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

REPLY 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 the 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Iowa Supreme Court

Iowa Court of Appeals

OTHER AUTHORITIES:

REPLY STATEMENT OF THE FACTS

The State's recitation of the facts misstated and omitted several material facts.

(1) **Krogmann arrived to Smith's house at 8:30 a.m.**

The State claimed in its brief that on the morning of the shooting, Krogmann showed up "*after* eight a.m." (State's Br. p. 15). While technically accurate, it was *after* 8:00 a.m., the State used this misleading language on purpose, like they did at the first trial, and again at this retrial, to try to minimize the damage that the timeline does to their case. The record was clear that Krogmann had to have arrived at Smith's house right at 8:30 a.m., not "after 8:00 a.m." and Smith herself testified that it was 8:30 a.m. (8/18/21 TT Vol. 2, p. 66, l. 15-17). Plus, Krogmann was seen, in person, between 8:00 and 8:15 a.m. meeting with a customer, prior to driving to Smith's house. (8/19/21 TT Vol. 3, p. 88, l. 17, p. 92, l. 10-11).

This timeline is important because the State attempted to portray Krogmann's actions in between the first gunshot and the first call to help as being a lengthy period of time. Indeed, the

State's brief spent multiple pages trying to extend the time in between the first shot, and the first call for help. (State's Br. p. 15-17). But, it is undisputed that Krogmann's first call for help to Jeff Krogmann was at 8:53 a.m. and Krogmann's first call to 911 was at 8:57 a.m. That means that the entire encounter at Smith's house from the time Krogmann arrived, until the time he called for help, was 23 minutes. The State attempted, wrongly, in its brief to make it sound like it was a longer period of time.

Not once did the State even mention in their brief, or during their discussion of the time frames, that Krogmann ever called 911. Instead, they asserted several times that he refused to call 911. (State's Br. p. 15, 16, 26). This is even more appalling given the first trial where the State falsely told the jury at the first trial that Krogmann did not call 911 at all. *Krogmann v. State*, 914 N.W.2d 293, 306 (Iowa 2018).

The timeline is important because if Krogmann arrived at the residence at 8:30 a.m., when you subtract the length of time that Krogmann and Smith talked before the first shot (15 minutes), and the time of the first call to help (8:53 a.m.), there

was a maximum of 8 minutes in between the first shot and the call for help. That means there were only eight minutes for the second two shots to occur, the conversation between Smith and Krogmann that takes up several pages of the State's brief to occur, for Krogmann to look for, and find, Smith's cell phone, and for Krogmann to use Smith's phone to call for help. This time frame demonstrates that the State's version of the facts – that Krogmann engaged in a lengthy discussion full of threats and refusals to get help, followed by meandering about not getting any help for Smith - is simply not true.

(2) **Who called 911.**

The State claimed in its brief that Smith's brother, Michael Schneiders, was the one that called 911. (State's Br. p. 19). In so doing, the State cites Smith's testimony that Michael called 911. (State's Br., p. 19). But, this was demonstrably false.

Michael Schneiders testified that when he arrived, he asked Jeff Krogmann if Jeff was on with 911, and because Jeff Krogmann was actively talking to 911, Michael went to tend to Smith, rather than call 911 himself. (TT Vol. II, p. 95, l. 2-4).

Michael himself never called 911. *Id.* Perhaps most harmful to the State's false narrative in its brief is that the 911 calls were all admitted at trial. The calls came from Krogmann and Jeff Krogmann, not Michael Schneiders. (State's Exhibit 1 and 2).

While Smith testified at both the first trial, and then again at the retrial, that Krogmann "refused" to call 911, her testimony was simply not true. And, perhaps most telling, the State has done nothing to inform its own witness, the victim of a shooting, that the shooter was the one who called for help within 8 minutes, and had himself talked to 911 several times on the phone in between the shooting and help arriving. Smith did not realize these basic facts. She didn't know that Krogmann never refused to call 911, and instead had already called both his son, and 911, to get her help, by the time he gave her the phone to call her mother. (State's Exhibit 1 and 2). Smith's entire testimony was tainted by this fundamental misunderstanding of what happened the day of the shooting.

