IN THE SUPREME COURT OF IOWA
Supreme Court No. 22-0324

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WAYLON JAMES BROWN,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY
THE HONORABLE JAMES DAANE, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

This case can be decided based on existing legal principles. Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

Defendant Waylon Brown appeals his convictions following a jury trial finding him guilty of first-degree robbery and willful injury causing serious injury.

Course of Proceedings

The State accepts the defendant's statement of the course of proceedings as substantially correct.

Facts

"Get him, Tommy!," yelled defendant Brown to his accomplice. Trial Tr. vol. 1, 22:23–23:1.

Victim Jeremiah Johnson had been walking to a convenience store to get doughnuts for his children. Trial Tr. vol. 1, 20:21–21:18. He encountered defendant Brown, who asked about Brown's girlfriend, Channin Phillips. Trial Tr. vol. 1, 22:1–5. Brown was mad about an incident two weeks earlier involving Channin. Trial Tr. vol. 1, 29:2–12.

When Jensen rebuffed Brown's inquiry about Channin, Brown yelled for his accomplice Thomas "Tommy" White. Trial Tr. vol. 1, 22:5–23:1. White emerged from between some cars and ran toward Jensen. Trial Tr. vol. 1, 23:2–7. In response, Jensen ran to the apartment door because he knew a surveillance camera was there. Trial Tr. vol. 1, 23:8–13. Brown and White chased after him. Trial Tr. vol. 1, 23:14–25.

Jensen felt something strike him twice in the back of the head as he fell against the glass door. Trial Tr. vol. 1, 24:15–22. He saw a baseball bat in White's hand. Trial Tr. vol. 1, 28:9–14, 32:4–14. Then defendant Brown told White to take Jensen's backpack. Trial Tr. vol. 1, 24:23–25:7. They took his backpack as well as a cellphone from his pocket and a ring from his finger. Trial Tr. vol. 1, 25:8–18.

After Brown and White ran away, Jensen tried to stand up three times but kept falling from dizziness. Trial Tr. vol. 1, 25:19–26:2. He was bleeding "a lot" from his head because he takes blood-thinner medication. Trial Tr. vol. 1, 26:3–7. He struggled his way inside and up the elevator to his apartment. Trial Tr. vol. 1, 26:8–20.

Inside the apartment, Jensen's cousin awoke to the sound of someone screaming "bloody murder." Trial Tr. vol. 1, 37:9–38:18. She

saw Jensen bleeding "really bad" from the head and called 911. Trial Tr. vol. 1, 38:18–39:11, State's Ex. 14 (911 recording).

Police arrived and found a trail of blood leading to Jensen's apartment. Trial Tr. vol. 1, 42:7–45:25. Jensen went to the emergency room, where doctors put seven staples in the top of his head and six staples in the back. Trial Tr. vol. 1, 27:1–4. He had x-rays to make sure there was no internal bleeding. Trial Tr. vol. 1, 28:18–29:1. In the days that followed, he had two more follow-up visits for scans. Trial Tr. vol. 1, 27:18–24. He still has scars in the top and back of his head, and he suffers from night terrors. Trial Tr. vol. 1, 27:5–14, 27:25–28:8.

Detective Nathan West interviewed Brown. Trial Tr. vol. 1, 56:7–11. Brown admitted he knew Tommy White but called White "no good" and "too wild." Trial Tr. vol. 1, 60:17–24, State's Ex. 34 (interview video at 0:00, 0:25).[1] Initially, he denied being with White or chasing the victim to the apartment building. State's Ex. 34 at 2:20, 3:50. The detective showed a still photo from the surveillance video, and Brown identified White as the attacker holding the bat and

[1] To watch the interview video on the disk, open the "VIDEO_TS" folder and then select the file called "VTS_01_1.VOB."

wearing a green hat. Trial Tr. vol. 1, 56:12–23, 60:4–9, State's Ex. 34 at 5:40. However, when the detective showed a still photo of the second attacker, Brown initially identified the person as a man named "Dudley." Trial Tr. vol. 1, 56:23–24, State's Ex. 34 at 6:05. Brown eventually admitted the second suspect in the video was him, wearing dark clothing and carrying a satchel. Trial Tr. vol. 1, 56:24–57:3, 59:20–60:16, State's Ex. 34 at 6:50. But Brown claimed he was not chasing the victim; instead, he insisted that he pushed White and told him to stop attacking the victim. Trial Tr. vol. 1, 57:14–19, State's Ex. 34 at 8:15, 9:50, 10:30, 12:15.

