IN THE SUPREME COURT OF IOWA

STATE OF IOWA Plaintiff-Appellee, v. PATRICK H. BOOKER, JR., Defendant-Appellant	Supreme Court No. 20-1551

APPEAL FROM THE IOWA DISTRICT COURT
FOR DUBUQUE COUNTY
HON. MONICA L. ZRINYI WITTIG, JUDGE

APPELLANT'S BRIEF AND ARGUMENT

MARTHA J. LUCEY
State Appellate Defender

STEPHAN J. JAPUNTICH
Assistant Appellate Defender
sjapuntich@spd.state.ia.us
appellatedefender@state.ia.us

STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX

ATTORNEYS FOR DEFENDANT-APPELLANT FINAL

CERTIFICATE OF SERVICE

On the 20th day of September, 2021, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Patrick Booker, Jr., #6910268, Iowa State Penitentiary, 2111 330th Avenue, PO Box 316, Fort Madison, IA 52627.

APPELLATE DEFENDER'S OFFICE

/s/ Stephan J. Japuntich

STEPHAN J. JAPUNTICH
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
sjapuntich@spd.state.ia.us
appellatedefender@spd.state.ia.us

SJJ/lr/6/21
SJJ/ls/09/21

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issue raised involves a substantial issue of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c). Does a pretextual reason for striking a minority juror qualify as a "race-neutral reasons"?

STATEMENT OF THE CASE

Nature of the Case: This is an appeal, by Patrick H. Booker, Jr., following conviction and sentencing for Sex Abuse in the Third Degree in violation of Iowa Code §§ 709.4(1)(a) 902.14(1)(b) and 901A.2 (2017). Booker also appeals the application of the mandatory sentencing provision of Iowa Code § 903B.1 (2017).

Course of Proceedings: On August 26, 2019, Mr. Booker was charged with (Count I) Sexual Abuse in the 3rd Degree in violation of Iowa Code § 709.4(1)(a) (2019) and (Count II) Kidnapping in the First Degree in violation of Iowa

Code § 710.2 (2019). (Trial Information & Supplemental Trial Information) (App. pp. 4-8).

The matter went to trial and phase 1 concluded when a Dubuque County jury found Booker guilty of Count I and not guilty of Count II. (09/22/20 Verdict Forms) (App. pp. 11-21).

The second phase dealt with a prior, out-of-state sexual abuse conviction for purposes of sentencing enhancement. The jury found that Booker committed some form of sexual abuse in Illinois. (09/15/20 State's Exhibit 35 Cook County Certified Statement of Conviction/Disposition, 09/22/20 Supplemental Jury Instructions) (Ex. App. pp. 8-13, App. pp. 17-21).

A motion for new trial was filed on November 20, 2020. (Motion for New Trial) (App. pp. 24-28).

The court denied the motion for new trial in a written order. (11/19/20 Order Re Motion in Arrest of Judgment and Motion for New Trial) (App. pp. 24-33).

On November 23, 2020, Booker was sentenced to serve a term of incarceration for the remainder of his life. (Judgment & Sentence) (App. pp. 34-38).

A notice of appeal was filed on November 24, 2020. (Notice) (App. pp. 39-40).

On January 8, 2021, the State filed a motion nunc pro tunc requesting that the district court amend the sentencing order to conform to special sentence provision contained in Iowa Code § 903.B1 which applies to second or subsequent sex offenders. (Motion Nunc Pro Tunc) (App. p. 41).

A hearing was subsequently held on the State's motion and the court granted the State's request to amend the sentencing order. (01/20/21 Transcript of Proceedings).

A separate notice of appeal was filed on January 29, 2021. (1/29/21 Notice of Appeal) (App. pp. 46-47).

The second appeal was consolidated with the instant case by order of the Supreme Court on March 5, 2021. (Order) (App. pp. 48-50).

Facts: Dr. Kevin Zettek is a physician employed by Mercy One in Dubuque. (Trial Transcript Vol. II pp 99 L 11-25, 100 L 1-2).

On April 18, 2018, CH was brought to the emergency room for treatment. She claimed that she had been sexually assaulted. (Vol. II p. 101 L 2-16).

An examination was performed by Dr. Zettek and a SANE[1] nurse and swabs were collected. The nurse interviewed CH. (Vol. II pp. 101 L 17-25, 102-103 L 1-25, 104 L 1-3, State's Exhibit 15 Examination Report) (Conf. App. pp. 66-67).

According to Dr. Zettek, the patient showed no signs of trauma; however, a whitish discharge was observed. (Vol. II pp. 107 L 9-24, 109 L 2-5).

Trisha Heston is a registered nurse and employed at Mercy One in Dubuque. Heston is a trained S.A.N.E. and provided treatment to CH. (Vol. II pp. 110 L 18-25, 111 L 1-

[1] SANE is an acronym for Sexual Assault Nurse Examiner.

25, 112 L 1-12,113 L 6-11, State's Exhibit 16 S.A.N.E. Records) (Conf. App. pp. 68-72).

According to Heston, CH was examined on April 18, 2018, but the assault occurred on either April 13 or 14 of 2018. In the interim time period, CH indicated she had bathed and defecated. (Vol. II p. 116 L 9-20).

Although CH indicated that Booker had knocked her head against a wall, Heston did not observe any sign of trauma to her head. (Vol. II p. 117 L 1-10).

CH testified that although she hadn't seen him recently, she had known Booker for several years prior to August 14, 2018 and that she invited him to her house for a "tatoo party" wherein individuals would come to her house and get tattoos and body piercings. According to CH, Booker performed piercings and cut hair. (Vol. II pp. 123 L 18-21, 126 L 6-25, 127 L 1-2).

Booker brought with him his roommates Andy Cheeks (known as "Roo"), and Larry Earley. (Vol. II pp. 127 L 24-25, 128 L 1-25, 129 L 1-8).

Booker and the others arrived at CH's residence on Friday afternoon and stayed the night. The following day, people came to CH's residence and left after receiving their tatoos. That evening, only Booker, Earley, Cheeks and CH occupied the residence. (Vol. II pp. 129 L 12-25, 130 L 1-16).

