ELECTRONICALLY FILED SEP 14, 2022 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 21-1617

STATE OF IOWA,
Plaintiff-Appellee,
vs.
ROBERT PAUL KROGMANN,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY ON A
CHANGE OF VENUE FROM DELAWARE COUNTY
THE HONORABLE LINDA FANGMAN, JUDGE

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

MARTHA E. TROUT
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-8894 (fax)
martha.trout@ag.iowa.gov

JOHN BERNAU
Delaware County Attorney

SUSAN KRISKO
ISRAEL KODIAGA
MARTHA TROUT
Assistant Attorneys General

ATTORNEYS FOR PLAINTIFF-APPELLEE FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES.. 4

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 8

ROUTING STATEMENT..12

STATEMENT OF THE CASE..12

ARGUMENT... 26

I. THE DISTRICT COURT CORRECTLY DENIED THE ADMISSION OF DEFENDANT'S EXHIBIT "A" AS HEARSAY...26

II. THE DISTRICT COURT CORRECTLY ALLOWED SHERIFF JOHN LECLERE TO TESTIFY ABOUT WHY SOMEONE SHOOTS ANOTHER PERSON...................... 31

III. THE COURT CORRECTLY EXCLUDED EVIDENCE RELATED TO THE CIVIL SETTLEMENT BETWEEN THE DEFENDANT AND THE VICTIM, JEAN SMITH.............33

IV. THE DISTRICT COURT CORRECTLY ALLOWED DR. DENNERT'S EXPERT TESTIMONY. 37

V. THE DISTRICT COURT CORRECTLY DENIED THE DEFENDANT'S MOTION FOR A NEW TRIAL; THE GREATER WEIGHT OF EVIDENCE SUPPORTS THE JURY'S VERDICT. 39

VI. THE DISTRICT COURT'S INSTRUCTION ON SPECIFIC INTENT IS A CORRECT STATEMENT OF LAW. 44

VII. THE DISTRICT COURT CORRECTLY INSTRUCTED THE JURY THAT IT COULD INFER THE DEFENDANT'S INTENT FROM USE OF A DANGEROUS WEAPON.........48

VIII. THE DISTRICT COURT CORRECTLY DENIED THE DEFENDANT'S REQUEST TO MERGE THE CONVICTIONS FOR ATTEMPTED MURDER AND WILLFUL INJURY.... 52

IX. THE DISTRICT COURT CORRECTLY ASSESSED COSTS AGAINST THE DEFENDANT. 55

CONCLUSION 61

REQUEST FOR NONORAL SUBMISSION 62

CERTIFICATE OF COMPLIANCE 63

TABLE OF AUTHORITIES

Federal Case

Sandstrom v. Montana, 442 U.S. 510 (1979) 50

State Cases

Anfinson v. State, 758 N.W.2d 496 (Iowa 2008) 47

Barker v. Iowa Dep't of Pub. Safety, 922 N.W.2d 581 (Iowa 2019) . 53

Colvin v. Story Cnty. Bd. of Rev., 653 N.W.2d 345 (Iowa 2002)...... 52

Elwood, O'Donohue, O'Cooner & Stochl v. Iowa Dist. Ct. for Chickasaw Cty., No. 99-0375 Iowa Ct. App. Dec. 22, 2000)........59

Graber v. City of Ankeny, 616 N.W.2d 633 (Iowa 2000) 35

In re Det. of Millikin, 964 N.W.2d 785 (Iowa Ct. App. 2021)............ 53

Interest of C.Z., 956 N.W.2d 113 (Iowa 2021) 59

Krogmann v. State, 914 N.W.2d 293 (Iowa 2018).......................53, 54

State v. McCollom, 260 Iowa 977, 151 N.W.2d 519 (1967)................ 50

Mut. Cas. Co. v. Van Haaften, 815 N.W.2d 17 (Iowa 2012) 53

State v. Ambrose, 861 N.W.2d 550 (Iowa 2015) 50

State v. Artzer, 609 N.W.2d 526 (Iowa 2000).................................. 50

State v. Beck, 854 N.W.2d 56 (Iowa Ct. App. 2014).......................... 47

State v. Bedard, 668 N.W.2d 598 (Iowa 2003) 46

State v. Benson, 919 N.W.2d 237 (Iowa 2018)................45, 46, 47, 48

State v. Berlovich, 220 Iowa 1288, 263 N.W. 853 (1935) 50

State v. Braggs, 784 N.W.2d 31 (Iowa 2010).................................... 54

State v. Brown, 656 N.W.2d 355 (Iowa 2003).................................. 33

State v. Brown, No. 02-0086, 2003 WL 1967828
(Iowa Ct. App. Apr. 30, 2003)..51

State v. Burt, 249 N.W.2d 651 (Iowa 1977) 35

State v. Bynum, 937 N.W.2d 319 (Iowa 2020)................................. 45

State v. Clarke, 475 N.W.2d 193 (Iowa 1991) 54

State v. Dinkins, 553 N.W.2d 339 (Iowa Ct. App. 1996) 38

State v. Elliott, 806 N.W.2d 660 (Iowa 2011) 28

State v. Ellis, 578 N.W.2d 655 (Iowa 1998).................................40, 41

