No. 21-1617
Delaware County No. FECR007326

IN THE
SUPREME COURT OF IOWA

STATE OF IOWA,

Appellee,

v.

ROBERT PAUL KROGMANN,

Appellant.

*ON APPEAL FROM THE IOWA DISTRICT COURT*
*IN AND FOR DELAWARE COUNTY*
*LINDA M. FANGMAN, DISTRICT COURT JUDGE*

# BRIEF FOR APPELLANT

Angela Campbell
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: angela@iowajustice.com
*Counsel for Appellant*

PROOF OF SERVICE & CERTIFICATE OF FILING

On September 13, 2022, I served this brief on all other parties by EDMS to their respective counsel, and I mailed a copy of this brief to Mr. Krogmann at Fort Dodge Correctional Facility.

I further certify that I did file this brief with the Clerk of the Iowa Supreme Court by EDMS on September 13, 2022.

/s/Angela L. Campbell

Angela Campbell, AT#0009086
*Counsel of Record for Appellant*
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: angela@iowajustice.com

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## ROUTING STATEMENT

This appeal presents several issues for resolution that are appropriately retained by the Iowa Supreme Court, including one issue with a conflict between a published decision of the court of appeals and the supreme court (part IV), one issue of first impression (part V), and one request for the Supreme Court to find a prior opinion wrongly decided (part VI). Iowa R. App. P. 6.1101(2)(b), (c), and (f).

## STATEMENT OF THE CASE

On March 23, 2009, the State of Iowa filed a two-count trial information charging Robert Krogmann with (1) attempted murder in violation of Iowa Code §707.11(2009), a class "B" felony, and (2) willful injury causing serious injury in violation of Iowa Code § 708.14, a class "C" felony. *State v. Krogmann*, 804 N.W.2d 518, 520 (Iowa 2011). After a jury trial, Krogmann was convicted, and Krogmann's direct appeal was denied. *Id.* at 527. Krogmann filed a postconviction application, which was initially denied by the district court, but the Iowa Supreme Court set aside the conviction, and remanded the case for a retrial. *Krogmann v. State*, 914 N.W.2d 293, 326 (Iowa 2018). In so doing, the Court found that there was structural error in the first trial due to an unconstitutional asset freeze that had been entered in the case that had not been properly challenged by defense counsel. *Id.*

Retrial commenced on August 17, 2021. (8/17/21 Vol. I Trial Tr. at 1). On August 24, 2021, the jury returned a guilty verdict on both counts. (App. at 42-43). On October 5, 2021, the district court sentenced Krogmann to 25 years on Count I, and 10 years on

Count II, consecutive to each other. (App. at 62-66). Krogmann timely appealed. (App. at 74). Cost orders were subsequently entered. (App at 78-81; 85-87). Krogmann appeals evidentiary rulings at trial, his conviction, his sentence, and the cost orders.

## STATEMENT OF THE FACTS

Robert Krogmann was a successful farmer from rural Manchester, Iowa. (8/20/21 TT Vol. 4, p. 147, l. 14-21; p. 163 l. 16-17). Since high school Krogmann had struggled with his mental health. (8/20/21 TT Vol. 4, p. 164, l. 11-15). Prior to the instant offense, he had been hospitalized in mental health facilities on three different occasions, 2001, 2002 and 2006, where he was suicidal, distraught, wanting to die, very depressed, and suffering overwhelming anxiety. (8/20/21 TT Vol. 4, p. 87, l. 6 – p. 88, l. 18). The last of the hospitalizations was three years prior to the instant offense date. (8/20/21 TT Vol. 4, p. 88, l. 21-23). Krogmann was diagnosed in the 1990s with bipolar disorder. (8/20/21 TT Vol. 4, p. 88, l. 6-12). His mother described his bipolar symptoms as "when he was high he could do anything; when he

was low he was depressed and couldn't make up his mind about much of anything." (8/20/21 TT Vol. 4, p. 165, l. 22-25).

In 2007 Krogmann and Jean Smith started dating. (8/18/21 TT Vol. 2, p. 27, l. 19 – p. 28, l. 8). The couple had known each other for decades, having gone to middle and high school together. (8/18/21 TT Vol. 2, p. 28, l. 7-10). On January 25, 2009, the couple returned from vacation and Krogmann broke up with Smith, which was a surprise to Smith, and she was so devastated that she missed work. (8/18/21 TT Vol. 2, p. 31, l. 9-17; p. 64, l. 7-16). A few days after the breakup, on about January 29, Smith reached out to Krogmann to get her crockpot back, and the couple rekindled their relationship. (8/18/21 TT Vol. 2, p. 31, l. 20 – p. 32, l. 4). Smith got onto Krogmann's computer where she saw notifications from Match.com from other women, so she broke up with him. (8/18/21 TT Vol. 2, p. 32, l. 13-23).

According to Smith, Krogmann seemed to accept the breakup for "awhile," but they did keep talking. (8/18/21 TT Vol. 2, p. 33, l. 11-19). Smith said at one point that Krogmann wanted to get back together, but she did not want to. (8/18/21 TT Vol. 2,

p. 33, l. 20-24). She also admitted, however, that she asked Krogmann to do "something extra" for him to show her that he wanted to be in a relationship. (8/18/21 TT Vol. 2, p. 65, l. 3-13).

Smith said Krogmann started texting and calling 50 times a day and brought unwanted flowers to her work. (8/18/21 TT Vol. 2, p. 34, l. 1-10). She did not consider this to be the "something extra" she had asked for. (8/18/21 TT Vol. 2, p. 65, l. 3-13). Krogmann also showed up at her house, but she and her family asked him to leave. (8/18/21 TT Vol. 2, p. 34, l. 16 – p. 35, l. 21). While all of this was going on, Smith did not feel like her life was in danger, and Krogmann didn't act like anyone's life was in danger. (8/18/21 TT Vol. 2, p. 35, l. 17-23).

Smith went over to Krogmann's house on March 11, 2009 to talk about getting back together. (8/18/21 TT Vol. 2, p. 35, l. 10-12; p. 36, l. 17 – p. 37, l. 7). Smith and Krogmann discussed that they weren't going to get back together, Krogmann asked if the two could remain friends, and the two left each other on good terms. (8/18/21 TT Vol. 2, p. 38, l. 1; p. 64, l. 21-23). Smith

admitted that they hugged during this encounter at Krogmann's house on March 11. (8/18/21 TT Vol. 2, p. 65, l. 14-22).

After the conversation on March 11, Smith initially said that two days went by with no contact between Smith and Krogmann, but later agreed that they actually texted on March 12. (8/18/21 TT Vol. 2, p. 38, l. 5-9; TT Vol. 2, p. 65, l. 22 – p. 66, l. 5). They did not see each other in person again until the morning of March 13.

While this relationship drama was going on, in the spring of 2009, Krogmann's family was becoming increasingly concerned about his mental health. And, while they "always" were concerned about his mental health, it was increasingly concerning to them because of how he was talking and acting. (8/20/21 TT Vol. 4, p. 142, l. 20 – p. 145, l. 8). Krogmann's family believed he was suicidal, and was "stuck" on the relationship with Smith, but they never were afraid for Smith's safety. (8/20/21 TT Vol. 4, p. 145, l. 9 – p. 151, l. 13). Mary Krogmann, Krogmann's sister-in-law, saw Krogmann daily during early March of 2009. (8/20/21 TT Vol. 4, p. 155, l. 13-16). During that time, Mary Krogmann

described him as "at the lowest I'd ever seen him." (8/20/21 TT Vol. 4, p. 155, l. 22-23). Krogmann was "perseverating" on Smith, or "focusing on the same thing but never making progress." (8/20/21 TT Vol. 4, p. 156, l. 13-18). Mary Krogmann explained that he was constantly asking, "What can I do to win her back, what can I do to show her that I love her, you know that, that sort of thing." (8/20/21 TT Vol. 4, p. 157, l. 16-19).

Mary Krogmann saw Krogmann early in the evening of March 12, 2009. She made him sit down and eat lasagna because at that time "sometimes he would go days without eating" because all he would think about was Smith. (8/20/21 TT Vol. 4, p. 158, l. 15 – p. 159, l. 5). She was not ever concerned about Smith's safety. (8/20/21 TT Vol. 4, p. 159, l. 20-22).

Rosemary Krogmann, Krogmann's mother, was also seeing him daily in the March 2009 timeframe. (8/29/21 TT Vol. 4, p. 166, l. 1-4). She noticed that he would pace the floor, not knowing what to do with himself, not knowing any purpose, not eating and not sleeping. (8/29/21 TT Vol. 4, p. 166, l. 14-17). She was worried he was suicidal. (8/29/21 TT Vol. 4, p. 166, l. 18-21). The family

was so concerned about his mental state that his brothers and sons had gone to his house and taken away his guns. (8/20/21 TT Vol. 4, p. 166, l. 22 – p. 167, l. 1). On the evening of March 12, 2009, Rosemary Krogmann said Krogmann came to her house after he left Dan and Mary Krogmann's house. (8/20/21 TT Vol. 4, p. 168, l. 16 – p. 169, l. 2). She said Krogmann never threatened to harm Smith because "he loved her." (8/20/21 TT Vol. 4, p. 172, l. 3-5).

Jason Hoeger, like Krogmann, was a local farmer, and the two were friends. (8/19/21, TT Vol. 3, p. 29, l. 6 – p. 30, l. 7). On the evening of March 12, 2019, Hoeger called Krogmann to invite him to play cards with several other individuals at another gentleman's farm. (8/19/21, TT Vol. 3, p. 36, l. 12-17). Even though the call should have been short, the call actually lasted 45 minutes because Krogmann talked to Hoeger about Smith. (8/19/21, TT Vol. 3, p. 37, l. 1-6). Jeff Krogmann, Krogmann's son, encouraged Krogmann to go to the card game to try to give him something to do to feel better. (8/20/21 TT Vol. 4, p. 205, l. 20-21).