CH had previously made plans to have sex with Booker and Cheeks. (Vol. II p. 136 L 16-24). Some time after midnight, all four of them were in CH's bedroom. When Earley expressed his desire to join the activities CH became "uncomfortable" left the room and went into the kitchen. Booker followed her and began hitting her head against the wall causing injury to her lip and head. (Vol. II pp. 130 L 17-25, 131 L 1-4, 147 L 3-25). Booker also forced her to stand in the kitchen for some hours with the window open; CH claimed that it was cold outside at the time. (Vol. II pp. 131 L 5-10).

Eventually, CH left the kitchen, went to her room and laid down on her stomach. Booker entered her room, tore off her clothing and penetrated her vaginally and anally. Cheeks and Earley entered the room and told Booker to stop what he was doing and he told them to "mind their own business" and they left the room. (Vol. II p. 131 L 11-25).

Booker asked CH for medicine and she gave him four melatonin tablets which caused him to fall asleep. (Vol. II p. 132 L 1-10).

CH was also confronted with her deposition testimony wherein she denied suffering an injury to her lip and, subsequently, testified she could not recall if she had suffered an injury to her lip. (Vol. II pp. 157 L 19-25, 158 L 1-25, 159 L 1-10, 12/13/19; Deposition p. 56 L 9-24).

The State produced Officer Nicole Salazar who was dispatched to CH's residence to investigate her complaint. She arrived at CH's at 3:51 p.m. on April 17, 2018, (Vol. III pp. 4 L 15-25, 5 L 1-25, 6 L 1-16).

CH told her that red markings on the kitchen wall were from the injury to her lip. Officer Salazar photographed the wall. (Vol. III p. 12 L 1-11). However, she did not take a sample from the wall to have it analyzed. (Vol. III p. 17 L 18-23).

Salazar also photographed marks she observed on CH's person. (Vol. III p. 13 L 5-16, State's Exhibit 2 photograph of CH and Exhibit 3 photograph of CH's lip) (Conf. App. pp. 62-63).

Scott Stocksleger, of the Iowa Department of Criminal Investigations (DCI) Criminalistics Laboratory, is a forensic DNA specialist. (Vol. III p. 23 L 12-225, 24 L 1-12).

Stocksleger performed DNA analysis on the contents of a sexual assault kit, performed on CH, and buccal swabs obtained from Booker. The report was provided to the Dubuque Police Department. (Vol. III pp. 29 L 7-25, 30 L 1-10, State's Exhibit 14 DCI Laboratory Report) (Conf. App. pp. 64-65).

Stocksleger noted that the collection for the sexual assault kit occurred four days after the incident. He explained that after 3 days, the ability to test seminal fluid is greatly reduced. (Vol. III p. 32 L 5-24).

Stocksleger did not detect any spermatozoa on the anal swabs, nor did he detect seminal fluid on the vaginal swabs. (Vol. III p. 34 L 2-19).

However, he did discover "sperm fraction" from the vaginal sample which was part of a mixture of DNA from different donors. The DNA profile was incomplete, but a portion of the sample was consistent with the DNA of Patrick Booker. The chances of it coming from a different individual is "…1 out of 2.3 quintillion". (Vol. III p. 34 L 20-25, 35-36 L 1-25, 37 L 1-6).

Andy Cheeks attended the tatoo party of April 14, 2018. (Vol. III pp. 91 L 19-22, 92 L 24-25, 93 L 1-2).

According to Cheeks, CH wanted to have sex with Booker, himself and Earley; Cheeks experienced a

physiological problem rendering him unable to perform sexually. (Vol. III p. 95 L 18-23).

Cheeks did not witness Booker having sex with CH. (Vol. III p. 95 L 24-25). Contrary to CH's testimony, Cheeks did not walk into a room while they were engaged in intercourse. (Vol. III p. 96 L 3-6). Cheeks did not observe Booker attempting to have sex with CH. (Vol. III p. 96 L 7-8).

Nor did Cheeks witness Booker trapping her in the kitchen, or did he hear "banging noises". (Vol. III pp. 96 L 19-23, 98 L 1-7).

Booker had keys to CH's apartment and Cheeks overheard Booker attempting to give the keys back to her. (Vol. III p. 98 L 8-20).

Next, the defense called Corby Yager. (Vol. III p. 103 L 17-20). Yager has known Booker for about two-and-a-half years. (Vol. III p. 104 L 13-14).

Yager also knows CH and attended the previously referenced tatoo party. After she arrived to the party, Yager

saw Booker, Cheeks, CH and her son. (Vol. III pp. 104 L 20-25, 105 L 20-25, 106 L 1-16).

During the weekend in question Booker texted messages to Yager that she considered being flirtatious. (Vol. III pp. 116 L 16-25, 117 L 1-10).

The defense produced April Saunders, age 49, who resided in the same quad-plex as CH during the relevant times. Saunders did not know Booker, Cheeks or Earley prior to the tatoo party. However, she did know CH prior to becoming her neighbor. (Vol. III pp. 111 L 8-25, 112-113 L 1-25, 114 L 16-25, 115 L 1-11).

Saunders testified that CH has a reputation for being dishonest. (Vol. III pp. 119 L 20-23, 126 L 8-21).

Saunders was told about the tatoo party by CH. During that weekend, she saw CH in her (Saunders') apartment on Friday, Saturday and Sunday; she also saw CH at the Dollar General Store on Saturday morning. They also talked on the

telephone during that same time period. (Vol. III pp. 115 L 12-25, 116 L 116 1-24).

CH talked to Saunders, in-person, at approximately 9 or 10 a.m. on Sunday morning and told her that … "she was being raped…" but didn't want Saunders sending her husband upstairs to help her. (Vol. III p. 121 L 4-24).

At the time of the Sunday conversation, there were still men in CH's apartment. (Vol. III p. 122 L 5-9).

Ashanti Eason is Booker's niece and a coworker and former roommate of CH. (Vol. III pp. 123 L 7-25, 124 L 1-25, 126 L 1).

Eason testified that CH has a reputation for being dishonest. (Vol. III p. 126 L 11-21).