State v. Fountain, 786 N.W.2d 260 (Iowa 2010) 46, 47

State v. Green, 896 N.W.2d 770 (Iowa 2017)................................... 49

State v. Hagen, 840 N.W.2d 140 (Iowa 2013) 56

State v. Hanes, 790 N.W.2d545 (Iowa 2010)...................................39

State v. Heard, 636 N.W.2d 227 (2001).. 46

State v. Hephner, 161 N.W.2d 714 (Iowa 1968).................................51

State v. Huston, 825 N.W.2d 531 (Iowa 2013) 33

State v. Jeffries, 430 N.W.2d 728 (Iowa 1988) 54

State v. Johnson, 887 N.W.2d 178 (Iowa Ct. App. 2016) 60

State v. Kehoe, 804 N.W.2d 302 (Iowa Ct. App. 2011) 51

State v. Lacey, 968 N.W.2d 792 (Iowa 2021).................................. 33

State v. Love, 858 N.W.2d 721 (Iowa 2015) 52, 54

State v. Lunardi, No. 00-2045, 2002 WL 1331852
(Iowa Ct. App. June 19, 2022) 57

State v. McMurry, 925 N.W.2d 592 (Iowa 2019)............................. 60

State v. Neiderbach, 837 N.W.2d 180 (Iowa 2013).......................... 37

State v. Ochoa, 244 N.W.2d 773 (Iowa 1976) 50

State v. Ogg, 243 N.W.2d 620 (Iowa 1976) 32

State v. Oppedal, 232 N.W.2d 517 (Iowa 1975) 38

State v. Reeves, 670 N.W.2d 199 (Iowa 2003) 49

State v. Rinehart, 283 N.W.2d 319 (Iowa 1979) 50

State v. Rojas, 524 N.W.2d 659 (Iowa 1994) 29

State v. Schuler, 774 N.W.2d 294 (Iowa 2009) 45

State v. Serrato, 787 N.W.2d 462 (Iowa 2010) 50

State v. Shanahan, 712 N.W.2d 121 (Iowa 2006) 40, 41

State v. Shorter, 945 N.W.2d 1 (Iowa 2020) 51

State v. Smith, 242 N.W.2d 320 (Iowa 1976) 50

State v. Smith, 522 N.W.2d 591 (Iowa 1994) 37

State v. Thoren, 970 N.W.2d 611 (Iowa 2022) 31, 35

State v. Tipton, 897 N.W.2d 653 (Iowa 2017) 26

State v. Tyler, 867 N.W.2d 136 (Iowa 2015) 31

State v. Veal, 564 N.W.2d 797 (Iowa 1997) 27, 28

State v. Willis, 218 N.W. 921 (Iowa 1974) 36

Williams v. Hedican, 561 N.W.2d. 817 (Iowa 1997) 32

State Statutes

Iowa Code § 4.7 59

Iowa Code § 622.72 57

Iowa Code § 625.14 .... 58, 59

Iowa Code § 708.1 47

Iowa Code § 815.5 .... 56, 57, 59
Iowa Code § 815.13 58
Iowa Code § 910.1(2) 56, 60
Iowa Code § 910.1(10) 56
Iowa Code § 910.7(5) 55

Federal Rule

Fed. R. Evid. 408 .... 35, 36

State Rules

Iowa R. App. P. 6.108 55
Iowa R. Evid. 5.103 39
Iowa R. Evid. 5.106(a) 30
Iowa R. Evid. 5.401 34
Iowa R. Evid. 5.408 35
Iowa R. Evid. 5.702 .... 31, 32
Iowa R. Evid. 5.704 37
Iowa R. Evid. 5.7801(c) 28
Iowa R. Evid. 5.801(a) 28
Iowa R. Evid. 5.807 29

Other Authorities

Laurie Kratky Dore, *Iowa Practice Series: Evidence* § 5.1002:1, n.1 at 1126 (2021 ed.) 29

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT CORRECTLY DENIED THE ADMISSION OF DEFENDANT'S EXHIBIT "A" AS HEARSAY.

Authorities

State v. Elliott, 806 N.W.2d 660 (Iowa 2011)
State v. Rojas, 524 N.W.2d 659 (Iowa 1994)
State v. Tipton, 897 N.W.2d 653 (Iowa 2017)
State v. Veal, 564 N.W.2d 797 (Iowa 1997)
Iowa R. Evid. 5.7801(c)
Iowa R. Evid. 5.801(a)
Iowa R. Evid. 5.807
Iowa R. Evid. 5.106(a)
Laurie Kratky Dore, *Iowa Practice Series: Evidence* § 5.1002:1, n.1 at 1126 (2021 ed.)

II. THE DISTRICT COURT CORRECTLY ALLOWED SHERIFF JOHN LECLERE TO TESTIFY ABOUT WHY SOMEONE SHOOTS ANOTHER PERSON.

Authorities

State v. Brown, 656 N.W.2d 355 (Iowa 2003)
State v. Ogg, 243 N.W.2d 620 (Iowa 1976)
State v. Thoren, 970 N.W.2d 611 (Iowa 2022)
State v. Tyler, 867 N.W.2d 136 (Iowa 2015)
Williams v. Hedican, 561 N.W.2d. 817 (Iowa 1997)
Iowa R. Evid. 5.702

III. THE COURT CORRECTLY EXCLUDED EVIDENCE RELATED TO THE CIVIL SETTLEMENT BETWEEN THE DEFENDANT AND THE VICTIM, JEAN SMITH.

Authorities

Graber v. City of Ankeny, 616 N.W.2d 633 (Iowa 2000)
State v. Burt, 249 N.W.2d 651 (Iowa 1977)

State v. Huston, 825 N.W.2d 531 (Iowa 2013)
State v. Lacey, 968 N.W.2d 792 (Iowa 2021)
State v. Thoren, 970 N.W.2d 611 (Iowa 2022)
State v. Willis, 218 N.W. 921 (Iowa 1974)
Fed. R. Evid. 408
Iowa R. Evid. 5.401

IV. THE DISTRICT COURT CORRECTLY ALLOWED DR. DENNERT'S EXPERT TESTIMONY.

Authorities

State v. Dinkins, 553 N.W.2d 339 (Iowa Ct. App. 1996)
State v. Hanes, 790 N.W.2d545 (Iowa 2010)
State v. Neiderbach, 837 N.W.2d 180 (Iowa 2013)
State v. Oppedal, 232 N.W.2d 517 (Iowa 1975)
State v. Smith, 522 N.W.2d 591 (Iowa 1994)
Iowa R. Evid. 5.704

V. THE DISTRICT COURT CORRECTLY DENIED THE DEFENDANT'S MOTION FOR A NEW TRIAL; THE GREATER WEIGHT OF EVIDENCE SUPPORTS THE JURY'S VERDICT.