Krogmann did go to the card game, and Hoeger, Krogmann and several other friends played cards for several hours that night. (8/19/21, TT Vol. 3, p. 30, l. 23 – p. 31, l. 15). When Hoeger left between midnight and 1:00, Krogmann was still there. (8/19/21, TT Vol. 3, p. 35, l. 14-16).

Martin Steffen, Krogmann's boss at his part-time job at Dyersville Equipment, spoke to Krogmann on the evening of March 12, and asked him to drive to Sigourney, Iowa to pick up a John Deere planter for the dealership. (8/19/21 TT Vol. 3, p. 84, l. 25 – p. 86, l. 3). Krogmann said he wasn't going to be able to do it. (8/19/21 TT Vol. 3, p. 85, l. 21-23). At 7:41 a.m. on March 13, Steffen again spoke to Krogmann, and asked him to instead go pick up a check from a customer. (8/19/21 TT Vol. 3, p. 86, l. 15-21; p. 89, l. 24-25). Krogmann did go pick up that check from the customer after this phone call, between 8:00 and 8:15 a.m., before going to Smith's house. (8/19/21 TT Vol. 3, p. 88, l. 17, p. 92, l. 10-11).

On the morning of Friday, March 13, Smith was home in her robe, drinking coffee. (8/18/21 TT Vol. 2, p. 38, l. 16-25).

Krogmann knocked on the door, and Smith let him in. (8/18/21 TT Vol. 2, p. 39, l. 2-9). Smith estimated that the time was 8:30 a.m. (8/18/21 TT Vol. 2, p. 66, l. 15-17). The two had a conversation back and forth awhile, approximately 15 minutes, during which Krogmann asked if they could get back together, and Smith said not then, but it may be possible in the future. (8/18/21 TT Vol. 2, p. 39, l. 14-16; p. 40, l. 1-3; p. 66, l. 23-25; p. 67, l. 1-4). Krogmann asked if he could have a hug, Smith agreed, and gave him a hug. (8/18/21 TT Vol. 2, p. 39, l. 17-18). Nothing escalated during the conversation, but when Smith turned to get a cup of coffee, when she turned back around, Krogmann had a gun pointed at her. (8/18/21 TT Vol. 2, p. 39, l. 19-21; p. 67, l. 9-14). Smith was familiar with the gun because she had gone with Krogmann previously to buy accessories for it. (8/18/21 TT Vol. 2, p. 67, l. 22-24). Smith knew Krogmann to be a hunter and a target shooter, and he was a good shot. (8/18/21 TT Vol. 2, p. 68, l. 21 – p. 69, l. 4).

According to Smith, Krogmann said that they were both going to die that day together, and if he couldn't have me, then "no

one was gonna." (8/18/21 TT Vol. 2, p. 41, l. 1-3). Smith said Krogmann then shot her. (8/18/21 TT Vol. 2, p. 41, l. 12). He was about 13 feet away when he shot. (8/18/21 TT Vol. 2, p. 68, l. 6-12, p. 73, l. 10-12). Smith said she didn't feel anything or hear anything, and she just kept standing there talking to him, unable to believe it. (8/18/21 Vol. 2, p. 41, l. 14-23). Smith said Krogmann said he was going to kill her and then shoot himself. (8/18/21 TT Vol. 2, p. 42, l. 14-15). Smith said that when he shot her a second time, she put her hand up to stop it and the bullet went through her hand and arm. (8/18/21 TT Vol. 2, p. 43, l. 18-21). Smith said she didn't remember if he said anything before he shot the second time. (8/18/21 TT Vol. 2, p. 43, l. 22-24). She again didn't feel any pain. (8/18/21 TT Vol. 2, p. 44, l. 19). A third shot went through Smith's spine, and she fell. (8/18/21 TT Vol. 2, p. 44, l. 23-25).

Smith said she asked him to call 911, but, according to her, he refused to call, and that he had left his phone in the car specifically so that he couldn't call. (8/18/21 TT Vol. 2, p. 42, l. 21-25). Smith also said she asked him to go get her phone, but he

"wouldn't do that." (8/18/21 TT Vol. 2, p. 44, l. 11-12). Smith said Krogmann said, after he shot her, something to the effect of "I didn't think it would take you this long to die" and to not to try to get to her phone because he would shoot her again. (8/18/21, Vol. 2, p. 45, l. 23 – p. 46, l. 20). Later she admitted that it was either "five seconds or five minutes" after he shot her that Krogmann started looking for the phone, she couldn't remember. (8/18/21 Vol. 2, p. 60, l. 9-16). She also admitted that Krogmann told her he couldn't find her phone. (8/18/21 Vol. 2, p. 69, l. 20-22). She said Krogman said he "didn't plan to come over there to shoot" her but he wasn't going to spend the rest of his life in jail. (8/18/21 Vol. 2, p. 71, l. 19 – p. 72, l. 18).

Smith said Krogmann got her a pillow and a rosary, prayed with her, and he called someone and said he had "shot Jean." (8/18/21 TT Vol. 2, p. 45, l. 7 – p. 46, l. 2). She didn't believe Krogmann was trying to get 911 for her, but she knew he was talking on the phone. (8/18/21 TT Vol. 2, p. 46, l. 24 – p. 47, l. 1; p. 48, l. 21- p. 49, l. 1). After his call to the unknown person, Smith said she asked Krogmann to call her mom for her, which he did.

(8/18/21 TT Vol. 2, p. 49, l. 2-8). She spoke to her mom and told her mom to call her brother Michael. (8/18/21 TT Vol. 2, p. 49, l. 6-8). Smith didn't know why Krogmann took the phone away from her, but he did take it back from her. (8/18/21 TT Vol. 2, p. 49, l. 13-17).

What Smith did not realize is that, in fact, Krogmann was not refusing to call 911, but instead he had already called both his son, and 911, to get her help.

The next thing Smith remembered was Krogmann's son, Jeff Krogmann walking in the door, and then her brother Michael Schnieders walking in the door. (8/18/21 TT Vol. 2, p. 50, l. 9-17). Jeff Krogmann took the gun from Krogmann, and Michael Schnieders picked up a broom, hit Krogmann over the head and on his back with the broom, and chased him out of the house. (8/18/21 TT Vol. 2, p. 50, l. 9 – p. 51, l. 25). The sheriff and EMTs then arrived, and took Smith to the hospital where she was treated for her serious injuries resulting from being shot. (8/18/21 TT Vol. 2, p. 53, l. 20 – p. 54, l. 16).

Krogmann was arrested and charged with attempted murder and willful injury causing serious injury. He went to trial the first time in 2010, and was convicted, but the Iowa Supreme Court reversed his conviction because the state, with participation of Smith, had his assets frozen before trial. *Krogmann v. State*, 914 N.W.2d 293, 326 (Iowa 2018). The Iowa Supreme Court found that there was structural error in the first trial from the asset freeze. *Id.* After the first trial, Krogmann settled a civil case with Smith and paid her $1,500,000. (8/18/21 TT Vol. 2, p. 84, l. 10-15).

The matter headed to a second trial. Both parties filed motions in limine. Of relevance to this appeal, the court denied the motion in limine that requested a finding that Exhibit A, a recording of Krogmann immediately after his arrest, would be admissible. (App. at 40). The court also sustained the motion in limine by the state which moved to exclude any mention of the civil lawsuit, or resulting settlement. (App. at 36).

The second trial commenced on August 17, 2021. Smith testified as explained above. During trial, the State asked Smith the circumstances that led her to stop working. She stated that

she worked for "a short time until I figured out that I really couldn't do that." (8/18/21 TT Vol. 2, p. 27, l. 7-10). She was later asked why she didn't keep working and she said it was because "there was a lot of stuff I couldn't do" and "because of the pain" she "didn't get any sleep" until eventually she missed too many days of work. (8/18/21 TT Vol. 2, p. 61, l. 6-16).

As a result of this testimony, the defense reoffered evidence of the civil settlement to combat the idea that Smith had financial struggles after the injury and that she had to stop working, when in fact she stopped working after she received $1,500,000 from Krogmann. (8/18/21 TT Vol. 2, p. 84, l. 5-15).

Jeff Krogmann explained at trial that he received a call from Krogmann at 8:53 a.m. on March 13, 2009 on Smith's phone, and when he returned the call Krogmann said Smith had been shot, he was at her house, and he needed to call 911 right away. (8/20/21 TT Vol. 4, p. 184, l. 2 – p. 185, l. 19). Jeff Krogmann instantly headed to his car to head to Smith's house, a 10-minute drive away, and after speaking to Krogmann, he called 911. (8/20/21 TT Vol. 4, p. 185, l. 20 – p. 187, l. 13). Jeff Krogmann called 911 two

separate times, because his first call was interrupted by Krogmann himself calling 911. (8/20/21 TT Vol. 4, p. 187, l. 14 – p. 188, l. 14). Jeff Krogmann's first call to 911 was at 8:59 a.m. (8/20/21 TT Vol. 4, p. 189, l. 6-8). When Jeff Krogmann got to Smith's house, he explained that he found his dad kneeled over Smith, and he was no longer holding the gun. (8/20/21 TT Vol. 4, p. 190, l. 11 – p. 191, l. 2). Jeff Krogmann described his dad as being "distraught, and "unstable." (8/20/21 TT Vol. 4, p. 191, l. 21-25). Jeff Krogmann got the gun, unloaded it, and put the live bullets and empties in his pocket. (8/20/21 TT Vol. 4, p. 192, l. 15 – p. 193, l. 14). At that point, Michael Schnieders arrived. (8/20/21 TT Vol. 4, p. 193, l. 22-23).