It is clear from the record that Krogmann called 911 right after calling Jeff Krogmann. (State's Exhibit 1 and 2). The 911

operator put Jeff Krogmann on hold in order to talk to Krogmann himself on his 911 call. (State's Exhibit 1 and 2). Krogmann was the only person that gave 911 Smith's address to come to save her. (State's Exhibit 1 and 2). Krogmann called 911 within minutes of the shooting, immediately after he hung up the phone with Jeff Krogmann. Krogmann admitted on the calls he had shot Smith. (State's Exhibit 1 and 2). And he begged several times for 911 to get there quickly to save Smith's life. (State's Exhibit 1 and 2).

The State's false narrative about the 911 calls is important because the State's entire argument about Krogmann's ability to form specific intent, and his actual intent, hinges on their argument that Krogmann was acting in a cool, collected, and evil manner. But the facts underlying that argument were simply not true. Smith's testimony was just flat wrong – Krogmann *didn't* refuse to call 911. Michael *wasn't* the one that called 911. The only reason 911 was there was because *Krogmann* called for help. And the only reason Michael was there was because after Krogmann called Jeff Krogmann and 911, *Krogmann* gave the phone to Smith to call her mother.

The 911 evidence demonstrates that what Tracy Thomas said, and what the defense offered at trial, was the correct version of events. Krogmann was not trying to kill Smith – in fact, he was the reason she survived the shooting. The only explanation for the facts as they actually were (as opposed to the way the State tries to manipulate the facts to have been) is that Krogmann was not operating in a state of mind that can be explained by anything other than severe mental illness. He was exhibiting the definition of diminished capacity.

(3) **Krogmann exiting the house.**

The State again mischaracterized the record in its brief by claiming that when Michael Schnieders arrived, "Robert and Jeff Krogmann *walked* outside the house" while Michael helped Smith and called 911. (State's Br. p. 18). Not true. Schnieders attacked Krogmann with a broom, and forced him out of the house eventually, though it "took a little yelling at him." (TT Vol. 2, p. 94, l. 16-25.) As mentioned above, both Jeff Krogmann and Schnieders agreed that Jeff Krogmann was on the phone with 911 when Schnieders arrived and that Krogmann was forced out of the

house against his will by Schnieders. After Krogmann was chased out by the broom, Jeff Krogmann stayed behind and spoke with Schnieders. (TT Vol. 2, p. 95, l. 2-10). It wasn't until after Krogmann had left that Jeff Krogmann then also left to go find out where he went. (TT Vol. 2, p. 95, l. 6-12). By the time Jeff Krogmann left the house, Krogmann was already gone. (TT Vol. 5, p. 195, l. 2-7).

This mischaracterization is important because it is another instance where the State tries to make Krogmann sound like a cool, collected, calm shooter, walking away from the crime scene. But he wasn't. He was suicidal, distraught, mentally ill, and only left because the son of the person he just shot attacked him with a broom. He did not "walk out" of the house with his son. He was forced out, after calling for help and pleading for 911 to come quickly to save Smith's life.

(4) **Status of the relationship.**

The State claimed that after Smith got onto Krogmann's computer and saw he had been on Match.com, she "ended the relationship and refused to get back together with him." (State's

Br. p. 14.) This isn't accurate. After the Match.com incident, Smith asked Krogmann to do "something extra" for him to show her that he wanted to be in a relationship, but he didn't do enough soon enough, despite his texting, calling, bringing flowers to work, or coming to her house. (8/18/21 TT Vol. 2, p. 65, l. 3-13). And, the morning of the shooting, Smith actually told Krogmann that maybe someday they could get back together, just not right then. (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).