Authorities

State v. Ellis, 578 N.W.2d 655 (Iowa 1998)
State v. Shanahan, 712 N.W.2d 121 (Iowa 2006)

VI. THE DISTRICT COURT'S INSTRUCTION ON SPECIFIC INTENT IS A CORRECT STATEMENT OF LAW.

Authorities

Anfinson v. State, 758 N.W.2d 496 (Iowa 2008)
State v. Beck, 854 N.W.2d 56 (Iowa Ct. App. 2014)
State v. Bedard, 668 N.W.2d 598 (Iowa 2003)
State v. Benson, 919 N.W.2d 237 (Iowa 2018)
State v. Bynum, 937 N.W.2d 319 (Iowa 2020)
State v. Fountain, 786 N.W.2d 260 (Iowa 2010)

State v. Heard, 636 N.W.2d 227 (2001)
State v. Schuler, 774 N.W.2d 294 (Iowa 2009)
Iowa Code § 708.1

VII. THE DISTRICT COURT CORRECTLY INSTRUCTED THE JURY THAT IT COULD INFER THE DEFENDANT'S INTENT FROM USE OF A DANGEROUS WEAPON.

Authorities

Sandstrom v. Montana, 442 U.S. 510 (1979)
State v. McCollom, 260 Iowa 977, 151 N.W.2d 519 (1967)
State v. Ambrose, 861 N.W.2d 550 (Iowa 2015)
State v. Artzer, 609 N.W.2d 526 (Iowa 2000)
State v. Benson, 919 N.W.2d 237 (Iowa 2018)
State v. Berlovich, 220 Iowa 1288, 263 N.W. 853 (1935)
State v. Brown, No. 02-0086, 2003 WL 1967828
(Iowa Ct. App. Apr. 30, 2003)
State v. Green, 896 N.W.2d 770 (Iowa 2017)
State v. Hephner, 161 N.W.2d 714 (Iowa 1968)
State v. Kehoe, 804 N.W.2d 302 (Iowa Ct. App. 2011)
State v. Reeves, 670 N.W.2d 199 (Iowa 2003)
State v. Rinehart, 283 N.W.2d 319 (Iowa 1979)
State v. Serrato, 787 N.W.2d 462 (Iowa 2010)
State v. Shorter, 945 N.W.2d 1 (Iowa 2020)
State v. Smith, 242 N.W.2d 320 (Iowa 1976)

VIII. THE DISTRICT COURT CORRECTLY DENIED THE DEFENDANT'S REQUEST TO MERGE THE CONVICTIONS FOR ATTEMPTED MURDER AND WILLFUL INJURY.

Authorities

State v. Clarke, 475 N.W.2d 193 (Iowa 1991)
Barker v. Iowa Dep't of Pub. Safety, 922 N.W.2d 581
(Iowa 2019)
Colvin v. Story Cnty. Bd. of Rev., 653 N.W.2d 345 (Iowa 2002)
In re Det. of Millikin, 964 N.W.2d 785 (Iowa Ct. App. 2021)

Krogmann v. State, 914 N.W.2d 293 (Iowa 2018)
Emps. Mut. Cas. Co. v. Van Haaften, 815 N.W.2d 17
(Iowa 2012)
State v. Braggs, 784 N.W.2d 31 (Iowa 2010)
State v. Jeffries, 430 N.W.2d 728 (Iowa 1988)
State v. Love, 858 N.W.2d 721 (Iowa 2015)

IX. THE DISTRICT COURT CORRECTLY ASSESSED COSTS TO THE DEFENDANT.

Authorities

Elwood, O'Donohue, O'Cooner & Stochl v. Iowa Dist. Ct. for Chickasaw Cty., No. 99-0375 Iowa Ct. App. Dec. 22, 2000)
Interest of C.Z., 956 N.W.2d 113 (Iowa 2021)
State v. Hagen, 840 N.W.2d 140 (Iowa 2013)
State v. Johnson, 887 N.W.2d 178 (Iowa Ct. App. 2016)
State v. Lunardi, No. 00-2045, 2002 WL 1331852
(Iowa Ct. App. June 19, 2022)
State v. McMurry, 925 N.W.2d 592 (Iowa 2019)
Iowa Code § 625.14
Iowa Code § 910.7(5)
Iowa Code §s 622.72
Iowa Code § 815.13
Iowa Code § 4.7
Iowa Code § 815.5
Iowa Code § 910.1(2)
Iowa Code § 910.1(10)
Iowa R. App. P. 6.108

ROUTING STATEMENT

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

STATEMENT OF THE CASE

Nature of the Case

Robert Krogmann appeals his convictions for attempted murder and willful injury. The Honorable Linda Fangman presided over the trial in Black Hawk County on a change of venue from Delaware County. The issues on appeal are whether the court erred in denying the admission of Krogmann's post-arrest interview, whether the court erred in allowing Sheriff LeClere to testify about why people shoot people, whether the court erred in excluding evidence of a civil settlement between the victim, Jean Smith, and the defendant, whether the court erred in allowing the State's expert to testify about a legal conclusion, whether the weight of the evidence is contrary to the verdict, whether the court correctly instructed the jury on specific intent and the dangerous weapon inference, whether the court should have merged the counts at sentencing, and whether the court correctly assessed costs to the defendant.