As a jail inmate, Brown had access to a kiosk capable of sending text messages. Trial Tr. vol. 1, 71:19–73:1. In one message to his girlfriend Channin, he pleaded, "i hope dude dont make it to court otherwise im gone please talk to him channin. . . ." State's Ex. 35 (text message 11/15/2021); App. 10. The next day he instructed, "do what you can out there i know you can fix my situation please help me. . . ." State's Ex. 36 (text message 11/16/2021, 4:50 a.m.); App. 11. He messaged later, "im serious about that please try to talk to him . . ." State's Ex. 37 (text message 11/16/2021, 12:14 p.m.); App. 12.

At trial, Brown offered co-defendant White as a witness. But White answered nearly every question with "Plead the Fifth." Trial Tr. vol. 1, 77:16–80:14. A defense investigator testified that he had previously spoken with White, who claimed Brown was helping reclaim a backpack that Jensen had stolen from White. Trial Tr. vol. 1, 81:19–83:19, Def. Ex. 104 (White affidavit); App. 13.

Brown also testified at trial. He claimed he was sitting outside at 4:30 a.m. when he saw two men, one of whom was yelling, "Hey, stop him. He took my shit." Trial Tr. vol. 1, 85:23–87:12. Brown said he shoved Jensen by the door because he thought it would help the other man get his stuff back. Trial Tr. vol. 1, 87:13–88:1. He claimed he did not notice that White had a baseball bat. Trial Tr. vol. 1, 88:2–10. Brown denied ever telling anyone to take the victim's backpack or jewelry. Trial Tr. vol. 1, 88:15–17.

The jury watched the surveillance video. It showed Brown and White chasing Jensen. State's Ex. 30 (surveillance video) at 0:02. Brown—dressed in dark clothing and carrying a satchel—caught up to Jensen by the door. State's Ex. 30 at 0:02. White—wearing a green hat and brandishing a baseball bat—followed behind Brown. State's Ex. 30 at 0:02. White swung the bat and then Brown kicked in the

direction of Jensen, who was just out of frame. State's Ex. 30 at 0:08. Brown turned toward Jensen, picked something up, and put it in his pocket. State's Ex. 30 at 0:15–0:23. White grabbed Jensen's backpack before they ran away. State's Ex. 30 at 0:27.

ARGUMENT

I. Sufficient Evidence Proved Brown's Guilt for First-Degree Robbery.

Preservation of Error

"[A] defendant need not file a motion for judgment of acquittal to challenge the sufficiency of the evidence on direct appeal." *State v. Crawford*, 972 N.W.2d 189, 198 (Iowa 2022).

Standard of Review

"'We review the sufficiency of the evidence for correction of errors at law.'" *Id.* at 202 (quoting *State v. Buman*, 955 N.W.2d 215, 219 (Iowa 2021)). "In conducting that review, we are highly deferential to the jury's verdict. The jury's verdict binds this court if the verdict is supported by substantial evidence." *Id.* (citing *State v. Tipton*, 897 N.W.2d 653, 692 (Iowa 2017)). "Substantial evidence is evidence sufficient to convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." *Id.* "In determining whether the jury's verdict is supported by substantial evidence, we view the

evidence in the light most favorable to the State, including all 'legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence.'" *Id.* Direct and circumstantial evidence are equally probative. Iowa R. App. P. 6.904(3)(p).

Discussion

Ample evidence proved Brown's guilt for first-degree robbery. The victim's testimony and the surveillance video established that Brown was an active participant in the robbery and baseball-bat assault. Additionally, Brown's false statements and attempts to influence a witness confirmed his role in the crimes. Accordingly, this Court should affirm his convictions.