Nancy Martin was another neighbor of CH's at the quadplex. Martin and CH both lived in the upstairs units. Martin is not acquainted with Cheeks or Earley. (Vol. III pp. 129 L 15-19,130 L 10-25, 131 L 1-19).

Martin was at home on the weekend of April 14th, 2018 and she testified she heard no "thumping or banging. (Vol. III pp. 131 L 20-25, 132 L 1-7).

Martin testified that CH has a reputation for being dishonest. (Vol. III p. 132 L 8-18).

Shane Flesher is an investigator for the Office of the State Public Defender. (Vol. III pp. 134 L 20-23, 135 L 1-8). During the course of his investigation of this case he obtained the phone records of Booker, CH and Saunders for 2018. (Vol. III pp. 137 L 10-25, 138 L 1-25, 139 L 1-3 Defendant's Exhibit A Saunders' Phone Records, Exhibit B Bookers Phone Records, Exhibit D CH's Phone Records) (Conf. App. pp. 4-61).

The records indicate that April Saunders called CH at 1:00 a.m. on April 14, 2018. (Vol. III p. 143 L 14-23).

The defense called Larry Earley who testified that on the first day of his stay at CH's apartment, during the relevant time period, he and Cheeks engaged in consensual group sex with CH. (Vol. IV pp. 32 L 20-23, 34 L 16-25, 35 L 1-9).

Earley testified that the bedroom he stayed in was next to CH's bedroom. During his stay, he never heard any banging, screaming or crying, nor did he witness Booker and CH engaging in sexual intercourse. (Vol. IV p. 36 L 11-23, 38 L 21-23).

Earley admitted having a close relationship with Booker, who is his brother, but didn't recall talking to him on the phone regarding Earley's testimony during Booker's stay in the Black Hawk County Jail. (Vol. IV pp. 40 L 9-25, 41 L 1-22).

Earley went from denying the conversation took place to saying he did not remember. (Vol. IV pp. 40 L 23-25, 41 L 1-25, 42 L 1-5).

Next, the following exchange between the prosecution and Earley took place:

> Q. Well, you just told me that you hadn't talked to him on the phone, and now you're saying you don't remember.
> A. Sir, I'm telling you, I haven't talked to my brother in so long. It could have been yesterday, and I don't remember. I don't remember talking to him."

(Vol. IV p. 42 L 3-8).

The State proposed to play a recorded phone conversation between Booker and Earley which took place on September 9, 2020. (Vol. IV p. 42 L 15-18).

The defense objected to the playing of the exhibit for the jury based upon Iowa R. Evid. 5.403 (2019). (Vol. IV p. 42 L 21-22).

Following a hearing outside the presence of the jury, the court allowed a specified portion of the exhibit to be played before the jury. (Vol. IV pp. 42 L 23-25, 43-49 L 1-25, 50 L 1-3, Court Exhibit 1-Disk).

Earley admitted that the voices on the recording were his, but he denied that Booker advised him on how to testify. (Vol. IV pp. 50 L 4-25, 51 L 1-14).

Based on Earley's denial, the State requested permission to play the remainder of the exhibit. Over Booker's 5.403 objection, the court allowed it to be played for the jury. (Vol. IV 51 L 15-25, 52 L 1).

After the recording had been played for the jury, the following exchange between the prosecution and Earley took place:

> Q. Mr. Earley, correct me if I'm wrong, but it sounds like the two of you were discussing how you should testify?
> A. You're wrong.

(Vol. IV p. 52 L 3-6).

On redirect examination Early testified that the only time Booker told him what to say he told him to tell "…only the truth."

(Vol. IV p. 61 L 8-14).

Nowhere in Booker's statements, as captured in Court's Exhibit, is there any attempt to influence the testimony of Early other than to tell him, what any competent trial lawyer would tell his witness; answer only the question, do not volunteer information. (Court Exhibit 1 00:27 to 01:29).[2]

[2] All times are approximate.

The State called Ashante Eason as a rebuttal witness. (Vol. IV p. 64 L 1-4). Eason is the twin sister of Ashanti Eason. (Vol. IV p. 64 5-22).

The State asked Eason if she was ever present when her sister talked to Booker about his story in the case. (Vol. IV p. 65 L 19-22). She expressed the opinion that, regarding her sister, "She's not very truthful 90 percent of the time." (Vol. IV p. 66 L 10-15).

Conversely, she testified that CH "…has been truthful as far as I know, to this day." (Vol. IV p. 66 L 16-22).

On cross-examination she conceded that she knew CH had been convicted of Theft in the Second Degree. (Vol. IV p. 70 L 12-24).

The next rebuttal witness, Kayla Leib, CH's sister, testified that CH is "…very truthful, always honest…" (Vol. IV pp. 68 L 1-25, 69 L 1-24).

On cross-examination, Leib admitted knowing that her sister was convicted of the crime of Theft in the Second degree. (Vol. IV p. 70 L 13-24).

The State recalled CH who was asked to explain why she initially told the police that the incident occurred on Sunday. (Vol. IV pp. 72 L 7-25, 73 L 1-7).

On cross-examination she was confronted with her deposition testimony wherein she testified that Booker attempted to have sex with her on Saturday as opposed to her rebuttal testimony in which she said it happened on Sunday. (Vol. IV pp.73 L 4-7, 74-75 L 1-25, 76 L 1-23).

CH testified that in addition to her conviction for Theft in the Second Degree in Dubuque County, she was also convicted of misdemeanor theft in Scott County. (Vol. IV pp. 76 24-25, 77 L 1-18).

Additional relevant facts will be discussed below.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO WARRANT A CONVICTION FOR SEXUAL ABUSE IN THE THIRD DEGREE, THE VERDICT WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE AND THE STATE FAILED TO PROVE THAT THE PRIOR CONVICTION IS APPROPRIATE FOR ENHANCEMENT.

Standard of Review: The standard of review for sufficiency of evidence claims is for errors at law. State v. Thomas, 561 N.W.2d 37, 39 (Iowa 1997).

Review of rulings on motions for a new trial based upon the weight of the evidence is for abuse of discretion. State v. Nitcher, 720 N.W.2d 547, 559 (Iowa 2006).