Course of Proceedings

In 2018, the Iowa Supreme Court reversed Krogmann's convictions for attempted murder and willful injury after finding trial counsel ineffective in failing to challenge the freezing of his assets. *Krogmann v. State*, 914 N.W.2d 293, 326 (Iowa 2018). The supreme court remanded the case to the district court for a new trial. *Id.*

Trial in the matter began in Black Hawk County on August 17, 2021, and ended with guilty verdicts on both counts on August 24, 2021. Trial Tr. Vol. I p. 1, lines 1-25, Trial Tr. Vol. V p. 95, l.5 through p. 98, line 4. The district court sentenced Krogmann on October 4, 2021, to a 25-year term of incarceration for his conviction of attempted murder with a 70-percent mandatory minimum sentence and a ten-year term of incarceration for his willful injury conviction. Order Judg. and Sent. (10/5/21); App. 62-65. The court also ordered that the sentences be served consecutively to one another. Order Judg. and Sent. (10/5/21); App. 62-65. Krogmann filed his first notice of appeal from these convictions. Not. of Appeal (11/1/21); App. 74.

On October 5, 2021, the State requested the recovery of prosecution costs. Order (10/5/21); App. 69. The district court

granted the request. Order (10/5/21); App. 69. Krogmann objected to the award and filed a motion to reconsider the order granting costs. Def. Resist. (10/6/21); App. 71-73. Ultimately, the court granted the State's request for prosecution costs. Order Prosec. Costs (11/29/21); App. 85-86. Krogmann filed a second notice of appeal from this order. Not. of Appeal (12/6/21); App. 88. The Iowa Supreme Court consolidated the appeals in January of 2022. Supreme Ct. Order No. 21-1841 (1/6/22).

Facts

In 2007, Jean Smith and Krogmann began dating. Trial Tr. Vol. II p. 27, lines 16-23, p. 29, line 25 through p. 30, line 16. When the couple arrived home after a vacation in January of 2009, Krogmann broke off the relationship with Smith. Trial Tr. Vol. II p. 31, line 4 through p. 32, line 4. The pair rekindled the relationship a few weeks later but when Smith discovered Krogmann was on Match.com, she ended the relationship and refused to get back together with him. Trial Tr. Vol. II p. 32, lines 5-23. Krogmann called and texted her up to 50 times a day and brought her flowers at work trying to convince her to get back together. Trial Tr. Vol. II p. 33, line 17 through p. 34, line 14.

On the morning of March 13, 2009, Krogmann showed up unannounced at Smith's rural Dundee, Iowa, home after eight a.m. Trial Tr. Vol. II p. 38, lines 10-25. He knocked on the door and she let him in the house. Trial Tr. p. 39, lines 1-20. He told her he wanted to get back together and asked for a hug. Trial Tr. Vol. II p. 39, lines 14-20. She turned away to get a cup of coffee and when she turned back around, Krogmann had a gun pointed at her. Trial Tr. p. 39, lines 14-20. Krogmann concealed the gun because she did not see it when he entered her house. Trial Tr. p. 40, lines 13-24.

Jean Smith asked Krogmann if he was going to shoot her. Trial Tr. Vol. II p. 40, line 25 through p. 41, line 3. He told her they "were both going to die that day." Trial Tr. Vol. II p. 41, lines 1-3. He told her that if he could not have her, no one would. Trial Tr. Vol. II p. 41, lines 1-3. He pointed the gun at her and shot her. Trial Tr. Vol. II p. 41, lines 4-12.

She asked him to call 911 but he told her he could not do that. Trial Tr. Vol. II p. 42, lines 19-25. He told her he purposely left his phone in the car so he could not call 911. Trial Tr. Vol. II p. 42, lines 19-25, p. 43, lines 12-14. Krogmann told Smith "he didn't want to spend the rest of his life in jail and was gonna finish it." Trial Tr. p.

42, lines 1-7. He shot her a second time. Trial Tr. p. 42, lines 1-7. Krogmann told her he was going to kill her and then himself. Trial Tr. p. 42, lines 8-15. Smith could not move her arm and knew she needed help. Trial Tr. p. 44, lines 18-22.

Smith begged Krogmann to call 911 but he again refused her request. Trial Tr. Vol. II p. 43, line 25 through p. 44, line 5. She pleaded with him to get her cell phone but he would not. Trial Tr. Vol. II p. 44, lines 9-12. Despite being shot twice, she was still standing. Trial Tr. Vol. II p. 44, line 23 through p. 45, line 5.

Krogmann shot her a third time causing Smith to fall to the ground. Trial Tr. Vol II p. 45, lines 1-22. She knew her condition was "pretty bad" and begged Krogmann to get her phone. Trial Tr. Vol II p. 45, lines 1-22. Again, he refused her request. Trial Tr. Vol II p. 45, lines 1-22. He reiterated that they were both going to die. Trial Tr. Vol II p. 45, lines 1-22. She asked him to get her a pillow which he did. Trial Tr. Vol II p. 45, lines 1-22. She asked him to get her phone but he would not. Trial Tr. Vol II p. 45, lines 1-22. She tried to scoot along the floor to get the phone but Krogmann told her, "if you try and go get it, I'll shoot you again and we'll just end this." Trial Tr. Vol. II p. 46, lines 12-20. She then asked him to get her mother's

rosary which was right behind him. Trial Tr. Vol II p. 45, lines 1-22. Krogmann got her the rosary, gave it to her, knelt down, and they said a prayer. Trial Tr. Vol II p. 45, lines 1-22.

Krogmann stood up and told her “I really didn’t think it would take this long for you to die.” Trial Tr. Vol. II p. 45, line 23 through p. 46, line 2. He went to get her phone and called someone. Trial Tr. Vol II p. 45, line 23 through p. 46, line 2. Krogmann told the person on the phone, “I did it. I shot Jean.” Trial Tr. Vol II p. 45, line 23 through p. 46, line 2, p. 48, line 18 through p. 49, line 8.