A. The evidence proved Brown's guilt as principal as well as aider and abettor.

The victim's testimony alone proved Brown guilty of first-degree robbery. Jeremiah Jensen testified that Brown initiated the attack by yelling, "Get him, Tommy!" Trial Tr. vol. 1, 22:5–23:1. Brown and Thomas White then chased after Jensen. Trial Tr. vol. 1, 23:2–25. After White struck Jensen with a baseball bat, Brown told White to take Jensen's backpack. Trial Tr. vol. 1, 24:15–25:7. Brown and his accomplice then took Jensen's backpack, cellphone, and ring.

Trial Tr. vol. 1, 25:8–18. This testimony, at the very least, proved aiding and abetting—Brown encouraged White to "get" the victim, helped chase the victim, and instructed White to take property from the victim's possession. *See* Jury Instr. 20; App. 15 ("'Aid and abet' means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed.").

The victim's consistent reports boosted his credibility. During the 911 call, he identified Brown and White as his attackers. State's Ex. 14 (911 recording) at 2:10. He made the same identification to one of the first police officers to arrive at the scene. Trial Tr. vol. 1, 48:12–21. Similarly, two days later he told the detective that he encountered the two men while walking to the store, that Brown told White to take the backpack, and that they took his cellphone. Trial Tr. vol. 1, 64:10–66:13. The jury could find Jensen credible from his telling of consistent stories throughout the investigation and at trial.

The surveillance video also supported the victim's testimony. That video showed Brown chasing after Jensen and catching him near the apartment door, with White close behind holding a bat. State's Ex. 30 (surveillance video) at 0:00. White swung with the baseball bat,

and Brown kicked in Jensen's direction. State's Ex. 30 at 0:08. Brown then reached down by Jensen, stood up, and put something in his pocket. State's Ex. 30 at 0:15–0:23. White took the backpack before both men ran off. State's Ex. 30 at 0:27. This video confirmed that Brown was an active participant in the robbery, including assaulting the victim and taking his property.

Brown's false statements showed his consciousness of guilt. When questioned by the detective, Brown initially denied being with White or chasing anybody. State's Ex. 34 at 2:20, 3:50. And when shown still shots of the surveillance video, Brown initially identified the photo of himself as a different man named "Dudley." Trial Tr. vol. 1, 56:23–24, State's Ex. 34 at 6:05. After admitting he was in the video, Brown still insisted he only saved the victim by pushing White off—even though the video showed Brown grabbing and kicking the victim. Trial Tr. vol. 1, 57:14–19, 60:25–61:9, State's Ex. 34 at 8:15, 9:50, 10:30, 12:15. The jury could interpret these false denials as proof of guilt. *See State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993) ("A false story told by a defendant to explain or deny a material fact against him is by itself an indication of guilt and the false story is

relevant to show that the defendant fabricated evidence to aid his defense.").

Likewise, Brown's attempt to influence a witness reflected his guilty knowledge. While in jail, he contacted his girlfriend and pleaded, "i hope dude dont make it to court otherwise im gone please talk to him channin. . . ." State's Ex. 35 (text message); App. 10. In two subsequent messages, he asked his girlfriend to "fix my situation" and "please try to talk to him." State's Ex. 36 & 37 (text messages); App. 11–12. The jury could find these messages equated to an acknowledgement of guilt and an effort to prevent the victim from testifying at trial. *See State v. Stufflebeam*, 260 N.W.2d 409, 412 (Iowa 1977) ("An attempt by a party to improperly, even illegally, influence a witness is thought to be an admission by conduct.").

The jury was not obligated to believe Brown's dubious story. He presented an affidavit from co-defendant White taking blame for the incident. Def. Ex. 104; App. 13. But White refused to testify in front of the jury (Trial Tr. vol. 1, 77:16–80:14), leaving his story untested by cross examination and, therefore, less reliable. Next, a rational jury would question the reliability of Brown's story at trial. He testified that he only shoved Jensen in an attempt to help White reclaim his

stolen backpack. Trial Tr. vol. 1, 85:23–88:1. But that story conflicted with what he told Detective West, that he pushed White in an attempt to stop the attack against Jensen. Trial Tr. vol. 1, 57:14–19, State's Ex. 34 at 8:15, 9:50, 10:30, 12:15. Brown's trial testimony also conflicted with the surveillance video, which showed him kicking toward Jensen and bending down as if taking something from Jensen. State's Ex. 30 at 0:08, 0:15–0:23.