Preservation of Error: Error was preserved by Booker's motions for judgment of acquittal in first phase of the trial and the court's subsequent adverse rulings. (Vol. III pp. 59 L 15-25, 60-65 L 1-25, 66 L 1, Vol. IV pp. 81 L 1-22).

Additionally, Booker filed motions in arrest of judgment and for new trial which were overruled. (10/29/20 Motions in Arrest of Judgment and for New Trial and Motion for New

Trial, 11/19/20 Order Re Motion in Arrest of Judgment) (App. pp. 22-33).

Discussion: The ultimate burden is on the State to prove every fact necessary to constitute the crime with which the defendant is charged. State v. Gibbs, 239 N.W. 2d 866, 867 (Iowa 1976). The evidence presented must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture. State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). A verdict is binding unless the findings is clearly against the weight of the evidence. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981).

CH's testimony was inconsistent to the point of being discredited by the many changes in her story and the refutation of her claims.

Despite claiming that Booker beat her head against the wall repeatedly, none of those present, nor her surrounding neighbors reported hearing any banging or thumping noises during the times in question.

CH was asked about the wall depicted in State's Exhibits 9, 10 and 11. She asserted that her blood was visible upon the wall. (Vol. II pp. 148 L 25, 149 L 1-4, Exhibits 9, 10 & 11 photographs of kitchen wall). She did not know if the blood came from her lip or her head. (Vol. II 149 L 15-18).

CH told Officer Salazar that the red stains on the kitchen wall were blood stains from her injured lip. (Vol. III p. 12 L 1-11).

Later, when confronted with her deposition testimony, she said she could not remember if she actually suffered an injury to her lip. (Vol. II pp. 157 L 19-25, 158 L 1-25, 159 L 1-10, 09/14/20 Deposition p. 56 L 9-24).

The following exchange took place:

> EXAMINATION
>
> BY MR. DRAHOZAL:
> Q. Did you ever suffer a cut to your lip
> that weekend?
> A. No.
> MR. DRAHOZAL: Okay. Thanks.
> That's all I have.
>
> EXAMINATION

BY MR. KIRKENDALL:
Q. Just to be clear, do you recall suffering a cut to your lip?
A. I don't recall that.
Q. Are you 100 percent positive that you didn't get a cut to your lip?
A. I mean, I'm not a hundred percent positive, but I don't remember.

(12/13/19 Deposition of CH p. 56 L 9-24).

Mercy One physician Dr. Zittek testified that upon examining CH he saw no signs of physical trauma. (Vol. II pp. 107 L 9-24, 109 L 2-5). Even though CH claimed to have incurred a permanent dent to her head when Booker knocked it against a wall, nurse Trisha Heston examined CH and found no evidence to support this claim. (Vol. II p. 117 L 1-10).

CH testified that both Cheeks and Earley witnessed Booker assaulting her sexually, but both men denied this. (Vol. II p. 131 L 11-25, Vol. III p. 95 L 24-25, Vol. IV p. 36 L 11-23, 38 L 21-23).

CH claimed that Booker tore her clothing off and proceeded to assault her despite her request to him that he stop. (Vol. II p. 131 L 16-25).

However, State's Exhibit 4, a photograph of the shirt torn in the assault, is curious as the tear is not jagged, as would be expected, but is torn in a straight line. (Vol. II pp. 141 L 18-25, 142 L 1-8, State's Exhibit 4 photo of shirt). (Ex. App. p. 30

These facts and inconsistencies are relevant to determining whether any sex act was performed by force or against the will of CH. (Jury Instruction No. 15, Element 2) (App. p. 9).

Another consideration germane to the issue of whether the sex act was against the will of the complaining witness is the fact that CH was planning on engaging in a ménage à trois with Booker and Cheeks prior to the incident.

Admittedly, an individual has the right to withdraw consent, however, the credibility of the complaining witness is relevant to the issue of whether consent was withdrawn. "The

focal point of the crime of sexual abuse is consent." State v. Kelso-Christy, 911 N.W.2d 663, 666 (Iowa 2018). (*citations omitted*). "This critical element does not inquire into the mind of the defendant to create a specific-intent crime, but turns on the intentions and mental state of the victim." *Id.*

Several witnesses who knew CH testified that she has a reputation for dishonesty including neighbor and friend April Saunders (Vol. III pp. 126 L 8-21, 1119 L 20-23), former roommate Ashanti Eason (Vol. III 126 L 11-21), neighbor Nancy Martin (Vol. III p. 132 L 8-18).

CH's sister testified that CH was "always honest" despite knowing she had been convicted of felony Theft in the Second Degree. (Vol. IV pp. 68 L 1-25, 69 L 1-24, 70 L 13-24).

When she was recalled as a rebuttal witness, CH revealed that she was also convicted of misdemeanor theft in Scott County. (Vol. IV pp. 76 24-25, 77 L 1-18).

Additionally, on rebuttal she contradicted her sworn deposition testimony by claiming the attack occurred on

Sunday as opposed to her earlier testimony saying it happened on Saturday. (Vol. IV pp.73 L 4-7, 74-75 L 1-25, 76 L 1-23).

This matter should be reversed and remanded for dismissal based on insufficient evidence. State v. Smith, 508 N.W.2d 101 (Iowa Ct. App. 1993).

For the same reasons, the court erred in finding that the verdict was supported by the weight of the evidence. CH provided the only evidence of being sexually assaulted against her will.

There were inconsistencies in her testimony and witnesses who know her well testified that she is dishonest.

Additionally, she has been convicted of two crimes involving dishonesty. *See* Iowa R. Crim. P. 5.609(a)(1)(B)(2) (2020).

The jury's finding that the complained of sex act was against CH's will is clearly against the weight of the evidence as CH's testimony lacks credibility. State v. Ellis, 578 N.W.2d 655 (Iowa 1998).

Mr. Booker incorporates by reference the facts and arguments advanced in § IV for the proposition that the evidence adduced in the second phase was insufficient to prove that Patrick Booker is the same individual described in State's Exhibit 35, that the State failed to prove that Booker's criminal history qualified him for enhanced sentencing and that this court should reverse and remand on the issue of enhancement.