Smith thought she was going to die and wanted to make peace with her life. Trial Tr. Vol. II p. 47, line 18 through p. 48, line 11. Knowing that Krogmann had her phone, she asked if she could call her mother to tell her she loved her. Trial Tr. Vol. II p. 47, line 18 through p. 48, line 11. He agreed and called her mother. Trial Tr. Vol. II p. 49, lines 2-4. Smith was able to tell her mother that she loved her and her dad. Trial Tr. Vol. II p. 49, lines 5-10. Smith asked her mother to tell her daughters she loved them and she asked her mom to call her brother, Michael. Trial Tr. Vol. II p. 49, lines 5-8. Krogmann abruptly ended the call and shut off the phone. Trial Tr. Vol. II p. 49, lines 5-17.

Jean Smith's mother, Mary Schnieders, knew something was wrong when she talked to her daughter on the morning of March 13, 2009. Trial Tr. Vol. II p. 80, line 20 through p. 82, line 13. Jean seemed distraught which concerned her. Trial Tr. Vol. II p. 81, line 22 through p. 82, line 15. Mary Schnieders called her son, Michael, and told him to go to Jean's house because something was "going on." Trial Tr. Vol. II p. 82, lines 2-20.

A few minutes after Krogmann ended the call with Jean's mother, his son, Jeff, walked into her house. Trial Tr. Vol. II p. 50, lines 8-18. Jeff Krogmann asked his dad where the gun was and took it away from him. Trial Tr. Vol. II p. 50, lines 12-24. Moments later, Smith's brother, Michael Schnieders, walked into the house. Trial Tr. Vol. II p. 51, lines 2-17. Schnieders picked up a broom that was outside the door and when he entered the house, he saw his sister lying in a pool of blood on the kitchen floor. Trial Tr. Vol. II p. 51, lines 4-25. Schnieders hit Robert Krogmann over the head with the broom. Trial Tr. Vol. II p. 51, lines 4-25.

Robert and Jeff Krogmann walked outside the house while Schnieders tried to help his sister. Trial Tr. Vol. II p. 52, lines 1-3. He

called 911 and tried to stop her bleeding while he waited for first responders to arrive. Trial Tr. Vol. II p. 52, lines 4-15.

Delaware County Sheriff John LeClere was the first to arrive at the scene. Trial Tr. Vol. II p. 102, lines 6-15, p. 103, line 10 through p. 104, line 4. When he arrived at the house, the door leading into the kitchen was open. Trial Tr. Vol. II p. 104, lines 5-13. He saw two people in the kitchen; a woman in a white robe laying on the floor and a man beside her rendering aid. Trial Tr. Vol. II p. 104, lines 5-13. Mike Schnieders told the sheriff to send an ambulance. Trial Tr. Vol. II p. 113, line 21 through p. 114, line 9. Sheriff LeClere returned to his vehicle and radioed dispatch to send an ambulance as soon as possible. Trial Tr. Vol. II p. 113, line 21 through p. 114, line 9.

Paramedic David Staner responded to a 911 call at a residence in rural Dundee, Iowa on March 13, 2009. Trial Tr. Vol. II p. 129, lines 7-9, 16 through p. 130, line 12, p. 131, line 6 through p. 132, line 1. Sheriff LeClere was already at the scene and told Staner there was a woman inside who had been shot. Trial Tr. Vol. II p. 133, lines 6-14. Staner entered the house and saw the woman wearing a bath robe that was white but had blood stains all over it. Trial Tr. Vol. II p. 133, line 24 through p. 134, line 6. She was lying still when Staner

approached her and he had to shake her to wake her up. Trial Tr. Vol. II p. 134, lines 1-6. He noted that she was very pale, lethargic, and had a “nonexistent radial pulse.” Trial Tr. Vol. II p. 134, lines 9-19. He described the woman as being in “profound shock.” Trial Tr. Vol. II p. 134, lines 14-19. He noticed a large wound on her wrist up to her upper arm such that the arm was nearly detached. Trial Tr. Vol. II p. 136, lines 6-14. Staner observed bone and exposed tissue on her arm as well as two wounds in her abdomen. Trial Tr. Vol. II p. 137, lines 3-24. Staner applied pads to the wounds to stop the bleeding and administered intravenous fluids to get her blood pressure up. Trial Tr. Vol. II p. 136, line 15 through p. 139, line 19. He was doing what he could to keep her alive. Trial Tr. Vol. II p. 139, lines 20-22.

Staner informed the hospital of a trauma alert; she needed to be transported to another hospital to receive emergent surgical care. Trial Tr. Vol. II p. 140, lines 1-15. Staner believed that if she did not receive care, she would not survive. Trial Tr. Vol. II p. 141, lines 23-25. A helicopter airlifted Smith to the University of Iowa Hospitals and Clinics (UIHC). Trial Tr. Vol. II p. 140, lines 10-20, p. 146, line 13 through p. 150, line 14.

When she arrived at UIHC, she had several gunshot wounds. Trial Tr. Vol. II p. 150, line 21 through p. 151, line 14. There were two wounds on the left side; one below the rib cage and another one lower down. Trial Tr. Vol. II p. 150, line 21 through p. 151, line 3. She had one wound on the back crease of her armpit, one toward the center, and a fifth injury to her right upper extremity. Trial Tr. Vol. II p. 150, line 21 through p. 151, line 3. The three shots fired caused extensive damage to several places in her body, primarily from her rib cage to her pelvis. Trial Tr. Vol. II p. 151, lines 10-17. Dr. Tim Thomsen, who treated Smith at UIHC, described her condition as "life-threatening." Trial Tr. Vol. II p. 151, line 15 through p. 156, line 5.