Brown was an active participant in the first-degree robbery. The jury could reasonably accept proof that he initiated the attack by telling his accomplice to "get him" and that he aided by chasing and assaulting the victim. In particular, the evidence proved Brown's intent to commit a theft by instructing his accomplice to take the victim's backpack and by bending down to take something from the victim. Although Brown presented a different story that he was an unknowing participant, the jury could rationally reject that story in favor of the State's evidence. *See State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993) ("The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive."). This Court should not interfere with the jury's credibility finding.

B. Brown knew his accomplice was armed with a dangerous weapon.

Brown's conviction was elevated to first-degree robbery due to his accomplice's possession of a dangerous weapon. He now challenges that element, relying on *State v. Henderson*, 908 N.W.2d 868, 876 (Iowa 2018) (concluding first-degree robbery requires proof that "the alleged aider and abettor had knowledge that a dangerous weapon would be or was being used"). But *Henderson* does not control for two reasons. First, the jury instruction did not require knowledge, and Brown did not object, so it became law of the case. Second, the facts of Brown's offense are easily distinguishable from *Henderson*.

Brown's jury was not required to find his knowledge of the dangerous weapon. The relevant jury instruction required proof that "The defendant aided and abetted Thomas White who was armed with a dangerous weapon." Jury Instr. 17; App. 14. This instruction lacked *Henderson*'s knowledge element. A proper post-*Henderson* instruction would read something like, "The defendant knew Thomas White was or would be armed with a dangerous weapon." But Brown did not request such an instruction and did not object to the form of instruction 17 given at his trial. Trial Tr. vol. 2, 2:9–17. Therefore, the

instruction—which did not require *Henderson* knowledge—became law of the case. *See State v. Canal*, 773 N.W.2d 528, 530 (Iowa 2009) ("[The defendant] did not object to the instructions given to the jury at trial. Therefore, the jury instructions become the law of the case for purposes of our review of the record for sufficiency of the evidence.").

Next, unlike *Henderson*, the evidence proved Brown knew about his accomplice's baseball bat. *Henderson* involved a robbery in which the conspirators agreed in advance not to use guns, but one conspirator riding in a separate car showed up with a gun anyway. *Henderson*, 908 N.W.2d at 870–71. In contrast, Brown's accomplice did not conceal his possession of the baseball bat. The video showed Brown chasing the victim while co-defendant White openly brandished the weapon. State's Ex. 30 at 0:00. Brown stood next to White when White swung that bat at the victim. State's Ex. 30 at 0:08. Brown then continued the robbery by kicking the victim and bending down as if taking something from the victim's possession. State's Ex. 30 at 0:08–0:23. Although Brown testified that he never noticed the bat (Trial Tr. vol. 1, 88:2–14), the jury could rationally reject that testimony in favor of believing the videotaped proof.

The jury properly found Brown guilty of first-degree robbery. The unchallenged instructions became law of the case, and they did not ask the jury whether Brown knew his accomplice would use a dangerous weapon. And even if the jury had received a *Henderson*-compliant instruction, Brown's active participation in a robbery shoulder-to-shoulder with a conspicuously armed accomplice proved his knowledge. Accordingly, this Court should uphold the jury's verdict finding Brown guilty of first-degree robbery.

II. Brown's Convictions Do Not Merge Because Each Contained Different Elements.

Preservation of Error

The district court's failure to merge convictions when required constitutes an illegal sentence that can be raised on direct appeal. *State v. Halliburton*, 539 N.W.2d 339, 343 (Iowa 1995).

Standard of Review

"We review an alleged failure to merge convictions as required by statute for correction of errors at law." *State v. Johnson*, 950 N.W.2d 21, 23 (Iowa 2020).

Discussion

Brown's convictions do not merge. Willful injury and first-degree robbery—as they were marshalled to the jury—had different

elements. Therefore, they were different offenses that could be punished separately.