This is important because the State's entire theory rested on the idea that Krogmann was being rejected, and he was a logical, rational, scorned lover that sought revenge through violence. But that simply wasn't the case. He was the one who had broken up with Smith initially. He was the one on Match.com talking to other women. He was the one that was asked by Smith to do something "big" but he didn't do anything "big" quickly enough for Smith. And, right before the shooting Krogmann was told that there was hope for them in the future. (8/18/21 TT Vol. 2, p. 39, l. 17-18). Nothing escalated during the conversation before the

shooting, and the couple even hugged. But yet, when Smith turned around after getting a cup of coffee, Krogmann had a gun pointed at her and shot her. (8/18/21 TT Vol. 2, p. 39, l. 19-21; p. 67, l. 9-14).

The true narrative – as opposed to the false one set forth by the State - does not make sense. And that is the entire point. The true narrative does not make sense because Krogmann's mind does not make sense. He was not operating in his right mind, he was suffering from a disease or defect that prohibited him from thinking rationally, or forming specific intent. He had diminished capacity.

These specific examples, along with others throughout their brief, demonstrate that the State is trying to change the facts to try to support their false narrative about this case. The State has not even informed their main witness, the victim, Ms. Smith, about the true facts of the case. At the very least, this conduct by the State should indicate to this Court that it cannot rely on "facts" when argued by the State in its brief. And, the defense submits that the State's conduct should also be seen as something

more substantial – it should be seen as an indication to this Court there was not sufficient evidence based on the real facts of the case to sustain the conviction.

ARGUMENT

I. THE STATE MISCONSTRUED HEARSAY LAW IN THEIR ARGUMENT REGARDING THE ADMISSIBILITY OF EXHIBIT A.

In its brief, the State makes several arguments against the admission of Exhibit A, the recording of Krogmann's post-arrest interview, that misconstrues hearsay law. These misplaced arguments include, (1) the continuation of the State's argument from trial that the defense must "properly cross-examine" Agent Liao about what Krogmann said on the video in order to admit anything Krogmann said on Exhibit A; (2) a new argument that Exhibit A is "nonverbal" hearsay; (3) that Exhibit A was immaterial to any issue presented in the case; and (4) that *State v. Veal*, 564 N.W.2d 797 (Iowa 1997) rejected a claim "similar to Krogmann's."

A. Cross-examination of an interviewer is not the "best-evidence" of what someone else said during that videotaped interview; and cross-examination does not resolve the issues presented in this case.

Like it did at trial, the State asserts that defense counsel's cross-examination of Agent Liao was deficient and rendered Exhibit A inadmissible.[1] In so arguing, the State appears to conflate the method by which counsel is to impeach a witness with the witness's own prior inconsistent statements with the methods by which the State can open the door to evidence, and the methods by which best evidence is to be offered at trial. For example, the State argues, without citations to any rule or case,

> [Agent Liao] was subject to cross-examination and could be questioned on Krogmann's demeanor without the need to introduce the video. If the agent did not remember certain details, defense counsel was free to

---

1 The State seems to now abandon the idea that the proper method of confronting Liao would have been to "refresh his recollection" and argues now that impeachment was the proper route for cross-examination. The State doesn't even appear in its brief to try to defend the prior asserted theory that cross-examination was deficient for failing to "refresh" Liao's recollection with Exhibit A, like what was stated at trial. (8/19/21 TT Vol. 3, p. 128, l. 10 – p. 129, l. 3). This requirement of "refreshing recollection" still has no place in determining Exhibit A's admissibility. (Appellant's Br. p. 55-56).

> question him about the recollection or impeach him without the need to introduce the video.

(State's Br. p. 30.) Similarly, the State argued, again without any citation to any authority,

> Krogmann could have sought to impeach the agent's testimony more thoroughly, but elected not to do so. The residual hearsay exception should not be used to allow a defendant to subvert the rules of evidence when he failed to question the witness in a proper manner.