Dr. Thomsen testified about the nature and extent of Smith's injuries. Trial Tr. Vol. II p. 151, line 15 through p. 156, line 5. She had a laceration in her liver four inches long and two inches deep. Trial Tr. p. 151, line 15 through p. 152, line 2. She sustained a fracture of her right arm with the loss of soft tissue, muscle, skin, and fat. Trial Tr. Vol. II p. 152, lines 3-8. A bullet that entered her abdomen caused her to lose 60 centimeters of her small intestine and her colon. Trial Tr. Vol. II p. 152, line 10 through p. 153, line 8. She also sustained a "devastating missile injury" to her fourth lumbar vertebra and her

spinal cord. Trial Tr. Vol. II p. 154, line 23 through p. 156, line 5. This injury impacted her lower part of her body such that she is in constant pain. Trial Tr. Vol. II p. 156, line 6 through p. 157, line 9. Dr. Thomsen opined that the injuries she sustained created a substantial risk of death and the protracted loss or impairment of function. Trial Tr. Vol. II p. 162, lines 9-19.

Jean Smith underwent multiple surgeries to repair the injuries she sustained. Trial Tr. Vol. II p. 54, line 25 through p. 55, line 3. She has no strength in her hand and walks with a cane because she has no balance in her feet due to the fact that she has no feeling in her feet. Trial Tr. Vol. II p. 55, line 22 through p. 56, line 4. Her right ankle does not work at all and she wears a brace from her right knee down to her ankle. Trial Tr. Vol. II p. 55, line 25 through p. 56, line 4. She has "terrible pain every day" in her right foot due to the spinal injury. Trial Tr. Vol. II p. 56, lines 6-11.

Since the shooting, she has had to have a colostomy bag which was eventually removed, back surgery to replace the rods in her back that were inserted after the shooting and broke when she sustained a fall, and skin grafts. Trial Tr. Vol. II p. 56, line 17 through p. 57, line 18. She was in a wheelchair for a year until she was able to stand.

Trial Tr. Vol. II 57, line 24 through p. 58, line 6. She used a walker for six months while she learned to walk with crutches and then she progressed to a cane. Trial Tr. Vol. II 57, line 24 through p. 58, line 6.

While Jean Smith received medical attention, law enforcement officers were looking for Krogmann. Trial Tr. Vol. III p. 7, lines 3-7. Iowa State Patrol officer Jon Stickney followed Jeff Krogmann's car from Jean Smith's Dundee home to Robert Krogmann's home. Trial Tr. Vol. III p. 4, line 20 through p. 5, line 3, p. 6, line 20 through p. 10, line 17. Once at Krogmann's home, the younger Krogmann told officers that his father would return to the residence. Trial Tr. Vol. III p. 6, line 20 through p. 13, line 2. Krogmann drove home and officers arrested him without incident. Trial Tr. Vol. III p. 13, line 3 through p. 16, line 17.

Division of Criminal Investigation criminalist Victor Murillo examined the gun Krogmann used to shoot Jean Smith. Trial Tr. Vol. III p. 41, line 16 through p. 42, line 15. The gun was a Ruger Super Red Hawk .44 Magnum revolver. Trial Tr. Vol. III p. 45, line 15 through p. 46, line 6. Murillo described the gun as "big" and "heavy." Trial Tr. Vol. III p. 78, lines 11-17. The trigger pull requires more force and energy. Trial Tr. Vol. III p. 78, lines 11-17. The cartridge

the weapon uses is "extremely powerful" and the bullet in the cartridge is "lethal." Trial Tr. Vol. III p. 69, line 7 through p. 70, line 8.

Psychiatrist Dr. James Dennert examined Krogmann's medical records and interviewed Krogmann in December of 2019. Trial Tr. Vol. IV p. 4, lines 5-10. He provided expert testimony as to whether Krogmann was capable of forming specific intent given his history of mental illness which included diagnoses of bi-polar disorder II and depression. Trial Tr. Vol. IV p. 10, lines 14 through p. 23. Dr. Dennnert opined that there was "no mental condition or psychiatric condition that prevented Mr. Krogmann from being able to form [] specific intent." Trial Tr. Vol. IV p. 10, lines 17-23.

Dr. Dennert based his opinion on several factors. Trial Tr. Vol. IV p. 10, lines 24 through p. 13, line 13. Dr. Dennert obtained as much information as possible on Krogmann. Trial Tr. Vol. IV p. 11, lines 2-20. He read the criminal record, including the minutes of testimony, the police reports, videos, and Krogmann's medical records. Trial Tr. Vol. IV p. 11, lines 2-20. He also interviewed Krogmann. Trial Tr. Vol. IV p. 11, line 2 through p. 12, line 17.

During Dr. Dennert's interview, Krogmann acknowledged that he shot Jean Smith but could not recall the actual event. Trial Tr. Vol. II p. 12, line 8 through p. 13, line 13. He remembered things before the event and after the event, but he did not remember shooting her. Trial Tr. Vol. II p. 12, line 8 through p. 13, line 13. Dr. Dennert agreed with Krogmann's bi-polar II diagnosis and his depression. Trial Tr. Vol. IV p. 13, line 19 through p. 14, line 9. These diagnoses, however, did not prevent him from forming intent. Trial Tr. Vol. IV p. 18, line 19 through p. 19, line 1.

Krogmann's expert, Dr. Tracy Thomas, a forensic psychologist, testified that he was not capable of forming specific intent. Trial Tr. Vol. VI p. 74, line 3 through p. 75, line 2, p. 85, line 14 through p. 86, line 1. In reaching her conclusion, Dr. Thomas looked at Krogmann's mental health records and the police records. Trial Tr. Vol. IV p. 86, line 6-8. Krogmann's mental health records included reports about his prior hospitalizations, diagnoses, and the medications he was taking. Trial Tr. p. 87, line 3 through p. 101, line 2. She also reviewed the police records "from around the event." Trial Tr. Vol. IV p. 101, line 3-13. She was unfamiliar with the facts of the actual crime, however, and Krogmann's statements to Smith during the shooting.