By statute, a conviction merges when it "is necessarily included in another public offense of which the person is convicted." Iowa Code § 701.9. This statute codifies the Double Jeopardy Clause's prohibition of cumulative punishment. *Johnson*, 950 N.W.2d at 24. Both the statutory and constitutional protections turn on whether the legislature intended double punishment. *Id.* The Court employs a two-step inquiry. "[O]ur first step is to apply the legal-elements test that compares 'the elements of the two offenses to determine whether it is possible to commit the greater offense without also committing the lesser offense.'" *Id.* (quoting *Halliburton*, 539 N.W.2d at 344). The second step questions "'[w]hether the legislature intended multiple punishments for both offenses.'" *Id.*

Brown's merger challenge begins with delineating the elements of his two offenses. Robbery becomes first-degree robbery if the defendant "purposely inflicts or attempts to inflict serious injury" or "is armed with a dangerous weapon." Iowa Code § 711.2. But "when a statute provides alternative ways of committing the offense, the alternative submitted to the jury controls." *State v. Anderson*, 565

N.W.2d 340, 344 (Iowa 1997) (citations omitted). And the State prosecuted Brown under only the dangerous-weapon alternative. *See* Jury Instr. 17; App. 14 ("The defendant aided and abetted Thomas White who was armed with a dangerous weapon."). Thus, the relevant inquiry is whether the "armed with a dangerous weapon" alternative of first-degree robbery included all the same elements of willful injury. *See* Jury Instr. 26; App. 17 (defining willful injury to require proof of specific intent to seriously injure and acts that caused serious injury).

Brown's offenses, as marshalled, fail the legal-elements test. Contrary to his argument (Def. Br. at 32), it takes little imagination to envision a situation "for the elements of robbery in the first degree to be satisfied without the elements of willful injury." A person who displays a firearm during a bank robbery commits first-degree robbery even though he never did an act intended to cause serious injury and no serious injury resulted. Likewise, a person can commit willful injury by intentionally inflicting a serious injury without intending to commit a theft, precluding a robbery conviction. Thus, first-degree robbery and willful injury are not included offenses—their elements can be committed independently of one another.

Brown's circumstances do not match *State v. Hickman*, 623 N.W.2d 847 (Iowa 2001). In that case, the defendant's first-degree robbery charge included the alternative that he "[p]urposely inflicted or attempted to inflict a serious injury on [the victim]." *Id.* at 851 (quoting jury instruction). The Court determined the "purposely inflicts . . . a serious injury" alternative "convey[ed] the same thought" as the "intended to cause . . . serious injury" element of willful injury. *Id.* at 852. Brown's case is different. The trial court did not marshal the "purposely inflicts a serious injury" alternative of first-degree robbery, so that non-existent element could not merge with willful injury. He fails the impossibility test, so his offenses do not merge.

Brown's case does not reach the second step of the merger analysis. He argues the legislature did not intend multiple punishments. Def. Br. at 35. But this second step of questioning legislative intent applies only if he first clears the legal-impossibility test. *See Halliburton*, 539 N.W.2d 344 ("[W]e first decide whether the crimes meet the legal elements test for lesser included offenses. *If they do, we then study whether the legislature intended multiple punishments for both offenses*." (emphasis added)); *see also State v. Goodson*, 958 N.W.2d 791, 805 (Iowa 2021) ("Since the elements test

is met, we move to the second step to determine whether the legislature intended to double punish . . .").

Brown was properly convicted and sentenced for both offenses. Because his charges for first-degree robbery and willful injury had different statutory elements, the legislature intended multiple punishments. Consequently, the convictions do not merge, and this Court should affirm his sentences.

III. The District Court Soundly Exercised Its Discretion to Deny a Mistrial.

Preservation of Error

Brown preserved error by requesting a mistrial and receiving an adverse ruling in the district court. Trial Tr. vol. 2, 3:25–7:9.

Standard of Review

The denial of a motion for mistrial is reviewed for abuse of discretion. *State v. Plain*, 898 N.W.2d 801, 810 (Iowa 2017).

Discussion

The district court acted within its wide discretion to deny Brown's mistrial request. Granting a relatively short delay of trial was a reasonable method to deal with a juror's Covid-19 quarantine. And Brown's speculative claims of prejudice did not compel a mistrial as the only option. Accordingly, this Court should affirm.