(State's Br. p. 29).

It is hard to know exactly what the State relied upon here in criticizing defense counsel because the State cited no authority for its commentary on how cross-examination should be conducted. But, the State's arguments appear to confuse the questions presented in the instant case with the law of admissibility of a witness/declarant's prior inconsistent statements and the admissibility of a witness/declarant's prior consistent statements.

Iowa Rule of Evidence 5.801(d)(1) informs how the courts are to handle a "declarant-witness's prior statement" whether that prior statement is inconsistent or consistent with the declarant's trial testimony. Under this rule, if an impeached witness testifies, and is subject to cross-examination about a prior statement, and

the prior statement is inconsistent with the declarant-witness's testimony, that prior recorded inconsistent statement becomes admissible if it was given under penalty of perjury in a trial, hearing, deposition, or other proceeding. Iowa R. Evid. 5.801(d)(1)(A). And, if a declarant-witness is accused of fabrication, improper influence, or improper motive during their testimony, then Iowa Rule of Evidence 5.801(d)(1)(B) is triggered, and a recording of the witness's prior consistent statement becomes admissible if the statement was made before the alleged improper motive to fabricate arose, regardless of whether it was given under oath or not. *State v. Fontenot*, 958 N.W.2d 549, 556-560 (Iowa 2021).

Both of these rules, however, address a "declarant-witness's" prior statement. That means that these rules apply only when the testifying witness is being asked about their own prior statements. Conversely, then, these rules do not apply when a witness testifies about what a different person said or did previously, because then the person who made the prior statement is not the same person as the person who is testifying, and therefore, is not the aptly

named "declarant-witness" referenced in these rules. Agent Liao was not testifying about his prior statements. He was not a declarant-witness. Rules 5.801(A) and (B) do not apply to Agent Liao's testimony about what he heard Robert Krogmann say. And these rules do not apply to Agent Liao's testimony about what Robert Krogmann did or did not do. In short, these rules do not apply to the admission of Exhibit A.

Agent Liao was testifying about what *Krogmann* said and did. This testimony triggers different rules, namely the rules raised by the defendant in his principal brief, and ignored by the State in their brief. These are the "best evidence rule," the "rule of completeness," and the rule involving one party "opening the door."

The "best evidence rule" directs that 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. And, as the Court of Appeals has stated, there is "no better evidence" than a "video of the event." *Ransdell v. Huckleberry*

Entm't, LLC, 2020 Iowa App. LEXIS 927, at *26 (Iowa Ct. App. Sept. 23, 2020) (unpublished).

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). This rule explains in the text of the rule the opposite of what the State says in its brief. The defense not only gets to admit all of Exhibit A once the State offers any evidence about the subject matter that is on Exhibit A under the rule of completeness, but in so doing the defense is not therefore limited in its right to cross-examine further about it. There is nothing that requires the defense to do, or not do, something on cross-examination to trigger admissibility under the rule of completeness.

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 (emphasis added).

The State is simply incorrect that cross-examination has anything to do with this analysis. Exhibit A was admissible from the outset as non hearsay, and to the extent it was still considered hearsay, the State opened the door to its admissibility under the best evidence rule and the rule of completeness. Either way, the district court erred in excluding it at trial.

B. Exhibit A is not inadmissible "nonverbal" hearsay.

In its brief, the State offered on appeal a new reason why Exhibit A was properly excluded – Krogmann's "nonverbal conduct" was "intended as an assertion" and is therefore "still a statement" under Iowa Rule of Evidence 5.801(a). (State's Br. p. 28). The State offered no other citation or authority, other than Rule 5.801(a), to support its new argument that Exhibit A was

hearsay because it was "nonverbal conduct" that was "intended as an assertion."

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(c)(2). A "statement" can be an oral or written assertion, or, "nonverbal conduct, if intended as an assertion." Iowa R. Evid. 5.801(a)(1) and (2).