This matter should be reversed and remanded for dismissal for lack of evidentiary sufficiency, or retrial based upon the weight of the evidence standard, and reversed on the issue of enhancement by prior conviction.

II. THE DISTRICT COURT ERRED IN OVERRULING BOOKER'S BATSON CHALLENGE FOLLOWING THE STATE'S PEREMPTORY STRIKE OF JUROR NO. 38 AND IN GRANTING THE STATE'S MOTION TO STRIKE JUROR NO. 24 FOR CAUSE WITHOUT SUFFICIENT REASON AND IN FAILING TO ARTICULATE ITS REASONING.

Standard of Review: Systematic exclusion of distinct groups from a jury pool are reviewed de novo. State v.

Williams, 929 N.W.2d 621, 628 (Iowa 2019) *citing* State v. Plain, 898 N.W.2d 801, 811 (Iowa 2017).

Review of the district court's ruling on a motion to strike a juror for cause is for abuse of discretion. State v. Jonas, 904 N.W.2d 566, 571 (Iowa 2017) (citations omitted).

Preservation of Error: Error regarding the Batson challenge was preserved by Booker's resistance to the State's use of a peremptory challenge to strike Juror No. 38, the hearing that followed and the court's denial of the challenge. (Vol II pp. 62 L 20-25, 63-73 L 1-25, 74 L 1-19).

Error was preserved regarding the removal of juror No. 24 by virtue of the juror's examination, the State's motion to strike for cause, Booker's resistance to the strike and the court's ruling which allowed the strike. (Vol. I pp. 50 L 24-25, 51-57 L 1-25, 58 L 1-23).

Discussion: The State posed the following question to Juror No. 39:

> MR. KIRKENDALL: Let me just ask you a

> little bit. How about somebody wearing almost nothing, very scantly clad, walking through, you know, a neighborhood with a lot of bars, a lot of alcohol, a lot of drunk people, people looking to, you know, hook up with somebody else? Does that person potentially deserve what they get?
> JUROR NUMBER 39: Nope.

(Vol. II p. 23 L 17-24).

The prosecutor extended the hypothetical to include an individual who invites the other party to their residence where alcohol is available and ultimately declines to engage in sex. Juror 39 agreed that sex should not be forced upon an individual under those circumstances. (Vol. II pp. 23 L 25, 24 L 1-24).

The prosecutor asked Juror No. 38 if he agreed with Juror No. 39 and he responded "I would say pretty much the same. There's always two sides to a story." (Vol. II pp. 24 L 25, 25 L 1-5).

Juror No. 38 agreed with the State that even if excessive drinking and consensual "touching" the man would not be "entitled to something". (Vol. II pp. 25 L 6-25, 26 L 1-10). The

State asked if the act occurred and both individuals were drunk would that still be a crime to which Juror No. 38 replied "Yeah". (Vol. II p. 26 L 11-20).

After more discussion about the alcohol component the State asked "…but it would still have to stop if the woman said no?" Juror No. 38 replied "Yeah". (Vol. II pp. 26 L 21-25, 27 L 1-25).

Juror No. 38 was asked if there were ever incidents of false accusations made by women against men and he replied "Yes. I'm familiar with that". (Vol II. p. 28 L 1-23).

Juror 38 related an incident in which his cousin was involved in which "…four or five guys had sex with a girl…" and he thought that "both parties were to blame." However, he admitted that his opinion was based solely upon what his cousin told him. (Vol II pp. 28 L 24-25, 29 L 1-25, 30 L 1-3).

Responding to questions posed by the defense, Juror No. 38 indicated he would not "go with the flow" but would "…try to go on facts…" (Vol. II pp. 46 L 19-25, 47 L 1-20).

He expressed some confusion regarding the concept that the defendant was under no obligation to prove anything, but agreed to follow the instructions of the court. (Vol. II pp. 53 L 24-25, 54 L 1-25, 55 L 1-4).

When asked if he would feel as if he hadn't done his job if he did not vote to convict he replied "No. I think it's all about the facts. You know, you have to go by facts." (Vol. II pp. 58 L 18-25).

The court, realizing that that juror worked third shift, offered to provide him with a written notice to his employer excusing him from work. Juror No. 38 replied "I work at Bimbo, so they really don't care. They just want a body there, you know." (Vol II. pp. 56 L 21-25, 57 L 1-3).

The juror requested that the court contact his employer's human resource department to procure the excuse and the court agreed to do so. (Vol. II 57 L 4-18).

After the parties executed their strikes, the defense requested that the court disallow the State's strike of Juror

No. 38 as he is black and Mr. Booker is also black. (Vol II p. 66 L 5-13).

The State responded as follows:

> MR. KIRKENDALL: Your Honor, Juror Number 38 during the defense questioning was obviously uncomfortable with sitting through the length of the trial. He was talking about work he would miss, and miss going forward. Even when talked to by Your Honor, he was likely to go to work, and I believe he will continue to go to his third-shift job, and we had concerns about his ability to pay attention. More concerning than that was his answer concerning his cousin's apparent sex abuse conviction. The lesson he drew from his cousin has a 50-year prison sentence was that there were two sides to every story, and that the victim and his cousin were probably equally to blame. That this is a sexual assault case, the State felt it was going to be a difficult opinion to overcome, considering how these cases are likely determined by the jury.

(Vol II pp. 67 L 16-25, 67 L 1-7).

Later in the proceedings, the State asserted that Juror No. 38 "… talked about another sexual assault case where he's blaming the victim for her part in it. That has to rise to a level for a peremptory challenge." (Vol. II p. 71 L 13-16).

The court responded as follows:

> "THE COURT: I don't know that I understood that's what he was saying. I can understand he says he disagrees with his analysis that there are always two sides to a story, but I believe he would be able to sit here and listen to the evidence and base his decision on that evidence."

(Vol. II p. 71 L 17-22).

The State made further argument to the court regarding its desire to strike Juror No. 38. (Vol. II pp. 71 L 23-25, 72 L 1-10).

