admissibility of an exhibit], a defendant in a criminal case does not become subject to cross-examination on other issues in the case."); 5.104(c) "The court must conduct any hearing on a preliminary question so that the jury cannot hear it if . . . a defendant in a criminal case is a witness and so requests.").

Other sanctions were available under Rule 2.14(6)(c). The court could have ordered Tucker to make the discovery available for inspection, granted a continuance, or fashioned any other remedy necessary and in the interest of justice. In choosing appropriate discovery sanctions, courts are to consider "(1) the circumstances surrounding the violation; (2) the prejudice, if any, resulting from the violation; (3) the feasibility of curing any prejudice; and (4) any other relevant information." *Veal*, 564N.W.2d at 811. "Generally, a continuance to considered to be the 'traditionally appropriate remedy' for a claim of surprise

at trial." *Whitley v. C.R. Pharmacy Srvs., Inc.*, 816 N.W.2d 378, 389 (Iowa 2012).

The "circumstances surrounding the violation" were not favorable to Tucker, but a late disclosure very rarely occurs under circumstances that reflect well upon the late discloser. There were mitigating factors in Tucker's failure to timely disclose the evidence. First, the state knew that Tucker claimed the cash came from a settlement because he said as much to the arresting officers while being searched. (*e.g.,* TT2 78:18-79:2). Despite having knowledge of the settlement and claiming that the cash was drug proceeds, law enforcement conducted no investigation to confirm Tucker's version of the events. (*Id.* at 80:11-81:24).

Tucker explained that he had provided the settlement letter to one of his prior attorneys. (*Id.* at 109:11-13). Tucker had multiple attorneys on this case prior to Mr. Macro, who represented him at trial. The reason the letter was not timely disclosed was the negligent shuffling of files between multiple attorney's offices; Tucker did not intentionally hide the evidence from the state. (TT2 80:11-81:24), *c.f. Kendall/Hunt Pub. Co. v.*

Rowe, 424 N.W.2d 235, 240 (Iowa 1988) ("drastic" sanctions may be more appropriate where the failure to comply with a discovery order is "the result of willfulness, fault, or bad faith").

The prejudice resulting from Tucker's failure to disclose was slight, and easily cured. The state's only argument regarding prejudice was that it was surprised by the disclosure. (TT2 109:1-4). But the state had been aware throughout the course of the investigation and case that Tucker claimed the cash came from a settlement. (*See, e.g.* TT2 109:24-110:2 ("This information and the name of the lawyer comes up at the end of one of the officer's videos. As to the settlement, one of the officers are [sic] talking about it.")). The state chose not to pursue evidence that would demonstrate Tucker's innocence in its investigation.

Further, the letter was from a local law firm. (App. p. 113). The court stated (without elaboration) that the case had been "pending for a long time" and a "continuance does not seem appropriate." (TT2 114:21-22). But, it would have taken very little time to confirm the exhibit's authenticity. The letter contained all of the information the state needed to investigate

it, and to argue whether or not it was reasonable that the cash in the car came from the settlement. A continuance of a day, or even an afternoon, could have effectively cured the prejudice to the state. Prohibiting Tucker form using the evidence altogether went further than necessary to cure the prejudice.

Most importantly, the exclusion of the evidence interfered with Tucker's opportunity to present a defense. The letter was meant to rebut the state's case as to intent to distribute marijuana by providing a credible alternative source for the cash. The exclusion of the letter weakened Tucker's defense. As discussed above, the state's case for intent to distribute was not particularly strong.

The Court of Appeals held that the state was prejudiced because the cash was the "lynchpin" of its proof on the intent to deliver element, and the late disclosure of the settlement document gave it "no opportunity to modify its trial strategy in light of the documents or gather evidence to counter the possible admission of the documents." (Op. at 8). This ignores the State's role as a prosecutor. "A prosecutor is not an advocate in the ordinary meaning of the term. . . . [A] prosecutor owes a

duty to the defendant as well as the public." *State v. Graves*, 668 N.W.2d 860, 870 (Iowa 2003) (citations omitted). Therefore, "the prosecutor's primary interest should be to see that justice is done, not to obtain a conviction." *Id.* (citations omitted). Doing justice in this case would have meant following up on exculpatory evidence despite the cost to trial strategy.

Without the settlement letter, Tucker's explanation of the cash depended solely on his own testimony, with no corroboration. If the evidence had been admitted, the jury would have very little evidence from which to infer an intent to distribute. The district court abused its discretion in excluding the settlement letter as a discovery sanction. Further review should be granted to correct this error.