Conduct that has been determined to be this "nonverbal conduct" for the purposes of the hearsay rule includes such thing as nodding, sign language, or a videotape of an injured plaintiff recreating the accident that caused his injuries. *State v. Dessinger*, 958 N.W.2d 590, 599 (Iowa 2021). Similarly, when a child is asked a question about what kind of abuse he is alleging, acting out the abuse in response can be nonverbal conduct that was intended as an assertion. *Id.*

The State does not delineate here what on Exhibit A it contends is nonverbal conduct by Krogmann that was intended as a statement. Krogmann submits that the purposes for which he offered Exhibit A do not change even if there is something

somewhere on Exhibit A that could be construed as nonverbal conduct intended as an assertion. Whether or not Krogmann's conduct on the video is verbal, or nonverbal, Exhibit A was offered for a purpose other than to prove the truth of the matter asserted, whether verbal or nonverbal, and therefore Exhibit A is still not, by definition, hearsay. *State v. Plain*, 898 N.W.2d 801, 812 (Iowa 2017). Exhibit A was offered to show Krogmann's mental state as relied upon by Tracy Thomas and was admissible on that basis alone.

And, Exhibit A was later then offered under the best evidence rule, rule of completeness, and residuary exception to hearsay because Krogmann was entitled to offer the full interview once Agent Liao testified about parts of it. So, to the extent there was any nonverbal conduct intended as an assertion included on Exhibit A, the State opened the door to the exhibit's admission, and excluding it was still error.

For these reasons, whether or not there was any "nonverbal conduct intended as an assertion" on the entirety of Exhibit A is not germane to the questions presented to this Court.

C. Exhibit A is exceptionally material to the issues presented in the case.

The State claimed in it's brief that "the video did not offer any evidence that would have impacted the issue in the case; whether Krogmann could form specific intent." (State's Br. p. 30). The defendant disagrees. The video was the best evidence that impacted the only issue in the case – whether Krogmann's mental state on March 13, 2009 was such that he could form specific intent. The video also would have aided the jury in resolving factual disputes about Krogmann's statements and demeanor immediately after the shooting.

The defendant's expert, Tracy Thomas, explained how she does an evaluation of someone for diminished responsibility, including, most importantly, reviewing records "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). While Thomas looked at reports of the incident, reviewed mental health records, spoke with the defendant, and did forensic testing on the defendant, she also said Exhibit A was an important piece of

information in forming her opinion because it was so close in time to the shooting. (8/20/21 TT Vol. 4, p. 80, l. 7 0 p. 81, l. 10; p. 103, l. 2- p. 104, l. 21).

The State's expert, Dr. Dennert, on the other hand, formed his opinion about Krogmann without ever having seen Exhibit A, relying solely upon other peoples' characterizations of what happened that day. (8/20/21 TT Vol. 4, p. 12, l. 3-7). Dr. Dennert also did not do any of the forensic testing on Krogmann that Tracy Thomas had done. (8/20/21 TT Vol. 4, p. 107, l. 23-25).

The jury was then asked to choose between these two expert's opinions. Exhibit A was therefore one of the two main points of contention between the two experts: whether Exhibit A was relevant and supported their opinions, and whether testing of the defendant who raised a diminished capacity defense was necessary. So, not only was Exhibit A relevant to the issue presented to the jury regarding the experts' disagreement, defendant submits that Exhibit A was *the only* physical evidence of Krogmann's mental state on March 13, 2009.

In addition, Exhibit A not only rebutted Dr. Dennert's testimony, it also rebutted Agent Liao's testimony. Exhibit A showed that Krogmann could not "track and understand," "follow the conversation," "stay on topic," "volunteer information," or properly answer Agent Liao's questions in the way Agent Liao testified. (8/19/21 TT Vol. 3, p. 101, l. 1 – p. 107, l. 22). If these factors were not "material" to the State's case, then why did the State ask Agent Liao all of these questions about Krogmann in the first place?