A. Suspending trial was a reasonable way to accommodate a juror's Covid quarantine.

Brown's mistrial challenge rests on the district court's handling of a juror's midtrial Covid-19 quarantine. Trial commenced on Wednesday, January 19, and proceeded with jury selection, opening statements, presentation of evidence, and both parties resting their cases. *See generally* Trial Tr. vol. 1. The next day—Thursday—a juror overslept, and other jurors had conflicts on Friday, so the court ordered the trial to reconvene the following Monday. Trial Tr. vol. 2, 2:23–13:8. But on Monday, January 24, a different juror called in sick and later tested positive for Covid-19. Trial Tr. vol. 3, 2:3–21, 11:16–20. To accommodate the CDC guidance for a five-day quarantine period, the court decided to bring back the jury on Friday, January 28. Trial Tr. vol. 3, 11:20–12:9. Brown now faces the burden of demonstrating that the district court's decision was "an obvious procedural error" necessitating a mistrial. *State v. Newell*, 710 N.W.2d 6, 32 (Iowa 2006).

The district court's choice—to suspend trial for a short time—was a reasonable method to handle the juror's Covid quarantine. During trial, the court has discretion to permit jurors to separate. *See* Iowa R. Crim. P. 2.19(5)(c) ("The jurors shall be kept together unless

the court permits the jurors to separate as in civil cases . . ."); Iowa R. Civ. P. 1.927(1) ("A jury once sworn shall not separate unless so ordered by the court, who must then advise them that it is the duty of each juror not to converse with any other juror or person, nor be addressed on the subject of the trial . . ."). Even after deliberations begin, the court may "permit[] the jurors to separate temporarily overnight, on weekends or holidays, *or in emergencies*." Iowa R. Crim. P. 2.19(5)(h) (emphasis added). A juror's Covid-19 infection is such an emergency that justifies temporary separation.

Courts around the country have denied mistrials when Covid infections, exposures, or court closures necessitated midtrial delays, including delays much longer than the nine days Brown alleges was too long. *See, e.g.*, *United States v. Frazier*, ___ F. Supp. 3d ___, 2022 WL 4073339, at *2–4 (M.D. Tenn. Sept. 5, 2022) (denying a mistrial when the defendant's cross examination of a government witness was delayed for three weeks due to Covid); *United States v. Coversup*, No. CR 19-15-BLG-SPW, 2020 WL 4260519, at *2–4 (D. Mont. July 24, 2020) (finding no need for mistrial following 14-day midtrial break to allow a juror to quarantine for possible Covid exposure), *aff'd* No. 20-30266, 2022 WL 2207309 (9th Cir. June 21,

2022); *People v. Breceda*, 290 Cal. Rptr. 3d 899, 914–23 (Ct. App. 2022) (finding no need for mistrial when trial was suspended for 73 days during presentation of State's case-in-chief due to a Covid-related court closure); *People v. Garcia*, ___ Cal. Rptr. 3d ___, 2022 WL 4181084, at *5–10 (Ct. App. Sept. 13, 2022) (affirming the denial of a mistrial following 103-day midtrial continuance due to a Covid-related court closure). Although some judges have granted Covid-related mistrials[2], such is the nature of any discretionary standard. *Cf. State v. Clark*, 814 N.W.2d 551, 564 (Iowa 2012) ("While we might not have made the same call had the decision been ours, we cannot

[2] *United States v. Dennison*, No. 2:21-CR-00149-JDL-1, 2022 WL 4119762, at *7–10 (D. Me. Sept. 9, 2022) (finding manifest necessity for mistrial when the case agent tested positive during trial and the courtroom would not be available for a short continuance); *United States v. Thrush*, No. 1:20-CR-20365, 2022 WL 2373351, at *3–5 (E.D. Mich. June 30, 2022) (finding mistrial was proper when, after two days of testimony, the government's primary witness and the presiding judge's spouse tested positive for Covid); *United States v. Hinton*, No. 219CR20477TGBAPP, 2022 WL 3585718, at *1–2 (E.D. Mich. Aug. 22, 2022) (granting mistrial when government's witnesses were not expected to recover from Covid quickly, when other witnesses and the prosecutors were in close contact with the infected witnesses, and when the court and jurors were not available for a continuance); *State v. Smith*, 547, 244 A.3d 296 (N.J. App. Div. 2020) (finding manifest necessity to declare mistrial when trial was suspended in March 2020 and had not resumed by October 2020); *Commonwealth v. Evans*, 266 A.3d 653 (Pa. Super. Ct. 2021) (finding manifest necessity for a mistrial following defendant's possible Covid exposure when no reasonable alternatives were available).

say it was an abuse of discretion."). The fact that different judges may weigh the situation differently does not satisfy Brown's burden to demonstrate the district court acted unreasonably.