The court declared a recess and returned announcing the previous finding that the strike was improper was being abandoned and the State's strike would be granted. The court gave the following explanation for the changed ruling:

> "THE COURT: Okay. Have a seat. Sorry I took so long. All right. I have looked at the Supreme Court's positioning with regard to the Batson challenge, and the one case I'm referring to in particular that spells out the requirements for the Court to render a decision on such a challenge is State versus Mootz, Supreme Court of 2012, found at 808 Northwest 2nd, 207. When I am to render a decision, of course, this is a little bit different in the facts, because the Court raised the Batson challenge itself under this decision, I have to look at a showing that there is a prima facie case of racial discrimination. I've looked at the notes that I keep during the voir

> dire process, which show me that there are a variety of different things that came up with the individuals that the State struck. The only thing that I found that I couldn't use to support any position one way or the other, because there were a couple of people that the State struck who were really not addressed during voir dire, so I don't know that they can give me any support one way or the other, but I cannot say that there is a pattern of racial discrimination in the use of the peremptory strikes. There seem to be individuals that do have problems in their past with regard to opinions concerning knowing someone who has been involved with those questions, particularly based on the sex and the assault cases posed by the Court, and there were also individuals that were really vocal with regard to how upsetting it was to them that some people had suffered through either being falsely accused or who have had family members who were victims.
>
> So I will take back my previous decision and indicate that the State has established the necessary shifting of burden concerning the reasons for its use of peremptory strike, and so the panel is as it is, and I will instruct the Clerk to call -- or, excuse me, participate in the ICN conference to bring in the 16 people that I've placed on the record. So the three individuals that were in here, 37, 38, and 39, having all been struck, the Court Attendant will let them know that they can go home.

(Vol II pp. 72 L 16-25, 73 L 1-25, 74 L 1-6).

The court was incorrect in its finding that Booker failed to make a prima facie case of discrimination. "…the defendant

is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" Batson v. Kentucky, 476 U.S. 79, 96, 106 S.Ct. 1712, 1723, 290 L.Ed.2d 69 (1986).

Juror No. 38 related a case in which he thought that all of the parties involved shared the blame. He admitted that his opinion was based solely on the information he received from the defendant, who was his cousin. (Vol. II pp. 28 L 15-25, 29 L 1-25, 30 L 1-3).

The State's reasons for striking Juror No. 38 were pretextual as the juror agreed to judge the case based on the evidence and the law.

In State v. Thomas, this court found that striking a juror who emphatically expressed his opinion that police officers were not credible was held to be a race-neutral reason for being stricken. State v. Thomas, 847 N.W.2d 438 (Iowa 2014).

Juror No. 38 did not express any inflexible opinion of the police, or of Booker's guilt or innocence.

As the court initially noted, the juror said he would listen to the evidence and base his decision on that evidence. (Vol. II p. 71 L 17-22).

The court's ultimate decision was based on the fact that some of the jurors indicated they "…had suffered through either being falsely accused or who have had family members who were victims." (Vol. II p. 73 L 17-21).

The court's reasoning lacks a detailed explanation in support of allowing the strike. Based upon the U.S. Supreme Court case Snyder v. Louisiana, 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008), a two-step process has been suggested: "First, ensure that you provide a detailed and specific explanation for your ruling on a Batson challenge so that your rationale is not questioned on appeal. Second, when confronted with multiple race-neutral reasons for striking a juror, choose the reason that addresses the juror's demeanor."

Jennifer Lynn Moore, *Bring Batson Back to Life? An Analysis of Snyder v. Louisiana* 46 No. 5 Crim. Law Bulletin ART 5.

Judges are encouraged to facilitate clearer records for appellate review. *Jury Selection — Batson Challenges*, 122 Harv. L. Rev. 346, 354 (2008).

Because the court's reasoning is vague and discusses more than one reason without specifying which it was relying on (i.e. jurors upset by the facts of sexual abuse versus jurors expressing concerns about false accusations), without any specific reference to Juror 38, and because there is no reference to his demeanor by the court, it was error for the court to grant the State's strike.

Amendment VI to the U.S. Constitution, and Article I § 10 of the Iowa Constitution, provide guarantees of an impartial jury composed of one's peers. The striking of Juror No. 38, without sufficient reasons offered by the State, or articulated by the court, deprived Booker of both of these rights.

Booker has been prejudiced as the striking of Juror No. 38 deprived him of having a trial before an impartial jury of his peers.

Juror No. 24 was removed following a challenge for cause advanced by the State.

During her examination, she stated that she knew several people who had been falsely accused. (Vol. I pp. 52 L 4-25, 53 L 1-3).

The State asked her if she would hold the complaining witness to a higher standard of proof to which she replied "I wouldn't hold anybody to a higher standard of proving anything." (Vol. I p. 53 L 4-12).

Juror 24 expressed a need to have no doubt prior to voting to convict. The State asked if that was a firmly held opinion to which she replied "Um, as of this moment, yes." At that point the State motioned to excuse the juror for cause without offering a reason. (Vol. I p. 54 L 6-24).

The defense conducted further questioning of the juror wherein she stated that she could follow the law regarding the legal standard based on the court's instructions and she would not hold any witness to a higher standard than that contained in the court's instructions. (Vol I pp. 56 L 13-25, 57 L 1-2).

Next, defense counsel posed the following question:

> MR. DRAHOZAL: Would you be able to judge this case based only on the facts from this trial that you hear from witnesses and exhibits that you see and apply the law as the judge instructs you?
>
> JUROR NUMBER 24: Sure.

(Vol. I p. 57 L 3-7).

The court asked her to articulate an incident pertaining to "…adult relationship where you were concerned that the information you heard or was told was inaccurate?" She replied "The cases that I am more, um, passionate about have to do with minors." (Vol. I p. 57 L 11-16).

When asked to elaborate she said that a child in her family wrongfully accused another child and that it "destroyed" the family. (Vol. I p. 57 L 19-21).

The court excused the juror without giving a reason as to a legal reason why. (Vol. I pp. 57 L 22-25, 58 L 1-23).