Michael Schnieders lived a quarter of a mile away from Smith, and it took 3-5 minutes normally to drive from his house to her house. (8/18/21 TT Vol. 2 p. 89, l. 6-19). On March 13, he received a phone call from his mother telling him to get to Smith's house as soon as possible. (8/18/21 TT Vol. 2, p. 91, l. 17-22). He recalled the phone call as being somewhere between 8:30 and 9:00, a little closer to 9:00. (8/18/21 TT Vol. 2, p. 92, l. 10-11). He left

immediately, and when he arrived at Smith's house, approximately 2 minutes later, Jeff Krogmann was already there and already had the gun. (8/18/21 TT Vol. 2, p. 92, l. 17 – p. 94, l. 7p. 100, l. 8-9). Schnieders' arrival was recorded on the 911 calls because both Krogmann and Jeff Krogmann were off and on call with 911 prior to his arrival. (8/18/21 TT Vol. 2, p. 94, l. 8-15; Exhibits 1, 2). Schnieders hit Krogmann with the broom, and forced him off of the property. (8/20/21 TT Vol. 4, p. 194, l. 9-12). On his way out the door, Krogmann turned around and handed Schnieders Smith's cell phone. (8/18/21 TT Vol. 2, p. 100, l. 23 – p. 101, l. 3).

The 911 calls were played to the jury, State's Exhibit 1 and 2. (8/18/21 TT Vol. 2, p. 15-19; Ex. 1 & 2 (audio recordings)). These calls show that at 8:59 a.m. Jeff Krogmann called 911 and within 12 seconds, Krogmann also called 911. (Exhibit 2). Krogmann was the only one to give the 911 operator the address, after asking Smith on the call what the address was. (Exhibits 1, 2). During his call, Krogmann made the statements, "Send an ambulance," "somebody's been shot," "please hurry," "I have the

gun, "I shot her," "I didn't mean to," and "Please try to get here and save her." (Exhibit 2). After Krogmann's call with 911, the timing makes it clear that Krogmann then gave the phone to Smith to call her mother because there is a 3:22 gap in contact with him by the 911 operator, from 9:04:07 to 9:07:29 on Exhibit 2. So not only did the 911 calls show that Krogmann had called 911 before giving the phone to Smith, he had also called Jeff Krogmann before giving the phone to Smith. (Exhibit 2). So he wasn't refusing to give her the phone as she testified, he was trying to get her help.

The timeline at trial established the following: Krogmann arrived at Smith's house at about 8:30 a.m. They talked for approximately 15 minutes. Then Smith was shot. After she was shot, Krogmann had to look for her phone. At 8:53, no more than 8 minutes after the first shot, Krogmann had found the phone and called Jeff Krogmann to get Smith help. He then also called 911 himself at 8:59 a.m. (Exhibits 1, 2).

Between 9:07 and 9:20 a.m., before ever arriving at Smith's residence, law enforcement was already informed, based on

Krogmann's statements to the 911 officer, that he was the one that had shot Smith. (8/19/21, TT Vol. 3, p. 25, l. 4-12).

After the 911 calls, and after being chased out of the house by Schneiders' broom, Krogmann drove away from the scene. His son, Jeff Krogmann, followed him. (8/20/21 TT Vol. 4, p. 195, l. 2 – 196, l. 3). Jeff Krogmann stopped to tell the incoming officers where he thought Krogmann had gone, and led the officers to Krogmann's house. (8/19/21 TT Vol. 3, p. 10, l. 4-8). At the time Jeff Krogmann was leading law enforcement to Krogmann's residence, it was clear to law enforcement that Krogmann had shot Smith, and that Jeff Krogmann knew Krogmann had shot Smith. (8/19/21 TT Vol. 3, p. 26, l. 8-13). Jeff Krogmann went to Krogmann's house trying to find him, but didn't find him there. (8/19/21 TT Vol. 3, p. 12, l. 4-17). Krogmann then called Jeff Krogmann, who directed him to come where he was with law enforcement. (8/19/21 TT Vol. 3, p. 12, l. 18 – p. 13, l. 6; 8/20/21 TT Vol. 4, p. 195, l. 5-24). Krogmann drove his truck to where Jeff Krogmann and law enforcement were located, got out of his vehicle as directed, and turned himself in without incident.

(8/19/21 TT Vol. 3, p. 13, l. 7 – p. 16, l. 20). Krogmann was calm, cooperative, and did not smell of alcohol. (8/19/21 TT Vol. 3, p. 17, l. 6- 24).

Sheriff John LeClere testified at trial about the scene of the shooting, after Jeff Krogmann and Krogmann had left. He said he received the call at 9:00 a.m., and arrived about 14 minutes later. (8/18/21 TT Vol. 2, p. 123, l. 2-3). Krogmann was taken into custody around 9:15 to 9:25 a.m. (8/18/21 TT Vol. 2, p. 127, l. 2-5). LeClere said when he talked to Krogmann after the shooting, Krogmann was "distraught," and said, "I am such a dumb ass" and "I loved her." (8/18/21 TT Vol. 2, p. 122, p. 1-8; p. 127, l. 16-18). LeClere said on cross examination that it was unusual in his experience for Krogmann to have admitted immediately he shot Smith, or call 911 after he shot her. (8/18/21 TT Vol. 2, p. 123, l. 14-21). LeClere also said that except for getting prompt medical care, Smith might have died. (8/18/21 TT Vol. 2, p. 125, l. 17 – p. 126, l. 2). LeClere identified the handgun used as one that was legal to use for deer hunting in 2009. (8/18/21 TT Vol. 2, p. 126, l. 18-22). He also testified about searching Krogmann's house,

where he identified a photo of medications Krogmann was taking, as well as photographs of Krogmann and Smith still displayed in his house. (8/18/21 TT Vol. 2, p. 119, l. 11-17; p. 124, l. 21 – p. 125, l. 13; Ex. 40; Ex. B).

On redirect, LeClere was asked, "Is it unusual to take a .45, a gun that can take down a deer, shoot someone three times in the mass, center mass, and not think that they're going to die?" (8/18/21 TT Vol. 2, p. 128, l. 14-16). Defense counsel objected on the grounds of relevance, personal knowledge, and argumentative, which were overruled. (8/18/21 TT Vol. 2, p. 128, l. 18-20). LeClere then responded, "I think the only reason to shoot a person would be to take their life." (8/18/21 TT Vol. 2, p. 128, l. 21-22).

David Staner, the EMT who was first on the scene, said that if Smith had not gotten proper medical care at the time she did, she would not have survived. (8/18/21 TT Vol. 2, p. 141, l. 15-18).

Officer Stickney testified that he saw nothing unusual in Krogmann's behavior during his arrest, and that Krogmann asked how Jean was doing when he was arrested. (8/19/21 TT Vol. 3, p. 17, l. 22 – p. 18, l. 15). He also testified there was nothing out of

the ordinary about Krogmann's vehicle when it was searched. (8/19/21 TT Vol. 3, p. 21, l. 2-4). After his arrest, Krogmann was interviewed by special agent Jack Liao of the Iowa DCI. (8/19/21 TT Vol. 3, p. 99, l. 10-12).

Jeff Krogmann explained that he had taken firearms from Krogmann two days prior to the shooting and put them in his car because he was concerned Krogmann was going to hurt himself. (8/20/21 TT Vol. 4, p. 178, l. 12 – p. 180, l. 24). He was not concerned that Krogmann would hurt someone else. (8/20/21 TT Vol. 4, p. 180, l. 25 – p. 181, l. 2). On March 13, after officers arrested Krogmann, Jeff Krogmann showed them those firearms, which were still in his truck. (8/19/21 TT Vol. 3, p. 23, l. 3-8; Ex. 10).

Victor Murillo, a firearm expert for DCI, testified that there was no evidence of powder from the gun shot on Smith's clothing, indicating the shots were taken from more than 6 feet away. (8/19/21 TT Vol. 3, p. 67 l. 19 – p. 69, l. 5). He also verified that the gun had three live, functioning rounds in it when it was

turned over to law enforcement. (8/19/21 TT Vol. 3, p. 74, l. 12 – p. 75, l. 19).

Jack Liao was called by the State at trial and testified about his interview of Krogmann, which was done in a restraint chair, with Krogmann restrained, immediately after the shooting. (8/19/21 TT Vol. 3, p. 101, l. 1-3). On direct, he was asked specific questions about his impressions of the interview including:

- Whether Krogmann could "track and understand" when he was talking to him. (8/19/21 TT Vol. 3, p. 101, l. 4-6).
- Whether Krogmann was "able to follow the conversation. (8/19/21 TT Vol. 3, p., p. 101, l. 7-8).
- Whether he volunteered information at any point. (8/19/21 TT Vol. 3, p. 101, l. 9-13).
- Whether Krogmann asked from the very start whether Smith was okay. (8/19/21 TT Vol. 3, p., p. 101, l. 12-17).
- Whether Krogmann's questions or comments to Liao were "unusual" or uncommon. (8/19/21 TT Vol. 3, p. 101, l. 18 – 25).

- Whether Krogmann had "any signs of intoxication or impairment" evidence in the interview. (8/19/21 TT Vol. 3, p. 107, l. 15).
- Whether Krogmann could "track" what he was talking about throughout the interview. (8/19/21 TT Vol. 3, p. 107, l. 6-11).
- Whether he stayed "on topic" when asked questions. (8/19/21 TT Vol. 3, p. 107, l 12-15).
- Whether he was "able to respond" to the communications. (8/19/21 TT Vol. 3, p. 107, l. 20-22).

Agent Liao's responses to these questions as a whole led the jury to believe that everything was fine with Krogmann during the interview. Liao did admit, on cross, that the fact that Krogmann was being interviewed in a restraint chair was not normal. (8/19/21 TT Vol. 3, p. 109, l. 4-7). Liao also testified about specific statements Krogmann had made to him in the interview. (8/19/21 TT Vol. 3, p. 102, l. 6 – p. 105, l. 24).