Brown's circumstances do not require the same result as the unpublished outcome in *State v. Miller*, No. 09-1231, 2012 WL 5540844 (Iowa Ct. App. Nov. 15, 2012). In that case, the trial court—without consulting the parties—allowed a juror to travel out of state "for an undetermined length of time" after the jury had begun deliberations. *Id.* at *6–7. Brown's circumstances are different. The court consulted the parties about the juror's unavailability and picked a definite date for the jury to return for the remainder of trial. And because the case had not yet been submitted, the temporary separation was not as disruptive to the jury's deliberations. In fact, the *Miller* Court anticipated the unexpected illness of a juror as an acceptable "emergency" permitting temporary separation under Rule 2.19(5)(h). *See Miller*, 2012 WL 5540844, at *7 (favorably citing *Bryant v. State*, 202 N.E.2d 161, 163 (Ind. 1964), which found a juror's "sudden severe illness" constituted an emergency). And unlike *Miller* in which the jury in a murder trial might be influenced by a juror attending "the funeral of a family member who suffered a

violent death," *id.* at *5, jurors are well accustomed to handling Covid's interference with daily life.

Additionally, the decision to grant a mistrial must weigh the costs of a retrial. Those costs include the time and expense of calling another jury, which is wasteful when the current jury can reach a fair verdict after only a slight delay. But the costs also include the risk that evidence will degrade or disappear with the passage of time while awaiting retrial. In Brown's case, for example, there was difficulty securing the victim's testimony for trial. Brown had sent messages from jail encouraging others to "get ahold of the victim so he doesn't show up." Hrg. 1/18/2022 Tr. 13:16–15:19. The victim then disobeyed a subpoena and skipped his deposition, explaining he did so to protect the "[s]afety of [his] children." Tr. 23:10–22. As a result, the district court found it necessary to detain the victim until he testified at trial. Tr. 25:11–27:5. Granting a mistrial could have prevented the new jury from hearing the victim's crucial testimony, giving Brown another opportunity to profit from his improper attempts to influence a witness.

The district court acted reasonably when the juror tested positive for Covid-19. Trial could not continue with a Covid-infected

juror, but it was not necessary to scrap the entire trial. As the district court recognized, Brown had demanded a speedy trial, and granting a mistrial would delay his case longer than waiting a few days for the juror to finish his quarantine period. Trial Tr. vol. 2, 22:23–23:6, Trial Tr. vol. 3, 15:20–16:7. Pausing trial for a short time protected Brown's and the public's interest in the efficient administration of justice and, as discussed next, did not result in unfair prejudice.

B. Brown failed to demonstrate prejudice requiring a mistrial.

The record contains no proof that the temporary separation prejudiced Brown's right to a fair trial. Although he speculates about the possibility of faded memories, outside influences, and the fear of Covid-19 exposure, he failed to offer any evidence supporting those allegations. In the absence of any proof, this Court should not presume the jury abdicated its sworn duty to do justice.

First, Brown did not prove that the delay caused the jury to forget any evidence. He speculates that the 9-day gap "could have easily" affected the jury's memory and that it was "plausible" that evidence was forgotten. Def. Br. at 44. To begin, the evidence was quite simple, consisting of just 73 pages of testimony. *See generally* Trial Tr. vol. 1, pp. 19–92. And the crime itself was captured on video.