The court did say, after removing the juror, that the juror's face and body posture indicated that the case was "extremely bothersome" to her, but still gave no indication of the reason for removing the juror. (Vol. I p. 58 L 13-18).

Iowa R. Crim. P. 2.18(5) Addresses challenges for cause and mandates that a challenge for cause must "…distinctly specify the facts constituting the causes thereof." Iowa R. Crim. P. 2.18(5) (2020).

The rule goes on to provide 16 scenarios allowing the removal of a juror for cause. Iowa R. Crim. P. 2.18(5)(a-p) (2020).

The State never specified the facts supporting a removal of juror 24 for cause, nor did the court articulate a reason for removing the juror.

"First, trial court is vested with broad, but not unlimited discretion in ruling upon a challenge for cause." State v. Williams, 285 N.W.2d 248, 267 (Iowa 1979) *citing* State v. Winfrey, 221 N.W.2d 269, 273 (Iowa 1974); State v. Beckwith, 242 Iowa 228, 232, 46 N.W.2d 20, 23 (1951) (overruled on other grounds).

While it is true that this Court has determined that a defendant was not prejudiced by the district court granting a challenge for cause without specific facts, that case dealt with a juror who was "unquestionably disqualified" for having formed an opinion as to the guilt or innocence of the defendant and that was the only reason for challenge. State v. Prins, 113 Iowa 72, 84 N.W. 980, 981 (Iowa 1901).

In this case, more than one reason for disqualification was discussed. Was it because of Juror 24's hearing

impairment in one ear? (Vol. I p. 51 L 9-21). Was it because, according to the court, the case was "extremely bothersome" to her? (Vol. I p. 58 L 13-18). Was it because she was planning a trip to Florida in a week? (Vol. I pp. 51 L 25, 52 L 1-3). Was it because the juror indicated that she would have to be firmly convinced of facts adduced at trial? (Vol. I p. 54 L 6-24).

Juror 24's hearing impairment doesn't amount to a disqualification as the court advised her that if she was chosen to serve as a juror, accommodations could be made for her. (Vol. I p. 21 L 3-10).

Neither do her travel plans or her aversion to the subject matter of the case as this Court has previously held that "... persons should not be excused from their public responsibility of jury service for mere inconvenience, distaste for service, or even the threat of some loss of income." State v. Hobson, 284 N.W.2d 239, 241 (Iowa 1979) *citing* Watson v. Charlton, 243 Iowa 80, 93-94, 50 N.W.2d 605, 612-13 (1952).

Expressing a need to be firmly convinced of the defendant's guilt is not a reason giving rise to a challenge for cause, especially when the juror promises to follow the law as contained in the court's instructions.

Booker has been prejudiced as the State was improperly allowed to have Juror 24 removed, a juror who appeared to be open to hearing both sides of the story, thus hurting the defense and benefitting the State by virtue of being spared from expending an additional peremptory challenge.

This matter should be reversed and remanded for retrial.

III. THE DISTRICT COURT DID NOT HAVE JURISDICTION TO HEAR THE STATE'S MOTION NUNC PRO TUNC, NOR DID IT HAVE JURISDICTION TO ISSUE THE SUBSEQUENT AMENDMENT TO THE SENTENCING ORDER.

Standard of Review: Questions of jurisdiction are reviewed for corrections of errors at law. S.S. v. Iowa Dist. Ct. for Black Hawk County, 528 N.W.2d 130, 132 (Iowa 1995).

Preservation of Error: Jurisdictional questions may be raised at any time, but error was nonetheless preserved by

Booker's objection to the State's motion nunc pro tunc and the subsequent adverse ruling. (01/08/21 Motion Nunc Pro Tunc, 01/19/21 Resistance to Motion for Order Nunc Pro Tunc, 01/20/21 Transcript of Amended Sentencing Hearing, 01/22/21 Order) (App. pp. 41-45).

Discussion: Following sentencing, the State filed a motion nunc pro tunc seeking to correct an omission in the sentencing order, namely the special sentence referenced in Iowa Code § 903B.1 (2019). (01/08/21 Motion Nunc Pro Tunc, 11/23/20 Judgment & Sentence) (App. pp. 41, 34-38).

The defense filed a resistance to the motion nunc pro tunc asserting that a notice of appeal was filed on November 14, 2020, the fact that the case had already been assigned a Supreme Court docket number, 20-1551, that Booker had already been sentenced to life without parole and that the provisions of Iowa Code § 903B are not collateral to the subject matter of the appeal. (01/19/21 Resistance to Motion for Order Nunc Pro Tunc) (App. pp. 42-43).

Once an appeal from judgment and sentence has been perfected, the district court "retains jurisdiction to proceed as to issues collateral to and not affecting the subject matter of the appeal." Schettler v. Iowa Dist. Ct., 509 N.W.2d 459, 463–64 (Iowa 1993) (citation omitted).

"An appeal from a final order appealable as a matter of right in all cases other than termination-of-parental-rights and child-in-need-of-assistance cases under Iowa Code chapter 232 is taken by filing a notice of appeal with the clerk of the district court where the order or judgment was entered within the time provided in rule 6.101(1)(b)." Iowa R. App. P. 6.102(2) (2021).

Booker's notice of appeal was perfected on November 24, 2020. (Notice of Appeal, 01/20/21 Transcript of Amended Sentencing Hearing p. 4 L 20-23) (App. pp. 46-47).

The court expressed confusion as to whether the issue was "collateral or not collateral." (01/20/21 Transcript of Amended Sentencing Hearing p. 6 L 7-24).

The court reasoned that in the event "…that the Court of Appeals were not to uphold the ruling as Part B of the trial pertaining to the second or subsequent offender for enhancement purposes, this implication is still present for the Class "C" felony under 903B." (01/20/21 Transcript of Amended Sentencing Hearing p. 7 L 1-5).