V. The District Court Erred in Excluding the Unedited Body Cam Video.

The Court of Appeals erred in holding that the district court did not abuse its discretion in excluding the video. The video was relevant and admissible pursuant to Iowa R. Evid. 5.106.

As discussed above, Tucker's trial strategy was to attack the assumptions the state made to support the conclusion he was distributing marijuana. The state argued that Tucker was distributing because of his extreme reaction when officers searched his shorts. As seen on state's exhibit 2 (and Court's exhibit 4), when officers realized Tucker had something in his shorts, he began to yell for help, causing a scene and repeatedly asking the officer why they were grabbing him. (App. p. 111 at 3:15-5:00). The officers thought this was suspicious, but in the broader context of Tucker's experience with law enforcement, having previously been shot by an officer as an African American, the reaction is more understandable. Tucker was simply scared.

Iowa R. Evid. 5.106 provides:

> a. If a party introduces all or part of an act, declaration, conversation, writing, or recorded statement, an adverse party may require the introduction, at that time, of any part or any other act, declaration, conversation, writing, or recorded statement that in fairness ought to be considered at the same time.
>
> b. Upon an adverse party's request, the court may require the offering party to introduce at the same time all or part of the act, declaration,

> conversation, writing, or recoded statement, any other part or any other act, declaration, conversation, writing, or recorded statement that is admissible under rule 5.106(a). Rule 1.506(b), however, does not limit the right of any party to develop further on cross-examination or in the party's case in chief matters admissible under rule 5.106(a).

Iowa's "rule of completeness" is broad. *See, e.g. State v. Huser*, 894 N.W.2d 472, 507 (2017) ("[T]he rule of completeness in Iowa Rule of Evidence 5.106 might be characterized as posing an open-the-door concept."). The evidence offered under the rule of completeness need not necessarily be admissible, although "the rule cannot be simply used as an 'end run around the usual rules of admissibility.'" *Id.* at 509 (citing 7 Laurie Kratky Dore, *Iowa Practice Series: Evidence* § 5.106:1, at 94; and *United States v. Castro-Cabrera*, 534 F. Supp. 2d 1156, 1161 (C.D. Cal. 2008)). All the rule requires is "a demonstration that additional evidence is necessary to a proper understanding of the *admissible primary evidence*." *Id.* (citing Dore at 95).

The primary evidence in this case involved (1) Tucker's reaction to a search of his person while handcuffed, and (2) law enforcement's explanation that his reaction led them to believe

he was distributing marijuana. The secondary evidence – the reason Tucker had a reaction – was available within the same video. The evidence was admissible under Iowa R. Evid. 5.106 because "in fairness" it out go have been considered with the primary evidence to show why Tucker acted the way he did.

This evidence was necessary for Tucker's defense. He had the difficult task of his explaining his unusual behavior during the police search. He had relevant evidence that explained his behavior – his prior bad interactions with law enforcement. He was denied the opportunity to put on evidence towards this prong of his defense. That was error, and it was not harmless. Further review should be granted so that the judgment against Tucker can be vacated, and the matter can be remanded for a new trial.

CONCLUSION

The Court of Appeals erred in rejecting Tucker's claims. Tucker was tried by a jury not drawn from a fair cross-section of the community, and convicted by insufficient evidence in a trial which wrongfully excluded the evidence in his defense.

Further review should be granted so that these errors can be corrected.

PARRISH KRUIDENIER DUNN BOLES GRIBBLE GENTRY BROWN & BERGMANN L.L.P.

By: /s/ Andrew Dunn
Andrew Dunn AT0002202
Jessica Donels AT0013389
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: adunn@parrishlaw.com
ATTORNEY FOR APPLICANT–APPELLANT

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This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) (no more than 5,600 words); excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, statement of the issues, and certificates. This brief contains 4,328 words.

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I hereby certify that on January 26, 2022, I did serve Applicant-Appellant's Application for Further Review on Appellant by mailing one copy to:

Tyjuan Tucker
Defendant-Appellant

/s/ Andrew Dunn

Andrew Dunn
Dated: January 26, 2022

IN THE COURT OF APPEALS OF IOWA

No. 19-1919
Filed January 12, 2022

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TYJUAN LEVELL TUCKER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, William P. Kelly, Judge.