Trial Tr. Vol. IV p. 110, line 16 through p. 117, line 12. When asked if Krogmann's statements to Smith during the shooting about refusing to call 911 or that he did not want to go to jail for life, or that it was taking her a long time to die, Dr. Thomas testified those statements did not change her opinion. Trial Tr. Vol. IV p. 110, line 23 through p. 114, line 4. Additional facts will be discussed below as relevant to the State's case.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED THE ADMISSION OF DEFENDANT'S EXHIBIT "A" AS HEARSAY.

Preservation of Error

The State does not contest error preservation as Krogmann raised the issue pretrial and again at trial. Ruling on Mot. in Limine (2/26/20), Trial Tr. Vol. III p. 122, line 13 through p. 14, line 8 through p. 130, line 2.

Standard of Review

"Evidentiary rulings are generally reviewed for an abuse of discretion." *State v. Tipton*, 897 N.W.2d 653, 690 (Iowa 2017).

Merits

The district court correctly denied Krogmann's request to admit the video of his post-arrest interview with DCI agent Jack Liao. The

interview constituted hearsay and the defendant's bases for admission were unconvincing.

The State initially moved in limine to keep out the admission of Krogmann's post-arrest interview as hearsay and not subject to any exception. Mot. In Limine (2/26/20); App. 8-11. The district court sustained the State's motion in limine unless a proper foundation could be laid. Order in Limine (3/13/20); App. 36.

During trial, Krogmann sought to introduce the videotaped interview during the cross-examination of Agent Liao at trial and made an offer of proof regarding the video. Trial Tr. Vol. III p. 122, line 10 through p. 130, line 2. Krogmann argued that he should be able to impeach the agent's testimony with the video and that the State "opened the door" by its questioning of the agent. Def. Brief at 56. The district court considered, and again rejected Krogmann's efforts to admit the videotaped interview.

In *State v. Veal*, 564 N.W.2d 797, 808 (Iowa 1997), the supreme court rejected a claim similar to Krogmann's. In *Veal*, the defendant made pretrial statements to various people and sought to admit these statements in her trial for first-degree murder. *Id.* at 802, 808. The State moved in limine and objected to these statements as hearsay.

Id. at 808. The *Veal* court rejected the defendant's arguments that the statements were admissible as exceptions to the hearsay rule. *Id.* Here, the district court relied on *Veal* and found that Krogmann's attempt to introduce his videotaped interview was also hearsay.

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.7801(c); *State v. Elliott*, 806 N.W.2d 660, 667 (Iowa 2011). Krogmann's interview is hearsay as it is an out of court statement offered for the truth of the matter asserted. He did not testify at trial and his efforts to introduce the interview is nothing more than an attempt to "testify" in front of the jury without being subject to cross-examination.

Krogmann asserts, however, that the interview was not offered for the truth of the matter asserted. Def. Brief at 52. He contends he offered to show his "mental state at the time, his ability to answer questions, his demeanor, and his physical manifestations of mental illness. Def. Brief at 52-53. Krogmann's "nonverbal conduct," was intended as an assertion, and is still a "statement." Iowa R. Evid. 5.801(a). As such, it is hearsay.

Krogmann contends that if the evidence is hearsay, it is admissible under the residual hearsay exception. Iowa R. Evid. 5.807; *State v. Rojas*, 524 N.W.2d 659, 662-63 (Iowa 1994). The requirements for admissibility under the residual exception are five-fold: trustworthiness, materiality, necessity, service of the interests of justice, and notice. *Rojas*, 524 N.W.2d at 662-63. Krogmann contends that the video is "more reliable" than relying on the agent's recollection. Def. Brief at 53. 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.

Krogmann also argues that the video amounted to the best evidence and satisfied the rule of completeness. Def. Brief at 56. The best evidence rule does not apply in this context. The doctrine is not a general rule of preference requiring production of the "best" evidence possible with respect to every disputed fact. Laurie Kratky Dore, *Iowa Practice Series: Evidence* § 5.1002:1, n.1 at 1126 (2021 ed.) The "generally accepted premises of the best evidence doctrine – protection against inaccuracy and fraud in transmitting the contents

of writings and their equivalent." *Id.* at § 5.1002:1, at 1127. There is no question about the accuracy of the interview. Agent Liao testified about his recollection of the interview. He 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 question him about the recollection or impeach him without the need to introduce the video.

Similarly, the "rule of completeness" also does not apply. Iowa Rule of Evidence 5.106(a) provides:

> 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.

Iowa R. Evid. 5.106(a). Krogmann contends that the State "opened the door" by questioning the agent regarding his demeanor, whether he could "track" what he was talking about, and his responses. Def. Brief at 54. But, the video did not offer any evidence that would have impacted the issue in the case; whether Krogmann could form specific intent. It post-dated the shooting and Krogmann is hard-pressed to establish that one could determine his specific intent from

watching the video. The district court properly exercised its discretion in denying the admission of defense Exhibit "A."

II. THE DISTRICT COURT CORRECTLY ALLOWED SHERIFF JOHN LECLERE TO TESTIFY ABOUT WHY SOMEONE SHOOTS ANOTHER PERSON.

Preservation of Error

The State does not contest error preservation. Trial Tr. Vol. II p. 128, lines 14-22.

Standard of Review

A district court generally reviews a district court's evidentiary rulings for an abuse of discretion. *State v. Thoren*, 970 N.W.2d 611, 620 (Iowa 2022).

Merits

The district court correctly allowed the State to ask Sheriff John LeClere about why a person would shoot someone. Sheriff LeClere was an expert in the area of law enforcement and properly testified about his opinion as to why someone would shoot another person with a large-caliber gun three times in the center of mass. The district court must be affirmed.