The court's reasoning is flawed. "Unlike personal jurisdiction, a party cannot waive or vest by consent subject matter jurisdiction." *citing* In re Estate of Dull, 303 N.W.2d 402, 406 (Iowa 1981). Neither can a party "…confer subject matter jurisdiction on the court by an act or procedure." *Id.*

"[I]t is a general rule that a trial court loses jurisdiction over the merits of a controversy once an appeal is perfected" and "only retains jurisdiction over disputes between the parties, which are collateral to the subject matter of the appeal." State v. Brooks, 630 N.W.2d 815, 818 (Iowa 2001). It is not until Procedendo issues that "the appellate court relinquishes its jurisdiction, and commands the trial court to proceed." State v.

Banning, 205 Iowa 826, 218 N.W. 572, 574 (1928). "An appellate court must have some method of remanding a case to the lower court after the reviewing court has made its decision…In Iowa, remand is accomplished by the issuance of a procedendo." In re M.T., 714 N.W.2d 278, 281 (Iowa 2006).

"An exception to the general rule, however, permits the trial court to retain jurisdiction over disputes between the parties, which are collateral to the subject matter of the appeal." *Id. citing* Kirk v. Iowa Dist. Court, 508 N.W.2d 105, 108 (Iowa Ct.App.1993).

The issue in question, a sentence compelling lifetime supervision for those convicted of Class "C" felonies, or greater offenses, is not collateral to the issues to be decided on appeal. Booker appealed from "…the final order entered in this case on the 23rd day of November, 2020 and all adverse ruling (sic) and orders inhering therein." (11/24/20 Notice of Appeal) (App. pp. 39-40).

A sentencing order which affects the "range of punishment" is a direct consequence of a guilty plea. State v. Carney, 584 N.W.2d 907, 909 (Iowa 1998). The order in question affects Booker's punishment, therefore the sentencing order is necessarily an "adverse ruling and order" and not collateral.

Because the district court did not have jurisdiction over the subject matter of Booker's appeal his conviction and sentence when he was resentenced, Booker's amended sentence is without legal effect and his case should be remanded with directions to vacate the amendment to the sentencing order (01/22/21 Order) (App. pp. 44-45).

IV. THE DISTRICT COURT ERRED IN OVERRULING BOOKER'S OBJECTION TO STATE'S EXHIBIT 35 ON THE BASIS OF RELEVANCE AS THE DOCUMENT FAILS TO PROVE THAT BOOKER IS THE SAME INDIVIDUAL REFERENCED THEREIN.

Standard of Review: Evidentiary rulings are reviewed for an abuse of discretion. State v. Einfeldt, 914 N.W.2d 773, 778 (Iowa 2018).

Preservation of Error: Error was preserved by virtue of Booker's timely objection to the lack of authentication and relevance of the exhibit and the court's adverse ruling. (Vol. V pp. 17 L 25, 18 L 1-14, State's Exhibit 35 Certified Statement of Conviction/Disposition) (Ex. App. pp. 8-13).

Discussion: State's Exhibit 35 references "Patrick Booker", not Patrick H. Booker, Jr. (State's Exhibit 35).(Ex. App. pp. 8-13) The exhibit fails to identify Patrick H. Booker, Jr. as the individual convicted in that particular Illinois case. Therefore, the document lacks relevance, and is more prejudicial than probative.

Courts employ a two-step analysis to determine whether evidence is admissible. First, the court must determine whether the evidence is relevant to a legitimate factual issue in dispute. State v. Sullivan, 679 N.W.2d 19, 24 (Iowa 2004). "Relevant" evidence is evidence having "any tendency to make a fact more or less probable than it would be without the evidence" and the fact "is of consequence in determining the

action." Iowa R. Evid. 5.401 (2018); State v. Reynolds, 765 N.W .2d 283, 289 (Iowa 2009). If evidence is not relevant, it is not admissible. Iowa R. Evid. 5.402 (2018); State v. Reynolds, 765 N.W .2d at 289.

If the evidence is relevant, then the court must decide if the danger of unfair prejudice substantially outweighs the probative value of the evidence. Iowa R. Evid. 5.403 (2020); State v. Huston, 825 N.W.2d 531, 537 (Iowa 2013). A court must first consider the probative value of the proffered evidence. State v. Huston, 825 N.W.2d at 537. In determining probative value, the court considers "the strength and force of the evidence to make a consequential fact more or less probable." State v. Martin, 704 N.W.2d 665, 671 (Iowa 2005). The court then balances the probative value against the danger of the evidence having a prejudicial or wrongful effect upon the jury. State v. Huston, 825 N.W.2d at 537. Evidence is unfairly prejudicial when it "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers

other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case." State v. Rodriquez, 636 N.W.2d 234, 240 (Iowa 2001).

The State failed to prove that State's Exhibit 35 referred to Patrick H. Booker, Jr. In order to authenticate a documentary exhibit for purposes of admissibility, the proponent "…must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Iowa R. Evid. 5.901 (2021).

"Authentication or identification represents one component in the relevancy determination with regard to certain types of evidence, such as the contents of a document, telephone call or other exhibits." Laurie Kratky Doré, Iowa Practice Series: Evidence § 5.901:0 (Nov. 2020 update).

State's Exhibit 35 was nominally probative, as the individual had first and last names identical to Booker's, but was highly prejudicial as the proof of Booker being the named individual was inadequate.

Mr. Booker has been prejudiced as he would not have been convicted had the court correctly ruled on the admissibility of State's Exhibit 35. The testimony of Andy Cheeks cannot salvage the enhancement issue as he did not testify as to the specifics of the conviction.

This matter should be reversed and remanded for modification of the sentencing order to exclude the application of the penalty enhancement.

CONCLUSION

WHEREFORE, Defendant Patrick H. Booker respectfully requests that this Court reverse and remand this case for dismissal due to an insufficiency of evidence, or to reverse and remand for a new trial based on a dearth of evidentiary weight, the improper striking of Jurors No. 24 and 38, the error in admitting State's Exhibit 35, for abdication of the district court's order granting State's motion nunc pro tunc and abdication of the portion of the sentencing order with regard to the application of enhanced penalties.

NONORAL SUBMISSION

Counsel requests not to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $4.57, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

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) because:

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/s/ Stephan J. Japuntich Dated: 09/20/21

STEPHAN J. JAPUNTICH
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
sjapuntich@spd.state.ia.us
appellatedefender@spd.state.ia.us