And finally, one of the defense's witnesses, Jeff Krogmann, described his dad as being "distraught, and "unstable." (8/20/21 TT Vol. 4, p. 191, l. 21-25). The State painted Jeff Krogmann as biased because he was the son of Krogmann. But, Jeff Krogmann's testimony was critical to the defense as he testified about Krogmann's mental state in the days leading up to the shooting, as well as his appearance immediately after the shooting. Exhibit A would have demonstrated to the jury exactly what Jeff Krogmann saw.

For all of these reasons, the State's assertion that Exhibit A involved "nothing material" to the case is completely incorrect.

D. *State v. Veal* is misapplied.

The State claimed in its brief that in *State v. Veal*, 564 N.W.797, 808 (Iowa 1997), the Iowa Supreme Court "rejected a claim similar to Krogmann's" because the *Veal* defendant had "made pretrial statements to various people and sought to admit these statements in her trial for first-degree murder." (State's Br. p. 27). But, *Veal* did not involve (1) a video of an interrogation testified about by the interrogator, (2) a defense of diminished responsibility, (3) a question about the best evidence rule, (4) a question about the rule of completeness, or (5) a question about the residual exception to hearsay. *Id.*

Instead, in *Veal*, the defendant had made two statements she wished to admit in her defense at a murder trial. One statement was made to a civilian where the defendant said that she "did not know that they were going to kill that old lady." *Id.* at 24. The other statement the defendant in *Veal* made at the time of her arrest where she admitted she knew the victim, had

been to her house to use the phone, but "couldn't murder anyone." *Id.* at 24. Veal argued that her statements were exceptions to the rule against hearsay because they were excited utterances, they were admissions by a party opponent, and they were statements against interest. *Id.* The Iowa Supreme Court rejected each of those arguments. *Id.* The Court also found that there was nothing that opened the door to her statements, and the rules of hearsay did not violate her rights to due process. *Id.*

Here, Krogmann makes no such arguments. He does not claim that the video is an excited utterance, an admission by a party opponent or a statement against interest. Instead, Krogmann argues that his statements are not hearsay at all because Exhibit A was not being offered for the truth of the matters asserted, as defined in Iowa R. Evid. 5.801(c). (Appellant's Brief, p. 52). Exhibit A was being offered to show Krogmann's demeanor, and mental state, immediately after the shooting. And, even if it were hearsay, Krogmann argued that it met the residual hearsay exception under Iowa R. Evid. 5.807. – a question not raised in *Veal*. Unlike *Veal*, Krogmann further

demonstrated that Agent Liao testified about statements made in the interview, and Krogmann's demeanor during the interview, and therefore Exhibit A was the best evidence, the rule of completeness applied, and the State had opened the door by their direct examination of Agent Liao. None of these arguments were raised in *Veal*.

As such, the State's reliance on *Veal* is completely misplaced because it did not address "the same questions" raised by Krogmann in this appeal.

For all of these reasons, and for the reasons stated in Krogmann's principal brief, Krogmann's conviction should be overturned and the district court reversed.

II. THE STATE MISSTATED THE FACTS AND LAW IN THEIR ARGUMENT ABOUT THE ASSESSMENT OF COSTS.

The State's brief contained misstatements of facts and law regarding the question of costs that also necessitate reply.

The State claimed that Timothy Brandt was "a potential witness for the defense" and that "the defendant failed to provide an accurate address to the sheriff" so "he should bear the cost of

that." (State's Br. p. 60-61). This is just flat wrong and there is nothing ambiguous whatsoever about the record on this point.