See State's Ex. 30 (surveillance video). Jurors were allowed to take notes to preserve their memory. Trial Tr. vol. 1, 12:4–13:10; *see also Frazier*, ___ F. Supp. 3d ___, 2022 WL 4073339, at *2 (considering that "most of the jurors in this case have taken copious notes"); *Garcia*, ___ Cal. Rptr. 3d ___, 2022 WL 4181084, at *8 (considering that "jurors had their notes from before the recess"). Also, closing arguments occurred *after* the temporary separation, allowing the parties to refresh the jurors' recollection of the facts. *See Frazier*, ___ F. Supp. 3d ___, 2022 WL 4073339, at *2 (noting that "closing arguments will lessen the possibility that any evidence has been truly forgotten, as opposed to having been stored away in the memory bank for later retrieval"); *Garcia*, ___ Cal. Rptr. 3d ___, 2022 WL 4181084, at *8 (noting the parties "would have the opportunity to refresh the jury's recollection of the evidence in their closing arguments"). And because the State bore the burden of proof, any failure of memory inhered in Brown's favor. *See Breceda*, 290 Cal. Rptr. 3d at 919 ("It can just as easily be speculated that because the prosecution's case was more remote in time, the strength of the prosecution's evidence faded in the jurors' minds."). This Court

should not accept Brown's speculation that the jury forgot any evidence or that he suffered prejudice from it.

Second, Brown did not prove that the jury disregarded its duties or the court's instructions. He proposes that jurors "were exposed to outside influences" and guesses they "probably began making plans" and "rushed through deliberations." Def. Br. at 45. Before pausing trial, the court admonished the jurors not to talk about the case with anyone else, read the news, or do any research. Trial Tr. vol. 2, 11:24–12:5. If Brown believed outside influences affected the verdict, he had the opportunity to present such evidence. *See* Iowa R. Crim. P. 2.24(2)(b)(2), (3) (allowing a new trial when the jury has considered unauthorized evidence or has engaged in misconduct). The record contains no proof that outside influences affected the jury. Moreover, none of the jurors complained that deliberations conflicted with their schedules. And nothing suggests the court would not have granted scheduling accommodations, as it had done previously in trial. *See* Trial Tr. vol. 2, 10:10–11:12 (declining to schedule on Friday to allow one juror to attend an out-of-state business meeting and for another juror to attend her son's college visit and wrestling meet). This Court should not presume that the jury succumbed to any outside influence

or "rushed" its consideration of the evidence. *See Garcia*, ___ Cal. Rptr. 3d ___, 2022 WL 4181084, at *10 ("Despite the length of the delay, we presume that the jurors followed their obligations and did not discuss the case with anyone or conduct any outside research during the entirety of trial, including all recesses."); *Coversup*, 2020 WL 4260519, at *3 ("Coversup has not alleged any facts indicating the jurors have not followed the Court's instruction to distance themselves from anything that could influence them regarding the case.").

Third, no proof suggested that Covid-19 influenced the verdict. Brown thinks the jury "quite possibly" rushed deliberations to avoid exposure to Covid. Def. Br. at 45. But the trial court took reasonable steps to ensure the jury's safety during deliberations, including announcing plans for the recovering juror to wear a mask and for the jury to use the larger courtroom where they could maintain social distancing. Trial Tr. vol. 3, 5:8–19, 8:16–9:10. When trial resumed after the break, none of the jurors complained about exposure to the recovering juror. Brown's speculation did not demonstrate prejudice. *See, e.g.*, *United States v. Dermen*, 452 F. Supp. 3d 1259, 1264 (D. Utah 2020) ("Defendant suggests that the jurors could not deliberate

fairly because of their concerns over risks to their health. But there is absolutely no evidence this was the case."); *Breceda*, 290 Cal. Rptr. 3d at 919 ("The record includes no evidence any of the jurors expressed any concern about the COVID-19 safety measures the court implemented prior to their return or that they feared infection because they were in a courtroom."); *Jetall Companies, Inc. v. Heil*, No. 01-20-00615-CV, 2022 WL 3363208, at *4 (Tex. App. Aug. 16, 2022) ("Jetall's mistrial motion was not accompanied by any affidavit or other evidence that COVID-related health and safety concerns improperly influenced the jury to ignore the evidence to reach a quick verdict.")

The circumstances did not require a mistral as the only possible remedy for the juror's midtrial Covid quarantine. The delay was short, the evidence was straightforward, and the jury was admonished against outside influences. Pausing trial did not result in any undue prejudice, so Brown fails to demonstrate an abuse of discretion from the denial of his motion for mistrial.

CONCLUSION

The Court should affirm Waylon Brown's convictions and sentences.

REQUEST FOR NONORAL SUBMISSION

The State agrees this case is appropriate for submission without oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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