It wasn't until cross that Agent Liao admitted Krogmann was actually talking so quietly that he had to be very close to him,

sometimes he couldn't hear him, sometimes he was whispering, and sometimes there were long pauses before answers. (8/19/21 TT Vol. 3, p. 109, l. 18 – p. 110, l. 4). Liao on cross also did not remember several aspects of the interview. (8/19/21 TT Vol. 3, p. 112, l. 13-25; p. 114, l. 6-25; p. 115, l. 9-20). Liao admitted that it "wasn't like a typical interview as far as that there would be a fluid conversation between two people," and then qualified that answer with, "but at times it seemed like he would be cognizantly thinking of almost a short answer as opposed to a normal conversation." (8/19/21 TT Vol. 3, p. 113, l. 8-13). Liao asked several times during cross if he could "see the transcript" before answering about the interview. (8/19/21 TT Vol. 3, p. 114, l. 17; p. 115, l. 18.) He admitted that he did not remember the interview word-for word. (8/19/21 TT Vol. 3, p. 115, l. 22 – p. 116, l. 2). There was a disagreement about whether Krogmann supposedly said to Liao that he went to the truck and got his gun before shooting Smith – something that Smith said didn't happen – or whether that was something Liao had come up with himself during the interview. (8/19/21 TT Vol. 3, p. 116, l. 13 – p. 120, l.

6.) During these exchanges at trial, Liao was shown an unofficial transcript of the videotaped interview by the State. (8/19/21 TT Vol. 3, p. 110, l. 2-3).

After Liao's testimony, the defense reoffered Exhibit A, the recording of Liao's interview of Krogmann. (8/19/21 TT Vol. 3, p. 112, l. 21-23). The district court again refused to admit it. (8/19/21 TT Vol. 3, p. 127, l. 20 – p. 13, l. 2).

At trial, the State also offered the testimony of Dr. James Dennert as an expert to address the question of diminished capacity. Dr. Dennert's career focus had been in clinical practice, rather than in research, writing, or academia, and he overwhelmingly had testified for the prosecution. (8/20/21 TT Vol. 4, p. 6, l. 7-23). During his testimony, the State framed the question asked of him as,

> Q: What did I request – what question did I request you to answer.
>
> A: The question that I've been asked to address is whether Mr. Krogmann suffers any mental impairment, psychiatric condition or illness that would prevent him from being able to form the specific intent necessary for the crime for which he's been charged.

Q: And is that the legal standard of what we call diminished responsibility here in Iowa?

A: That's my understanding.

Q: If I was to tell you that the full definition is a mental condition which does not allow the person to form a premeditated, deliberate specific intent to kill, does that sound right?

A: That sounds correct.

(8/20/21 TT Vol. 4, p. 8, l. 10-24). And then later the question was repeated, "So the only question would be for you to answer, could Robert Krogmann form specific intent to kill?" (8/20/21 TT Vol. 4, p. 9, l. 18-20). This same question was asked of Dr. Dennert at the end of his testimony, phrased as "were you able to form an opinion as to whether the defendant was able to form a premeditated, deliberate specific intent to kill?" (8/20/21 TT Vol. 4, p. 37, l. 17-20).

Dr. Dennert's ultimate opinion was "there was no mental condition or psychiatric condition that prevented Mr. Krogmann from being able to form the specific intent." (8/20/21 TT Vol. 4, p. 10, l. 21-23). Dr. Dennert had formed that opinion without ever having seen Exhibit A, the video of Krogmann right after the

shooting. (8/20/21 TT Vol. 4, p. 12, l. 3-7). Dr. Dennert did acknowledge that Krogman had bipolar II, had some symptoms of hypomania, had significant depressions, and had suffered from episodes severe enough that he needed to be hospitalized. (8/20/21 TT Vol. 4, p. 13, l. 19 – p. 14, l. 9). Dr. Dennert explained,

> Affective, or mood, disorders such as depression, major depression, bipolar illness are considered to be episodic illnesses, that is people will have episodes when they're depressed. They may have episodes when they're hypomanic or manic but in between these episodes they're perfectly fine, they return to their usual state, with or without treatment. That's the natural history of the condition is that people may have these episodes and then the episodes will end and they will go back to their usual state.
>
> The idea of treatment is to try to prevent those episodes or to lessen their severity or to shorten the length of time that an individual has. But the condition itself consists of episodes of illness with periods in between that the individual is normal, whatever that is for that ... individual.

(8/20/21 TT Vol. 4, p. 14, l. 21 – p. 15, l. 11).

Dr. Dennert explained that people with bipolar illnesses can appear to have normal lives, with jobs, families, schooling, etc. But, "Depending upon the severity of the illness and how frequently their episodes are, that may affect their ability to function at those times but otherwise they're able to function

normally." (8/20/21 Vol. 4, p. 20, l. 1-7). Dr. Dennert acknowledged Krogmann's medications: Remeron, mirtazapine, lamotrigine, Lamictal, and clonazepam. (8/20/21 Vol. 4, p. 23, l. 6-11).

Dr. Dennert's opinion was allowed, over objection, on the purpose of the diminished responsibility defense:

> State: … what diminished responsibility means in this context is basically a legal excuse for behavior; correct?
>
> Defense: Objection, Your Honor. Calls for a legal conclusion.
>
> Court: Sustained
>
> State: Diminished responsibility is something that is not saying that the action wasn't done but just that the person shouldn't or could not be responsible for his own action?
>
> Defense: Objection, Your Honor. That's the same question. It's asking for an excuse.

(8/20/21 TT Vol. 4, p. 25, l. 8-23).

The objection was overruled, and Dr. Dennert answered,

> My understanding is is [stet] that we don't want to hold people responsible for actions if they really weren't in some way, and if the person is unable to form an intent to do an action, it seems unfair to hold that person responsible for committing the action.

> That's a different question from whether the person intended – well, I'm not going – that's good enough.

(8/20/21 TT Vol. 4, p. 26, l. 3-9).

Dr. Dennert acknowledged that Krogmann had a long history of hospitalizations for suicidal ideation, but not for assault ideation, and was severely depressed and suicidal on the day he shot Smith, but those facts did not affect his opinion. (8/20/21 TT Vol. 4, p. 49, l. 5 – l. 10).

Dr. Dennert admitted he could not recall ever having found someone who met the standard of diminished responsibility. (8/20/21 TT Vol. 4, p. 39, l. 13-25). Dr. Dennert struggled with the idea that if you formed the intent for one thing, you could be unable to form the intent to do something else, stating only that it is "possible" but that he didn't know "how that would work really…" (8/20/21 TT Vol. 4, p. 40, l. 1 – p. 42, l. 6). He also eventually agreed, after some equivocation, that it was "possible" that a personality disorder combined with major depressive disorder and emotionally traumatic events could prevent someone from forming intent. (8/20/21 TT Vol. 4, p. 43, l. 8-13).

Dr. Tracy Thomas was called as an expert forensic psychologist by the defendant to opine on Krogmann's capacity to form specific intent. Dr. Thomas, unlike Dr. Dennert, had testified for both the defense and the prosecution, and had been jointly hired and appointed by the court for her prior evaluations in other cases. (8/20/21 TT Vol. 4, p. 76, l. 2–15). Dr. Thomas explained how to do an evaluation of someone for diminished responsibility, including, most importantly, reviewing records that show the person's behavior and give evidence of the person's mental state "very close to the time of the alleged offense because the further and further we get away from that alleged offense the less informative the information is." (8/20/21 TT Vol. 4, p. 80, l. 1-6). She also looked at reports of the incident, reviewed mental health records, spoke with the defendant, and did forensic testing on the defendant. (8/20/21 TT Vol. 4, p. 80, l. 7 0 p. 81, l. 10). At the end of all of her review, Dr. Thomas formed the opinion that Krogmann lacked the capacity to form specific intent. (8/20/21 TT Vol. 4, p. 85, l. 19-22).

In forming her opinion, Dr. Thomas recounted the life-long struggle Krogmann had with his mental health, including the various treatment facilities he had been to over the past few decades, and his multiple diagnoses. (8/20/21 TT Vol. 4, p. 87, l. 6 – p.90, l. 17). She noted that his depression was "severe" with numerous suicide attempts and numerous periods of suicidal ideation. (8/20/21 TT Vol. 4, p. 92, l. 20 – p. 93, l. 3). Dr. Thomas also looked to the mental health records after the incident, which showed that Krogmann continued to "present as very depressed," had "disordered personality features" that were observed in that time period, and he was "very rigid," "perseverating" on the relationship with Ms. Smith, "obsessed" with the idea of getting back together with her, and "very inflexible" when therapists tried to work through these mental problems with him. (8/20/21 TT Vol. 4, p. 95, l. 1–11). She noted several traits about him in the records that indicated he had an undiagnosed personality disorder at the time of the shooting. (8/20/21 TT Vol. 4, p. 96, l. 6 – p. 97, l. 1). Dr. Thomas explained how personality disorders and their

symptoms are very difficult to treat. (8/20/21 TT Vol. 4, p. 97, l. 15 – p. 98, l. 12).

In forming her opinion, Dr. Thomas explained how important the video of Krogmann in Exhibit A was to her opinion because it demonstrated the symptoms of the mental disorders she found he was suffering from at the time of the shooting. (8/20/21 TT Vol. 4, p. 103, l. 2 – p. 104, l. 21; p. 140, l. 2-6). Dr. Thomas also did testing for malingering and testified that "there was nothing that stood out to me as being inconsistent with what he either had told me or what was in the record." (8/20/21 TT Vol. 4, p. 107, l. 1-4). She noted of Dr. Dennert that "he did not do any testing." (8/20/21 TT Vol. 4, p. 107, l. 23-25).