Tyjuan Tucker appeals a jury's guilty conviction for possession of a controlled substance—marijuana—with intent to deliver. **AFFIRMED.**

Andy Dunn and Jessica Donels of Parrish Kruidenier Dunn Boles Gribble Gentry Brown Bergmann & Messamer LLP, Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Louis S. Sloven, Assistant Attorney General, for appellee.

Considered by Bower, C.J., and Vaitheswaran and Schumacher, JJ.

VAITHESWARAN, Judge.

A jury found Tyjuan Tucker guilty of possession of a controlled substance (marijuana) with intent to deliver. *See* Iowa Code §124.401(1)(d) (2018). On appeal, Tucker challenges: (1) the sufficiency of the evidence supporting the jury's finding of guilt; (2) the district court's determination that the underrepresentation of African-Americans in the jury pool was not due to "systematic exclusion" in the jury-selection process; (3) his trial attorney's failure to present expert testimony on the "systematic exclusion" issue; (4) the district court's exclusion of documents relating to a prior settlement; and (5) the district court's exclusion of portions of a body camera video of his arrest.

I. Sufficiency of the Evidence

The jury was instructed that the State would have to prove the following elements of possession of marijuana with intent to deliver:

> 1. On or about July 28, 2018, the defendant, Tyjaun L. Tucker knowingly possessed marijuana.
> 2. The defendant knew that the substance possessed was marijuana.
> 3. The defendant possessed the substance with the specific intent to deliver it.

The jury was further instructed "the defendant's specific intent . . . is seldom capable of direct proof."

A reasonable juror could have found the following facts. Des Moines police officers cut through the parking lot of a fast-food restaurant. According to one of the officers, they noticed two vehicles "parked not in parking spots," which immediately caught their attention. "[A] female . . . was standing at the driver's side of a green Sebring." The officers observed "some sort of an exchange, just

the hand in the window" but "could not observe what was actually exchanged." The driver of the Sebring, later identified as Tucker, made "eye contact" with the officers and "immediately exit[ed] the parking lot," cutting in front of an SUV and forcing the driver of that vehicle to brake.

The officers stopped the Sebring. Their subsequent interactions were captured on an officer's body camera. One of the officers asked Tucker to step out of the vehicle. He patted Tucker down and asked if he had been "smoking marijuana earlier." Tucker said he had not. The officer continued the search, reaching for Tucker's groin area. Tucker pulled away, screamed for help, and yelled, "why are you grabbing me?" multiple times. Additional officers arrived. One of them pulled a small plastic bag containing "about an ounce" of marijuana from Tucker's underwear. Tucker's car was searched, and a wad of cash totaling $650 was discovered in the center console. The large amount of cash could have led a reasonable juror to find that Tucker possessed the marijuana with the specific intent to deliver the substance. *See State v. Adams*, 554 N.W.2d 686, 692 (Iowa 1996) ("Intent may be inferred form the manner of packaging the drugs, from large amounts of unexplained cash, as well as from the quantity of drugs." (citations omitted)).

There was certainly evidence from which a jury could have reached a contrary finding, including Tucker's unsolicited assertion that the cash was part of a $6800 settlement he "just got," the absence of additional packaging materials or a scale inside the vehicle, and the relatively small amount of marijuana in his possession. But the "plausibility of explanations" was within the jury's purview.

State v. *Williams*, 695 N.W.2d 23, 28 (Iowa 2005). Substantial evidence supported the jury's finding of guilt. *See State v*. *Thomas*, 847 N.W.2d 438, 442 (Iowa 2014).

II. Systematic Exclusion

Tucker argues he "was denied the right to a jury drawn from a fair cross-section of the community in violation of Article I, § 10" of the Iowa Constitution. He had the burden to

> establish a prima facie violation of the fair-cross-section requirement by showing:
>
> > (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

State v. *Lilly*, 930 N.W.2d 293, 299 (Iowa 2019) (quoting *State v*. *Plain*, 898 N.W.2d 801, 822 (Iowa 2017)).

Tucker maintains "[t]he first two prongs under the test in *Lilly* were undisputed." The State concedes "[t]he first prong of *Lilly* is met because Tucker is alleging underrepresentation and systematic exclusion of a distinctive group: African-Americans." The State also agrees "Tucker satisfied prong #2 of *Lilly*—the representation of African-Americans in this pool was more than one standard deviation below the average level, given the prevalence of African-Americans among Polk County residents who were eligible for jury service." The appeal turns on the third prong—proof of systematic exclusion.