The State, not the defendant, listed Timothy Brandt as a witness. The defendant moved to exclude Brandt's testimony from trial, arguing that his testimony should be excluded in its entirety because the testimony resulted from the State's illegal asset freeze before Krogmann's first trial. In so doing, the defendant argued,

> The State has also added witness Timothy Brandt to their witness list. Brandt did not testify at the first trial. Brandt's entire proffered testimony is based on conversations he claims to have had with Krogmann while Krogmann was at the Delaware County Jail in 2009. Similar to the jail calls and letters, these communications would not have happened had Krogmann not been illegally detained at the jail pending his last trial. As argued above, to allow Brandt's testimony would be to again violate Krogmann's rights under Iowa Const. art. I, § 12; Iowa Code § 811.1; U.S. Const., am V and XIV; U.S. Const., am VI; U.S. Const., am VIII; Iowa Const. art. I, § 10; and Iowa Const. art. I, § 9. Indeed, his testimony would be a direct show of prejudice regarding the asset freeze, the prosecutorial misconduct in securing the asset freeze, and the ineffective assistance of counsel in not properly objecting to it. As such, Brandt should be excluded as a witness in the retrial.

(App. 18-19).

The State, not the defendant, subpoenaed Brandt for trial. The State, not the defendant, decided last minute not to call Brandt to testify at trial. The State, not the defendant, decided to not call Brandt to testify at trial – and if he had testified, the defendant would have again objected, and then argued in this appeal that allowing him to testify would have violated Krogmann's rights because his existence as a witness came from the State's illegal, and unconstitutional, asset freeze.

Thus, the inclusion of expenses related to the *State's* witness, Timothy Brandt, were improperly assessed against Krogmann. The costs order should exclude all costs related to Brandt.

The State also argued in its brief that "*Elwood, O'Donohue, O'Cooner & Stochl v. Iowa Dist. Ct. for Chickasaw Cty.,* No. 99-0375 at *3 (Iowa Ct. App. Dec. 22, 2000)" supported the district court's assessment of costs for transportation and hotel costs for the State's expert, Dr. Dennert's, trial testimony.[2]

---

[2] The State provided no published citation for this case, and the brief appears to contain several typographical errors in the title. The case appears to be *Elwood, O'Donohoe, O'Connor & Stochl v.*

The defense submits that this case provides no relevant discussion about the issues presented here because *Elwood* is about the assessment of fees requested by court-appointed counsel in their representation of an indigent defendant. *See, Elwood, O'Donohoe, O'Connor & Stochl v. Iowa Dist. Ct. for Chickasaw Cty,* No. 99-0375 (Iowa Ct. App. December 22, 2000), available at https://casetext.com/case/elwood-v-district-court (last accessed 9/12/22).

The State argued in its brief that *Elwood* stood for the proposition that the opposing party had to reimburse an expert witness for "his hotel room necessitated by the State's request to depose him." (State's Br. at 60). Not so, because *Elwood* was about whether a law firm should be reimbursed for these expenses when representing an indigent defendant. But, in any event, in

---

Iowa Dist. Ct. for Chickasaw Cty, No. 99-0375 (Iowa Ct. App. December 22, 2000). The district court provided the Westlaw citation of 2000 W.L. 186967 (Iowa Ct. App. December 22, 2000). While the defendant was unable to locate the case using these citations, and the case appears to be too old to be on this Court's website, the case does appear to be publicly available at: https://casetext.com/case/elwood-v-district-court.

the instant case, the hotel rooms taxed were not taxed for a deposition, but instead were for the State calling their own expert witness for trial. When Krogmann deposed the expert, he did so by Zoom so as to limit costs for the expert, and no travel expenses were incurred for the deposition to be taxed. (App. at 76). As such, *Elwood* is irrelevant to the question presented here.

For these reasons, and for the reasons stated in Krogmann's principal brief, the costs order was in error and should be reversed.

CONCLUSION

For these reasons, and for all of the reasons presented in his principal brief, Krogmann asks this Court to reverse his convictions and remand for a new trial. And, Krogmann asks this Court to reverse the order on costs.

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 5,410 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