In support of her opinion that Krogmann did not have the capacity to form specific intent, Dr. Thomas explained,

> So for Mr. Krogmann there was really sort of a combination of factors that all came together to cause this, this lack of capacity to form specific intent. So, first of all, he's coming into this situation with this disordered personality that we already talked about. He struggles to cope with difficult situations. When confronted with conflict or stress, he is -- he becomes very distressed and despondent. He is unable to come up with just in general ways to cope or to solve problems. He's very rigid so he -- that kind of lends

> itself as well to this inability to kind of think about different ways of dealing with problems.
>
> His emotions are very labile and intense, so quickly he can get very escalated and are very intense, maybe more intense than, quote, the average person. So we have that already happening.
>
> We then have this known severe decompensation that he's experiencing in the weeks prior to the incident where he's just despondent over the breakup of this relationship. He is perseverating over it, thinking about it over and over and over. He's obsessing over it. It's to the point where his family is concerned enough that they remove firearms from him. He goes over to Ms. Smith's house in this state and goes into her house and some conversation takes place and I, and I -- when you add that in, that conversation, he's already at this very heightened state of emotional distress, cognitive distress, he's at the point where he can essentially not take any more and so something happens in that situation that basically causes a catastrophic failure of his emotional and cognitive or thinking abilities. The combination of the situation, the personality and that severe compression come together to form that failure, or that lack of capacity, to form intent in that moment.

(8/20/21 TT Vol. 4, p. 108, l. 7 – p. 109, l. 15).

After denying the defendant's motions for judgment of acquittal, the court also overruled two defense objections about instructions. The defense objected to Instructions 24 and 25, instructions allowing a dangerous weapon inference based on Model Instruction 700.8, which was overruled. (App. at 94;

8/23/21 TT Vol. 5, p. 11, l. 18 – p. 20, l. 1). The defense objected to the specific intent instructions as they applied to the assault instructions in a diminished responsibility case, and requested to argue that it did not apply to the lesser included offenses, which were overruled. (8/23/21 TT Vol. 5, p. 21, l. 16 – p. 22, l. 10).

The jury convicted on both counts. (App. at 42-43).

The defendant filed a Motion for New Trial, and Motion for Arrest of Judgment, which were denied. (App. at 44, 67). On October 4, 2021, the court sentenced Krogmann to 25 years on Count I, and 10 years on Count II, consecutive to each other. (Sent. Tr. p. 34, l. 10-11; App. at 62-66).

On October 4, 2021, after sentencing had concluded, the State filed an Application to Recover Prosecution Costs in the amount of $7,228.55. (App. at 60-61). The next day, October 5, the court granted the motion for costs. (App. at 69). The defendant filed a Resistance and Motion to Reconsider the Order granting the costs on October 6, 2021. (App. at 71). A hearing was held on the motion on November 5, 2021.

On November 12, 2021, the State filed an "Addition to State's Application to Recover Prosecution Costs," asking for $13,958.72 for more of Dr. Dennert's costs and time, including deposition costs, travel costs, and time spent reviewing records and preparing for trial. (App. at 75). The Defendant resisted, stating that only $150 per day was allowable for expert costs. (App. at 82).

On November 17, 2021, the Court issued its order on the first request for costs, and did reduce from $7,228.55 to a total of $611.20 of restitution. (App. at 80). Of relevance to this appeal, this order included, over objection, that the Defendant pay for:

(1) Service fees for the sheriff to serve a witness, Timothy Brandt, who was not called to testify at trial. (App. at 79).

(2) The State's cost of $275.30 for transcripts of depositions that were not used at trial. (App. at 80).

(3) The hotel cost for Dr. Dennert for $230.56. (App. at 80).

On November 29, 2021, the court issued a written ruling granting the State's request for $13,958.72 for Dr. Dennert's services and expenses. (App. at 85).

This timely appeal ensued.

## ARGUMENT

### I. THE COURT ERRED IN DENYING THE ADMISSION OF EXHIBIT A, THE RECORDING OF KROGMANN'S POST-ARREST INTERVIEW.

#### Error Preservation

Error was preserved by motion in limine rulings. (App. at 36, 40). Error was further preserved by offering Exhibit A during trial, asking the district court to reconsider its in limine ruling, and arguing it was not hearsay, implicated the best evidence rule, and the state had opened the door to its admission. (8/19/21 TT Vol. 3, p. 122, l. 21 – p. 123, l. 124; p. 125, l. 22 – p. 127, l. 1). Error was also preserved by the defense making a motion for new trial on this ground, which was denied. (App. at 45-48; 67).

## Scope and Standard of Review

### A. Applicable legal principles

Evidentiary rulings are reviewed for abuse of discretion. *Powers v. State,* 911 N.W.2d 774, 780 (Iowa 2018).

The "best evidence rule," directs, "An original writing, recording, or photograph is required to prove its content, unless these rules or a statute provides otherwise." Iowa R. Evid. 5.1002. "[T]he purpose of the best evidence rule 'is to secure the most reliable information as to the contents of documents, when those terms are disputed.'" *State v. Evans*, 2020 Iowa App. LEXIS 1155, No. 19-2083 at *8, (Iowa Ct. App. 2020) *citing State v. Khalsa*, 542 N.W.2d 263, 268 (Iowa Ct. App. 1995) and Charles McCormick, et al., McCormick on Evidence §243 (4th ed. 1984). When law enforcement is allowed to testify about the contents of a video, over objection, when the video itself is available, that testimony violates the best evidence rule. *See*, *e.g., T.D.W. v. State*, 137 So. 3d 574 (Florida Ct. App. 2014) (summarizing Florida caselaw regarding testimony about contents of videos as violating the best evidence rule).

The rule of completeness as set forth in Iowa Rule of Evidence 5.106 poses an "open-the-door concept." *State v. Scalco*, 2021 Iowa App. LEXIS 721, No. 19-1439, at *7, n. 1. (Iowa Ct. App., Aug. 18, 2021). Rule 5.106 holds:

> 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 other 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 with all or part of the act, declaration, conversation, writing, or recorded statement, any other part or any other act, declaration, conversation, writing, or recorded statement that is admissible under rule 5.106 (a). Rule 5.106 (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 R. Evid. 5.106.

Hearsay is defined as a statement that "a party offers into evidence to prove the truth of the matter asserted in the statement." Iowa R. Evid. 5.801. Conversely, statements that are offered for a purpose other than to prove the truth of the matter

asserted are not, by definition, hearsay. *State v. Plain*, 898 N.W.2d 801, 812 (Iowa 2017).

Hearsay statements are not excluded by the rule against hearsay under the residual exception found in Iowa R. Evid. 5.807. The Iowa Supreme Court has summarized the residual hearsay exception as requiring a showing of "trustworthiness, materiality, necessity, service of the interests of justice, and notice." *State v. Rojas*, 524 N.W.2d 659, 662–63 (Iowa 1994).

### B. Argument.

The district court erred in excluding Exhibit A, the video of Krogmann's post-arrest interview with law enforcement. First, the video does not fall under the definition of hearsay, as it was not being offered for the truth of the matter asserted – it was not being offered to prove that Krogmann's statements made during the interview were true. See Iowa R. Evid. 5.801(c). The opposite was the case – Krogmann made statements to the officer that were demonstrably not true. Instead, Exhibit A was offered to show Krogmann's mental state at the time, including his ability to answer questions, his demeanor, and his physical manifestations

of mental illness. For this reason alone, the video should have been admitted because it was not hearsay.

Even if it were hearsay, it still should have been admitted under the residual exception. See Iowa R. Evid. 5.807. The video met the requirements of the residual hearsay exception because it of its "trustworthiness, materiality, necessity, service of the interests of justice, and notice." *Rojas*, 524 N.W.2d at 662–63. The video shows exactly what Krogmann said in the interview and his demeanor, and is much more reliable than relying on Liao's ten-year-old recollection. Dr. Thomas's view of the video did not align with Liao's recollection. It would be much clearer for the jury to hear Krogmann's actual words and the context around them instead of all of the witnesses' varying descriptions.

Even if the video was properly excluded pre-trial, the video should have been admitted once the State offered testimony regarding Krogmann's statements and demeanor. Liao's said Krogmann could "track and understand,"(8/19/21 TT Vol. 3, p. 101, l. 4-6), was "able to follow the conversation," (8/19/21 TT Vol. 3, p., p. 101, l. 7-8), and volunteered information, (8/19/21 TT Vol.

3, p. 101, l. 9-13). Liao testified Krogmann's questions and comments were not "unusual" or uncommon. (8/19/21 TT Vol. 3, p. 101, l. 18 – 25). Liao opined Krogmann had no "signs of intoxication or impairment." (8/19/21 TT Vol. 3, p. 107, l. 15), Liao thought Krogmann could "track" what he was talking about, (8/19/21 TT Vol. 3, p. 107, l. 6-11), and he stayed "on topic" when asked questions, (8/19/21 TT Vol. 3, p. 107, l 12-15), and he was "able to respond" to the communications. (8/19/21 TT Vol. 3, p. 107, l. 20-22).

Liao opined specifically, "but at times it seemed like he would be cognizantly thinking of almost a short answer as opposed to a normal conversation." (8/19/21 TT Vol. 3, p. 113, l. 8-13). Liao asked several times if he could "see the transcript" before answering questions about the interview. (8/19/21 TT Vol. 3, p. 114, l. 17; p. 115, l. 18.) He admitted he did not remember the interview word-for word. (8/19/21 TT Vol. 3, p. 115, l. 22 – p. 116, l. 2). The parties debated what was said about the gun. (8/19/21 TT Vol. 3, p. 116, l. 13 – p. 120, l. 6.) During these exchanges at

trial, Liao was shown an unofficial transcript of the videotaped interview by the State. (8/19/21 TT Vol. 3, p. 110, l. 2-3).