Tucker contends he "met his burden under the 'systematic exclusion' prong to show that the disparate representation within the jury pool was a result of the court administration[']s jury management practices." He points to the State's use

of only "two sources—voter registration and driver's licenses—to form the jury pool" and asserts minorities have lower rates of participation in both. Tucker highlights the supreme court's statement that jury management practices may amount to systematic exclusion as well as a scholarly article cited by the court. *See Lilly*, 930 N.W.2d at 307–08 (citing Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 Drake L. Rev. 761, 790–91 (2011)).

The court did indeed discuss jury management practices in *Lilly* but stressed that "the challenger must tie the disparity to a particular practice" and "the defendant must prove that the practice has caused systematic underrepresentation." *Id*. The court quoted the following portion of Hannaford-Agor's article, which underscored the need for expert testimony:

> Litigants alleging a violation of the fair cross section requirement would still have to demonstrate that the underrepresentation was the result of the court's failure to practice effective jury system management. *This would almost always require expert testimony concerning the precise point of the juror summoning and qualification process in which members of distinctive groups were excluded from the jury pool and a plausible explanation of how the operation of the jury system resulted in their exclusion*. Mere speculation about the possible causes of underrepresentation will not substitute for a credible showing of evidence supporting those allegations.

Id. (emphasis added) (quoting Hannaford-Agor, 59 Drake L. Rev. at 790–91). It is clear, then, that a recitation of existing jury management practices is insufficient to establish systematic exclusion.

The district court afforded Tucker's attorney "the opportunity to put on any proof of evidence or expert testimony" on the third prong. Counsel declined, citing the "inherent, practical problems for an indigent defendant" to "hire experts under

a court-appointed case." Counsel made his systematic exclusion argument "solely based upon the fact that we use two sources for our jury pool."

The district court found insufficient "evidence to prove" systematic exclusion. "[B]ased on the lack of evidence," the court "overrule[d] the objection" to the composition of the jury pool and proceeded to trial.

On our de novo review of the record, we agree Tucker failed to tie Iowa's use of the two lists to systematic underrepresentation of a minority group. *See Lilly*, 930 N.W.2d at 308. We affirm the district court's ruling on the systematic exclusion prong of the "fair cross section" requirement.

III. Ineffective Assistance—Failure to Present Expert Testimony

Tucker argues his trial attorney was ineffective in failing to present expert testimony on whether jury management practices resulted in systematic exclusion of African-Americans from the jury pool. He is foreclosed from raising this ineffective-assistance-of-counsel claim on direct appeal. *See* Iowa Code § 814.7 (stating effective July 1, 2019—before Tucker was sentenced—an ineffective-assistance-of-counsel claim "shall not be decided on direct appeal from the criminal proceedings"); *State v. Treptow*, 960 N.W.2d 98, 108 (Iowa 2021) (concluding "[t]here is no due process right to present claims of ineffective assistance of counsel on direct appeal").

IV. Exclusion of Settlement Documents

During trial, the prosecutor moved to exclude "a settlement statement and other records" "just . . . handed" to her by Tucker's attorney. She cited the "pretty strict discovery process" including reciprocal discovery that took place months earlier. The prosecutor explained, "The State has gotten no notice of this, no

opportunity to deal with this, to look into the validity of any of it." Tucker's attorney pointed out the proposed exhibit was "merely documentation to . . . rebut the accusation that these were drug funds and not from legitimate means."

The district court excluded the documents. The court reasoned:

> Mr. Tucker did not comply with the State's application for reciprocal discovery within 14 days of the order . . . . [The case] has been pending for a long time. A continuance does not seem appropriate. The disclosure of these documents on the second day of trial, without allowing the State to prepare for those documents, it appears to violate the rule. . . . There's nothing that prohibits Mr. Tucker from testifying about the settlement. But to submit those documents . . . would impact our whole process of authentication, identification, and preparation . . . . This is an important trial. This appears to be unfair surprise.

On appeal, Tucker argues "[t]he erroneous exclusion of [his] settlement documents as a discovery sanction denied [him] the opportunity to put on a defense in violation of the Fifth Amendment [of the United States Constitution] and Article I, § 10 [of the Iowa Constitution]." Because the constitutional component of the argument was neither raised nor decided, we decline to consider it. *See In re C.W.*, No. 19–1658, 2020 WL 564825, at *4 (Iowa Ct. App. Feb. 5, 2020) (citing *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002)). We simply review the propriety of exclusion as a discovery sanction.