The video, unlike Liao's testimony, shows exactly what statements Krogmann made, the context of the statements, and that Krogmann was visibly distraught, writhing in his restraint chair, and not tracking most of the conversation. The video would shows Krogmann trying to answer the questions in a way that would have been even more harmful to his case if true, yet easily determined to be false. The video would have been, by far, the best evidence.

The court also held, in part, that Exhibit A was not admissible because Defendant had not first tried to use it to "refresh the recollection" of Liao. (8/19/21 TT Vol. 3, p. 128, l. 10 – p. 129, l. 3). The court's analysis, however, conflates refreshing someone's recollection of their own prior statements, a proper procedure prior to impeachment of a witness about their own prior statements, and the offering of the best evidence of someone else's demeanor. Here, the video showed Krogmann's demeanor and the

context of the statements made. There was nothing about Liao's memory that could be "refreshed" on these points.

The exclusion of Exhibit A violated both the best evidence rule, and the rule of completeness. The State opened the door to the admission of the tape. It should have been admitted.

Krogmann's statements, both at the time of the shooting and during his recorded interview shortly thereafter, were critical to the State's case. The State argued Krogmann was simply remorseful, not suffering from a mental disease or defect. Dr. Thomas relied specifically on Exhibit A in her opinion, and the State attacked her opinion. Dr. Dennert didn't even view Exhibit A until after he'd formed his opinion. The jury needed to see the video. For these reasons alone, Krogmann is entitled to a new trial.

## II. THE DISTRICT COURT ERRED IN ADMITTING THE TESTIMONY OF SHERIFF JOHN LECLERE REGARDING HIS OPINION ON THE REASONS SOMEONE SHOOTS ANOTHER PERSON.

### Preservation of Error

Error was preserved when defense counsel objected and was overruled. (8/18/21 TT Vol. 2, p. 128, l. 18-20). Error was further

preserved by the defense filing a Motion for New Trial on this ground, which was denied. (App. at 48).

Scope and Standard of Review

A. Applicable legal principles

"A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Iowa R. Evid. 5.602. Evidence is only relevant if, (1) "it has any tendency to make a fact more or less probable than it would be without the evidence; and (2) the fact is of consequence in determining the action." Iowa R. Evid. 5.401. A witness is not permitted to express an opinion as to the ultimate fact of the accused's guilt or innocence. *State v. Maurer*, 409 N.W.2d 196 (Iowa Ct. App. 1987).

B. ARGUMENT

LeClere was asked "Is it unusual to take a .45, a gun that can take down a deer, shoot someone three times in the mass, center mass, and not think that they're going to die?" (8/18/21 TT Vol. 2, p. 128, l. 14-16). Defense counsel objected, and was overruled. (8/18/21 TT Vol. 2, p. 128, l. 18-20). LeClere then

responded, "I think the only reason to shoot a person would be to take their life." (8/18/21 TT Vol. 2, p. 128, l. 21-22).

To have been convicted of Attempted Murder the State was required to prove that when the defendant acted, he specifically intended to cause the death of Jean Smith.

This testimony is not relevant. What John LeClere thinks someone's reason might be to shoot a person is not in any way relevant. LeClere also has no personal knowledge of what Krogmann was, or was not, thinking when he shot Smith. And, most egregiously, LeClere's irrelevant opinion on this question goes to the ultimate issue of whether Krogmann specifically intended to kill Smith by shooting her. This testimony was elicited to comment on Defendant's guilt or innocence, and actually did improperly comment on his guilt or innocence and therefore should have been excluded upon defense counsel's objection. *State v. Taylor*, 516 N.W.2d 38 (Iowa Ct. App. 1994), overruled on other grounds by *State v. Reeves*, 636 N.W.2d 22 (Iowa 2001).

The testimony was also highly prejudicial. The only question at trial for the jury was Krogmann's intent at the time he shot Smith. In determining that question, the jury was told by the sheriff that he thought the only intent could have been to kill Smith. This testimony was erroneously admitted, and highly prejudicial. As such, it should have been excluded from trial. Because it was not, Krogmann deserves a new trial.

## III. THE DISTRICT COURT ERRED IN EXCLUDING EVIDENCE OF THE CIVIL LAWSUIT AND SETTLEMENT.

### Preservation of Error

Error was preserved by the ruling on the motion in limine, the defense offering the evidence as an offer of proof at trial, and then reurging its admissibility at trial. (8/18/21 Vol. 2, p. 84, l. 5 – p. 86, l. 1).

### Scope and Standard of Review

#### A. Applicable legal principles

Evidentiary rulings are reviewed for abuse of discretion. *Powers,* 911 N.W.2d at 780. Evidence is relevant if, (1) "it has any tendency to make a fact more or less probable than it would be

without the evidence; and (2) the fact is of consequence in determining the action." Iowa R. Evid. 4.401.

### B. ARGUMENT

Smith testified on direct about the circumstances that led her to stop working. She stated that she worked for "a short time until I figured out that I really couldn't do that." (8/18/21 TT Vol. 2, p. 27, l. 7-10). She was later asked why she didn't keep working and she said it was because "there was a lot of stuff I couldn't do" and "because of the pain" she "didn't get any sleep" until eventually she missed too many days of work. (8/18/21 TT Vol. 2, p. 61, l. 6-16).

The civil settlement was relevant, and admissible, even before this testimony. In general, civil settlements can be admissible in criminal trials. *See, e.g., Manko v. United States*, 87 F.3d 50 (2nd Cir. 1996)(Reversing a conviction because a civil settlement was excluded from trial noting that Rule 408 of the Federal Rule of Evidence does not require exclusion of evidence). There was no Iowa rule of evidence that excluded the civil settlement from being admitted at trial, and it could have been

used to show that the Defendant accepted responsibility for the consequences of shooting Smith, and it could have showed a bias by Smith in her testimony. (App. at 24-25).

During trial, the civil settlement became even more relevant. The defense wanted to offer evidence of the civil settlement to combat the evidence offered by the State that Smith had financial struggles after the injury and that she had to stop working, when in fact she stopped working after she received $1,500,000 from Krogmann. (8/18/21 TT Vol. 2, p. 84, l. 5-15). This was clearly relevant evidence that contradicted the State's evidence and its omission was error. When relevant evidence is improperly excluded from trial, reversal and a new trial is appropriate. *See Giza v. BNSF Ry. Co.*, 843 N.W.2d 713, 726 (Iowa 2014).

## IV. THE DISTRICT COURT ERRED IN ITS RULING ALLOWING DR. DENNERT'S EXPERT TESTIMONY ON A LEGAL CONCLUSION.

### Preservation of Error

Error was preserved by the defense objecting at trial. (8/20/21 TT Vol. 4, p. 25, l. 8-23).

## Scope and Standard of Review

### A. Applicable legal principles

Evidentiary rulings are reviewed for abuse of discretion. *Powers,* 911 N.W.2d at 780. Experts are not allowed to testify to a legal conclusion or to tell the jurors how, or why, they should apply the law to the facts. *Kooyman v. Farm Bureau Mut. Ins. Co.*, 315 N.W.30, 32 (Iowa 1982). When such testimony happens, reversal is appropriate. *Smith v. Wright*, 2014 Iowa App. LEXIS 560, at *23 (Iowa Ct. App. 2014).

### B. Argument.

Dr. Dennert was allowed to testify to his understanding of the law of diminished responsibility itself, and the purposes of the law.

> My understanding is is [stet] that we don't want to hold people responsible for actions if they really weren't in some way, and if the person is unable to form an intent to do an action, it seems unfair to hold that person responsible for committing the action. That's a different question from whether the person intended – well, I'm not going – that's good enough.

(8/20/21 TT Vol. 4, p. 26, l. 3-9).

This was clearly inadmissible commentary on the law, the purposes of the law, and how diminished responsibility is applied in court. Because it was testimony about the main fighting issue in the case – the application of diminished responsibility to the facts of this case – its admission was reversible error. *See Smith*, 2014 Iowa App. LEXIS at *24-25.

## V. THE VERDICT IS CONTRARY TO THE LAW AND THE EVIDENCE.

### Preservation of Error

Error was preserved when the court denied the defendant's motion for judgment of acquittal at the close of the State's case. (8/20/21 TT Vol. 4, p. 62, l. 23 – p. 66, l. 4) and at the close of the defendant's case. (8/20/21 TT Vol. 4, p. 212, l. 25 – p. 215, l. 1).

### Scope and Standard of Review

#### A. Applicable legal principles

Challenges to the sufficiency of the evidence are reviewed in the light most favorable to the State, including all reasonable inferences that can be fairly drawn from the evidence. *State v. Sanford,* 814, N.W.2d 611, 615 (Iowa 2012). Appellate courts review the district court's exercise of discretion in its denial of a

motion for new trial on the ground that the verdicts are contrary to the weight of the evidence. *State v. Reeves*, 670 N.W.2d 199, 203 (Iowa 2003).

"Contrary to . . . [the] evidence" means "contrary to the weight of the evidence." *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). A verdict is contrary to the weight of the evidence where "'a greater amount of the evidence supports one side of an issue or cause than the other.'" *Id.* at 658. (quoting *Tibbs v. Florida*, 457 U.S. 31, 38 (1982)). The weight of evidence standard is distinguishable from the sufficiency of the evidence standard in that it is broader. *State v. Nicher*, 720 N.W.2d 547, 559 (Iowa 2006).

## B. ARGUMENT

The weight of the evidence presented in this case was not sufficient to satisfy the specific intent element of attempted murder. Krogmann had a .44 handgun, alone in a house with Ms. Smith. Even after he shot her, he had more live ammunition. He had the ability to kill her. He had the opportunity to kill her. But he did not kill her. Nothing intervened preventing him from

killing her. No person intervened preventing him from killing her. The only thing that must have been missing in this case was an intent to kill her.

This demonstrates that the weight of the evidence was not sufficient to prove beyond a reasonable doubt that Krogmann had the specific intent to kill Ms. Smith.

The undisputed evidence at trial was that Krogmann called 911, within minutes of the shooting, and prevented Smith from dying from her injuries. He gave 911 the address, asked them to hurry, and pleaded to "please save her." He had three functioning bullets in a functioning gun that were turned over to his son, and ultimately police.

All of this shows that Krogmann did not have the specific intent to kill Smith on March 13, 2009. He should have either been granted a judgment of acquittal on the attempted murder count, or he should be granted a new trial on this ground.

The weight of the evidence also did not overcome the diminished responsibility evidence at trial. Dr. Thomas demonstrated there must be reasonable doubt as to Krogmann's

capacity to form specific intent. Dr. Thomas's opinion was that Krogmann could not form the specific intent to kill Smith at the time of the shooting. She is properly credentialed to make that forensic determination, she reviewed all of the relevant medical records, she did extensive testing of Krogmann, and she reviewed both the defendant's actions at the time of the shooting, as well as the recording of him immediately after the shooting, and determined that he lacked the capacity to form specific intent.

Dr. Dennert, on the other hand, has never found someone to lack the capacity to form intent in his history as a mental health provider. He overwhelmingly testifies for the State. He did no testing of the Defendant. And, the State was the one with the burden to prove that the Defendant did have the capacity to form specific intent. Therefore, the weight of the evidence lies with the Defendant on the question of diminished responsibility.

In addition, if Krogmann had the capacity to form specific intent to kill, as the State's expert opined, and he actually did have that intent, why then didn't Krogmann kill Smith? Capacity to form intent + intent + opportunity + ability would most

certainly mean death, absent some sort of intervention. There was no intervention. Thus, the weight of the evidence demonstrates that either Krogmann did not have the capacity to form specific intent, or he actually did not form specific intent to kill Smith. Either way, Krogmann's motion for judgment of acquittal, or his motion for new trial, should have been granted.

## VI. THE COURT ERRED IN INSTRUCTING THAT ALL ASSAULTS ARE SPECIFIC INTENT CRIMES FOR THE PURPOSES OF DIMINISHED CAPACITY AND PROHIBITING ARGUMENT ABOUT DIMINISHED CAPACITY ONLY APPLYING TO ATTEMPTED MURDER AND WILLFUL INJURY

### Preservation of Error

The defense objected to the specific intent instructions as they applied to the assault instructions in a diminished responsibility case, preserving error. (8/23/21 TT Vol. 5, p. 21, l. 16 – p. 22, l. 10).

### Scope and Standard of Review

#### A. Applicable legal principles

Challenges to jury instructions are reviewed for errors at law. *State v. Green*, 896 N.W.2d 770, 775 (Iowa 2017).

In *State v. Fountain*, the Iowa Supreme Court explained the history of assault as a general intent, then specific intent, then general intent crime.

> Under the common law, Iowa courts defined assault as "an attempt to apply unlawful physical force to the person of another, coupled with the apparent present ability to execute the [act]." *State v. Straub*, []180 N.W. 869, 869 (1921). Under this definition, assault was defined as a general intent crime. See [*State v.]Redmon*, 244 N.W.2d [792,] 797 [Iowa 1976].
>
> In 1976, the Iowa legislature enacted Iowa Code section 708.1 containing its current elements. See 1976 Iowa Acts ch. 1245(1), § 801 (codified at Iowa Code § 708.1 (1979)). This section became effective January 1, 1978. 2 Id. ch. 1245(4), § 529. It was at this time the legislature added the requirement that the act constituting assault must be done with the intent to make physical contact that is insulting or offensive to another. Iowa Code § 708.1(1) (1979). Despite the inclusion of specific intent elements, we continued to hold that assault remained a general intent crime even after the legislature amended the statute to its current form. *See, e.g., State v. Ogan*, 497 N.W.2d 902, 903 (Iowa 1993), overruled by *State v. Heard*, 636 N.W.2d 227, 231 (Iowa 2001); *State v. Brown*, 376 N.W.2d 910, 913-15 (Iowa Ct. App. 1985).
>
> In *Heard*, we overruled prior precedent and determined that based on the statutory elements, an assault under Iowa Code section 708.1(2) included a specific intent element. [*State v.*]*Heard*, 636 N.W.2d [227,] 231 [Iowa 2001]. We held that the definition of assault contained in the Iowa Code required an action done with the

"intent to achieve some additional consequence so as to qualify as a specific-intent crime." Id. at 232.

Four months after the *Heard* decision, the Iowa legislature amended the assault statute, adding the following sentence: "An assault as defined in this section is a general intent crime." 2002 Iowa Acts ch. 1094, § 1 (codified at Iowa Code § 708.1 (2003)). This amendment was in response to the *Heard* decision. H.F. 2546 Explanation, 79th Gen. Assem., Reg. Sess. (Iowa 2001). A year later, we addressed the effect of this amendment on the definition of assault. *See State v. Bedard*, 668 N.W.2d 598, 601 (Iowa 2003). In *Bedard*, we concluded the "amendment did not alter the substantive content of the statute as it pertains to the elements of the crime." *Id.*

Since 2003, we have had the opportunity to address the intent requirement for assault multiple times. See *State v. Keeton*, 710 N.W.2d 531, 533 (Iowa 2006); *State v. Taylor*, 689 N.W.2d 116, 132 (Iowa 2004). In each of these cases, including the most recent case involving this issue, *Wyatt v. Iowa Department of Human Services*, 744 N.W.2d 89, 94 (Iowa 2008), we focused on the elements of the crime. In each of these cases, we found that regardless of the specific label attached to the crime--specific intent or general intent--the state must prove the elements of the crime and their accompanying mens rea beyond a reasonable doubt. See, e.g., *Keeton*, 710 N.W.2d at 534.

The elements of assault under Iowa Code section 708.1 have not changed since our decision in *Heard*. Under this section, a defendant must commit an act that he intends to cause pain or injury to the victim or to result in physical contact that would be insulting or offensive to the victim or to place the victim in fear of physical contact that will be injurious or offensive. Iowa Code §

> 708.1(1), (2). Because the elements of these assault alternatives include an act that is done to achieve the additional consequence of causing the victim pain, injury or offensive physical contact, the crime includes a specific intent component. See *Heard*, 636 N.W.2d at 231-32. Therefore, we adhere to our prior decisions holding that the 2002 amendment "did not alter the substantive content of the statute." *Bedard*, 668 N.W.2d at 601.
>
> Our conclusion that assault includes an element of specific intent is not inconsistent with the legislature's action in amending the statute. As we discussed, the legislature did not change the elements of an assault; it merely designated assault as a general intent crime. In criminal law, the designation of an offense as a general intent crime may carry with it certain consequences. Although we do not decide the effect or constitutionality of this amendment to the assault statute, we believe the amendment was simply an attempt to prevent a defendant charged with assault from relying on the defenses of intoxication and diminished capacity. *Heard*, 636 N.W.2d at 233-34 (Neuman, J., concurring) (stating "the defenses of intoxication and diminished responsibility . . . are pertinent only to the specific-intent elements of a crime"); see also *Keeton*, 710 N.W.2d at 533; *Redmon*, 244 N.W.2d at 797; *Brown*, 376 N.W.2d at 914-15.

*State v. Fountain*, 786 N.W.2d 260, 264-265 (Iowa 2010).

*Fountain* makes clear that the Iowa Supreme Court thought the legislative amendment to the assault statute indicated the legislative intent to remove the defense of diminished responsibility from assault cases. The Iowa Supreme Court has

not expanded on, or clarified, it's finding as to that amendment. The Iowa Court of Appeals has, however, attempted to reconcile this language from *Fountain*, along with the language of the legislative amendments, with the holdings that assaults are still a specific intent crime for purposes of instructing juries on the level of intent necessary to convict. For example, in *State v. Beck*, the Iowa Court of appeals determined this language from the Iowa Supreme Court was dictum, and therefore not binding on the question of whether diminished responsibility was a defense to assault. *State v. Beck*, 854 N.W.2d 56, 64-65 (Iowa Ct. App. 2014).

> The issue of the defenses available to the defendant was not raised in *Fountain*. Because the issue was not raised, the *Fountain* court did not have the advantage of considering full briefing and argument on the issue. Indeed, recognizing as much in the above-quoted passage, the court expressly stated that it did "not decide the effect or constitutionality of [the] amendment to the assault statute." *Id.* at 265. *Fountain* thus raised only a possible construction of the statute, but not a controlling construction of the statute. *Fountain's* statement regarding the construction of the assault statute as it relates to the availability of defenses was thus dictum and not binding precedent. *See Boyles v. Cora*, 6 N.W.2d 401, 413 (Iowa 1942) (defining dictum as "passing expressions of the court, wholly unnecessary to the decision of the matters before the court"). Further, the court's statement in *Fountain* is contrary to the

> previously-cited cases holding the defense is available in any case in which the State must provide specific intent. [Citations omitted]. We are not at liberty to ignore these controlling cases.

*Beck*, 854 N.W.2d at 64-65.

The Attorney General's Office requested further review in *Beck*, but the application was denied. (See Iowa Supreme Court Case No. 13-0347, application for further review filed 3/4/14; denied 7/14/14). As such, the question remains open for the Iowa Supreme Court to determine whether, in fact, the amendment to Iowa Code 708.1 designating assault as a general intent crime indeed eliminated the defense of diminished responsibility for assaults, as discussed in *Fountain*, or if instead, it was an amendment without any effect, as held in *Beck*.