Iowa Rule of Criminal Procedure 2.14(6)(c) states the court may "prohibit the party from introducing any evidence not disclosed." Review of an exclusion ruling under this rule is for an abuse of discretion. *See State v. Schuler*, 774 N.W.2d 294, 297 (Iowa 2009).

As Tucker pointed out, the documents he sought to introduce would have bolstered his claim that the large amounts of cash found in his vehicle were not

drug proceeds or funds used to purchase drugs. But, as the district court noted, Tucker was free to testify to the source of the money. In fact, he did so, stating he injured himself and received a settlement "two days prior to being pulled over." He said he cashed the check, bought a car with a portion of the proceeds, and placed the leftover money in the center console of his car. A portion of the body camera video introduced at trial included Tucker's statement about the source of the cash. And one of the officers at the scene agreed Tucker mentioned receipt of a settlement. In short, the jury was privy to Tucker's explanation notwithstanding the court's exclusion of the settlement documents. *See State v*. *Belken*, 633 N.W.2d 786, 796 (Iowa 2001) (stating "undisclosed evidence that was merely cumulative" was less likely to be prejudicial).

On the other side of the coin, the belated offer of the documents prejudiced the State. The lynchpin of the "intent to deliver" portion of the State's charge was the cash. The State had no opportunity to modify its trial strategy in light of the documents or gather evidence to counter the possible admission of the documents. *See id*. (examining a prejudice claim "in the context of its effect on . . . trial strategy.").

We conclude the district court did not abuse its discretion in excluding the settlement documents.

V. Exclusion of Entire Body Camera Video

The State offered a portion of the body camera video as an exhibit. Tucker objected, arguing the "rule of completeness" required introduction of the entire recording. The district court overruled the objection.

Tucker now argues the State used his negative on-camera reaction to infer he was "distributing marijuana." In his view, the district court should have admitted the entire footage to provide an alternate explanation for his reaction, specifically that he was previously shot by a police officer. Tucker frames his argument as a constitutional violation, an issue that was not preserved. We will review the issue under our evidentiary rules.

Rule 5.106, described as the rule of completeness, states, "[i]f a party introduces all or part of a[] . . . recorded statement, an adverse party may require the introduction, at that time, of any other . . . recorded statement that in fairness ought to be considered at the same time." "[T]he rule of completeness may trump the ordinarily applicable rules of evidence. Yet, the rule cannot be simply used as an 'end run around the usual rules of admissibility.'" *State v*. *Huser*, 894 N.W.2d 472, 509 (Iowa 2017) (citation omitted). "[A]ll relevant evidence, [including statements offered under rule 5.106, is] subject to the rule 5.403 balancing test that compares the probative value of the statements to their danger of unfair prejudice and confusing the jury." *State v*. *Davis*, No. 13–1099, 2014 WL 5243343, at *7 (Iowa Ct. App. Oct. 15, 2014).

The district court found the evidence of minimal probative value. The court stated Tucker's discussion of the shooting as well as the officers' discussion did not raise "a fact of consequence in dealing with drug possession." In the court's words, "I do not see how talking about an officer shooting, how that tends to make a fact of consequence more or less probable." The court also concluded the evidence "could lead the jury to a conclusion on an improper basis." The court stated, "that's one of the things that we try to keep out so that the jury can stay

focused on the facts at hand, on the case at hand, and to really focus in on the elements that the State has alleged that Mr. Tucker has done in this case."

We discern no abuse of discretion in the district court's ruling. Introduction of evidence relating to an independent interaction with police could have led the jury to confuse the issues. *See State v*. *Buman*, 955 N.W.2d 215, 221 (Iowa 2021); *State v*. *Walker*, 935 N.W.2d 874, 878 (Iowa 2019); *State v*. *Einfeldt*, 914 N.W.2d 773, 784 (Iowa 2018). The evidence also may have resulted in a trial within a trial. *See State v*. *Smith*, No. 18–1500, 2020 WL 1307693, at *2 (Iowa Ct. App. Mar. 18, 2020). And if the purpose of introducing the evidence was to evoke sympathy, as the district court found, that purpose was improper. *See State v*. *Delaney*, 526 N.W.2d 170, 175 (Iowa Ct. App. 1994) ("We look . . . to whether the evidence has an undue tendency to suggest a decision on an improper basis, appeals to the sympathies of the jury, or otherwise might cause the jury to base their decision on something other than the relevant legal propositions."). We affirm the district court's exclusion of the full body camera video.

Tucker's judgment for possession of marijuana with intent to deliver is affirmed.

AFFIRMED.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
19-1919	State v. Tucker

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