## B. ARGUMENT

Krogmann submits that the district court erred in denying his request to argue the diminished responsibility defense applies to the attempted murder count and willful injury count, but not the assault counts, and to have the jury instructed on this point.

The district court ruled the diminished responsibility defense must apply not only to the attempted murder and willful

injury counts, but also to all of the assault alternatives. In short, it ruled that the amendment to Iowa Code 708.1 is meaningless, and the language in *Fountain* can be ignored.

This ruling allowed for the State to make essentially an "all or nothing" argument that the Defendant was looking to excuse his actions completely by using a "legal defense." (8/23/21 TT Vol. 5, p. 40). The could do that, despite the focus of their questions to their own expert, Dr. Dennert, on only the "specific intent to kill" element of attempted murder. These arguments would not have been available to the State had the jury been properly instructed, and the defense been allowed to argue that Krogmann could be found to have diminished responsibility as to Attempted Murder and/or Willful Injury, but still be held "responsible" for the assault alternatives. This limitation by the court was in direct contradiction to the language in Iowa Code 708.1, as well as *Fountain*. As such, a new trial is warranted.

## VII. THE COURT ERRED IN DENYING DEFENDANT'S OBJECTION TO THE DANGEROUS WEAPON INFERENCE INSTRUCTIONS IN JURY INSTRUCTIONS 24 AND 25.

### Preservation of Error

The defense objected to Instructions 24 and 25, instructions allowing a dangerous weapon inference based on Model Instruction 700.8, which was overruled. (App. at 94, 95; 8/23/21 TT Vol. 5, p. 11, l. 18 – p. 20, l. 1). This preserved error.

### Scope and Standard of Review

#### A. Applicable legal principles.

Challenges to jury instructions are reviewed for errors at law. *Green*, 896 N.W.2d at 775.

Model Instruction 700.8 reads,

> **700.8 Murder In The First Degree - Dangerous Weapon Inference.** If a person has the opportunity to deliberate and uses a dangerous weapon against another resulting in death, you may, but are not required to, infer that the weapon was used with malice, premeditation and specific intent to kill.

Iowa Model Criminal Instruction 700.8 (2019).

The case law overwhelmingly applies this inference instruction to first degree murder cases. The citations in the

model instructions are first degree murder cases. *Waterbury v. State*, 387 N.W.2d 309 (Iowa 1986); *State v. Blair*, 347 N.W.2d 416 (Iowa 1984).

### B. Argument

The court erred in giving Instruction 24 and 25, the dangerous weapon inference instruction, over the objection of the Defendant. The model instructions are clear that the dangerous weapon inference is for murder in the first degree cases. In fact, model instruction number 700.8 actually is titled "Murder In the First Degree – Dangerous Weapon Inference." There is no similar model instruction for other offenses.

The language of the model inference instruction also demonstrates it is not applicable. "If a person has the opportunity to deliberate…" and "used with malice, premeditation and specific intent to kill." There is no requirement of "deliberation" in Attempted Murder – yet this instruction adds in the element of deliberation. Attempted murder also doesn't have the elements of malice or premeditation, and so the modified instruction as given by the court here, simply deletes those requirements from the

inference. (App. at 94). No authority allows for modification of the instruction.

In *State v. Green*, 896 N.W.2d 770, 781 (Iowa 2017), the Iowa Supreme Court calls it a "malice-inference jury instruction." The Court notes there that it may not be appropriate in every case where a person actually kills the other person. Here, there was no malice element and there was no death. This renders the inference instruction inapplicable. It was error to give that instruction, and therefore the Defendant deserves a new trial.

## VIII. THE COURT ERRED IN REFUSING TO MERGE THE COUNTS.

### Preservation of Error

Krogmann filed a motion requesting that the judgment on Count II not be entered otherwise it would violate the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution, and article 1, section 12 of the Iowa Constitution, and arguing willful injury should be merged under Iowa Code 701.9 with attempted murder. (App. at 14). The court overruled this request, preserving error. (Sent. Tr. p. 10, l. 20-25).

## Scope and Standard of Review

### A. Applicable legal principles

Double jeopardy claims are reviewed de novo. *State v. Finnel*, 515 N.W.2d 41, 54 (Iowa 1994). Alleged violations of the merger statute are reviewed for corrections of errors at law. *Id.*

### B. ARGUMENT

Krogmann submits that judgment should not have been entered on Count II because doing so would violate the Double Jeopardy clauses of the federal and state constitutions. Krogmann submits that the current precedent of the Iowa Supreme Court, including in his postconviction appeal, *Krogmann v. State*, 941 N.W.2d 293 (Iowa 2018), were wrongly-decided.

Using the elements test, willful injury resulting in serious injury must, at least in part, merge with attempted murder, because not only do the elements overlap, the lesser-included offenses overlap.

Attempted murder contains the lesser-included offenses of assault with intent to cause serious injury and assault. Willful injury causing serious injury also includes the lesser-included

offenses of assault with intent to cause serious injury and assault. So, at the very least, the elements that are incorporated into those identical lesser-included offenses should merge, otherwise the Defendant is punished twice for the commission of the same acts that constitute the lesser-included offenses.

Krogmann could not have been found guilty of willful injury causing serious injury without having committed the lesser offense of assault with intent to cause serious injury. Krogmann also could not have been found guilty of attempted murder without having committed the lesser offense of assault with intent to cause serious injury. Thus, he now stands punished, consecutively, twice, for the same assault with intent to cause serious injury.

This violates the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution, article I, section 12 of the Iowa Constitution, and Iowa Code section 701.9.

## IX. COSTS WERE ASSESSED IN ERROR.

### Preservation of Error

Error was preserved by the Defendant filing a Resistance and Motion to Reconsider the Order granting the costs on October 6, 2021, having a hearing on the matter, and receiving a written order. (App. at 71, 82, 85).

### Scope and Standard of Review

#### A. Applicable legal principles

Restitution orders are reviewed for corrections of errors at law. *State v. Klawonn*, 688 N.W.2d 271, 274 (Iowa 2004).

Costs that can be assessed against a defendant in a criminal matter are controlled by Iowa Code chapters 815, as well as provisions of chapters 622 and 625. See *State v. Basinger*, 721 N.W.2d 783, 785-86 (Iowa 2006) (Iowa Code section 625.8 applicable to criminal cases); *State v. Wheeler*, 829 N.W.2d 589, 2013 Iowa App. LEXIS 301 (Iowa Ct. App. 2013) (unpublished) (Applying Iowa Code section 625.14 and Iowa R. Civ. P. 1.101 to criminal cases).

Witness fees are limited to the cost of mileage for one hundred miles from the place of trial, unless otherwise ordered by the court at the time of entering judgment. Iowa Code Section 625.2.

Iowa Code section 625.14 and Iowa R. Civ. P. 1.101, applicable to criminal cases in *Wheeler*, 829 N.W.2d 589, does not allow for the taxation of deposition costs unless the depositions are introduced into evidence at trial. Iowa Code section 622.72 limits expert witness fees to be taxed at a limit of $150 per day. Iowa Code section 815.5 reads,

> Notwithstanding the provisions of section 622.72, reasonable compensation as determined by the court shall be awarded expert witnesses, expert witnesses for an indigent person referred to in section 815.4, or expert witnesses called by the state in criminal cases.

Iowa Code section 815.13 reads,

> The county or city which has the duty to prosecute a criminal action shall pay the costs of depositions taken on behalf of the prosecution, the costs of transcripts requested by the prosecution, and in criminal actions prosecuted by the county or city under county or city ordinance the fees that are payable to the clerk of the district court for services rendered and the court costs taxed in connection with the trial of the action or appeals from the judgment. The county or city shall pay witness fees and mileage in trials of criminal

> actions prosecuted by the county or city under county or city ordinance. These fees and costs are recoverable by the county or city from the defendant unless the defendant is found not guilty or the action is dismissed, in which case the state shall pay the witness fees and mileage in cases prosecuted under state law.

## B. ARGUMENT

The following costs were applied to Krogmann in violation of the statutory scheme. The deposition of Dr. Dennert was not introduced into evidence at trial, yet his deposition costs, as well as his time to sit for the deposition was included in the restitution. This was in violation of Iowa Code section 625.14 and Iowa R. Civ. P. 1.101, applicable to criminal cases in *Wheeler*, 829 N.W.2d 589, which does not allow for the taxation of deposition costs unless the depositions are introduced into evidence at trial. The State's cost of an additional $275.30 for transcripts of depositions that were not used at trial were also therefore erroneously assigned to Krogmann. (App. at 80).

The costs included service fees for the sheriff to serve a person, Timothy Brandt, who was not called to testify at trial, and therefore was not a witness. (App. at 79).

The State's total request for reimbursement of $13,958.72 for expert witness fees is made contrary to the provisions of Iowa Code section 622.72, and is not allowable under section 815.13.

The hotel cost for Dr. Dennert for $230.56 was not authorized by any of the statutes. There is no law that allows for the taxation of witness costs other than for testimony. The bill submitted by Dr. Dennert includes time for records review, report preparations, calls with the prosecutors, travel time and waiting time. None of these items are taxable to the defendant. No provision of law allows for taxation of airline tickets, or rental cars for witnesses, which was allowed in Dr. Dennert's expenses.

Therefore, Krogmann requests this Court reverse the assignment of costs.

## CONCLUSION

For these reasons, Krogmann asks this Court to reverse his convictions and remand for a new trial.

## REQUEST FOR ORAL ARGUMENT

Robert Krogmann requests to be heard in oral argument.

## COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's brief was $0, because it was filed electronically.

## CERTIFICATE OF COMPLIANCE

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

> [x] this brief has been prepared in a proportionally spaced typeface using Century in 14 point and contains 13,880 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).

/s/ Angela L. Campbell

Angela Campbell, AT#0009086
*Counsel of Record for Appellant*
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: angela@iowajustice.com