Iowa courts are committed to a liberal view on the admissibility of expert testimony. Iowa R. Evid. 5.702; *State v. Tyler*, 867 N.W.2d

136, 153 (Iowa 2015). Iowa Rule of Evidence 5.702 provides the following standard for the admission of such testimony:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Iowa R. Evid. 5.702. Thus, a threshold requirement for the admissibility of expert testimony is that the testimony must aid the trier of fact to resolve a disputed issue. *Williams v. Hedican*, 561 N.W.2d. 817, 823 (Iowa 1997). A reviewing court will not interfere with the district court's exercise of discretion in admitting an expert opinion unless it sees manifest abuse. See *State v. Ogg*, 243 N.W.2d 620,621 (Iowa 1976). But, a witness cannot express "an outright opinion" on the defendant's guilt. *Id.*

Here, on redirect examination, the prosecutor asked Sheriff LeClere a question regarding why someone would shoot another person three times in the center of mass. Trial Tr. Vol. II p. 128, lines 21-22. LeClere, who had been sheriff of Delaware County for over 20 years responded that a person shoots another person to "take their life." Trial Tr. Vol. II p. 102, lines 1-22, p. 128, lines 21-22. The officer's testimony did not improperly comment on Krogmann's guilt

or innocence but provided insight into a shooter's intent – the issue in the case.

Even if the district court erroneously allowed Sheriff LeClere's testimony, the admission of his statement was not prejudicial. *State v. Brown*, 656 N.W.2d 355, 361 (Iowa 2003). The sheriff's testimony was cumulative to Jean Smith's testimony that Krogmann made numerous statements to her during the course of the crime that he wanted to kill her. Trial Tr. Vol. II p. 41, line 1 through p. 46, line 2. The district court must be affirmed.

III. THE COURT CORRECTLY EXCLUDED EVIDENCE RELATED TO THE CIVIL SETTLEMENT BETWEEN THE DEFENDANT AND THE VICTIM, JEAN SMITH.

Preservation of Error

The State does not contest error preservation. Mot. in Limine (2/26/20), 3/11/20 Motion Hearing Tr. p. 21, line 8 through p. 25, line 24, Ruling in Limine (3/13/20); App. 8-9, 36.

Standard of Review

Review of the district court's ruling on the admissibility of evidence is for an abuse of discretion. *State v. Lacey*, 968 N.W.2d 792, 805-06 (Iowa 2021) (citing *State v. Huston*, 825 N.W.2d 531, 536 (Iowa 2013)).

Merits

The district court correctly denied Krogmann's request to admit evidence related to the civil lawsuit and settlement between Jean Smith and Krogmann during the trial. The district court correctly ruled that the civil settlement was not relevant to the issue in the case. Order in Limine (3/13/20); App. 36. The district court must be affirmed.

Under Iowa Rule of Evidence 5.401, evidence is relevant if:

a. It has any tendency to make a fact more or less probable than it would be without the evidence; and

b. The fact is of consequence in determining the action.

Iowa R. Evid. 5.401. The district court held "[t]here shall be no testimony regarding the existence of the civil suit or any resulting settlement as that matter is not relevant." Order in Limine (3/13/20); App. 36.

Krogmann contends, however, that the civil suit and settlement were relevant to Jean Smith's testimony that she was forced to stop working because of the pain and injuries she suffered after Krogmann shot her. Def. Brief at 60. He continues that "there is no Iowa rule of evidence that excluded the civil settlement from being admitted at trial" and it could have been used to show Krogmann accepted

consequences of shooting Smith, as well as a “bias by Smith in her testimony. Def. Brief at 60-61. In essence, Krogmann is advocating that a compromise or offer of compromise in a civil settlement be admissible in a criminal prosecution under Iowa Rule of Evidence 5.408, which would be contrary to the interests of most criminal defendants. Recently, in *State v. Thoren*, 970 N.W.2d 611, 638-39 (Iowa 2022), the court discussed the “low probative value” of admitting a settlement in a criminal prosecution. The court noted:

> Iowa Rule 5.408 prohibits use of evidence of settlements to prove the validity of a disputed claim, and does so to “promot[e] ... the public policy favoring the compromise and settlement of disputes.” *Graber v. City of Ankeny*, 616 N.W.2d 633, 638–39 (Iowa 2000) (en banc) (quoting Fed. R. Evid. 408 advisory committee's note to 1972 proposed rules). Such evidence has low probative value because the motivation to settle may be “a desire for peace rather than ... any concession of weakness of position.” *Id.* (quoting Fed. R. Evid. 408 advisory committee's note to 1972 proposed rules). In *Graber v. City of Ankeny*, we held the district court abused its discretion in admitting evidence of a settlement because allowing the evidence “would seriously undermine Iowa's public policy to encourage settlements.” *Id.* at 641. The same reasoning applies here.

Thoren, 970 N.W.2d at 638–39 (Waterman, J., concurring); *see also State v. Burt*, 249 N.W.2d 651, 652 (Iowa 1977) (an offer of compromise in a civil case when tendered as an admission of weakness of opposing party’s claim or defense is ordinarily not

applicable in a criminal case, except in a plea-bargain situation.); Fed. R. Evid. 408 advisory committee's note to 2006 amendment (statements made during compromise negotiation of other disputed claims are not admissible in subsequent criminal litigation, when offered to prove liability for, invalidity of, or amount of those claims).

The district court correctly recognized that admitting evidence related to the civil lawsuit between Jean Smith and Krogmann had no relevance to the issue in the trial. The settlement post-dated the crime and had no bearing on whether Krogmann could form specific intent. To allow Krogmann to discuss the civil settlement invited jury nullification such that she was paid $1.5 million dollars and the criminal prosecution should just go away. *State v. Willis*, 218 N.W. 921, 924-25 (Iowa 1974) ("Jury nullification exalts the goal of particularized justice above the ideal of the rule of law. We are persuaded the rule of law should not be subverted."). The district court must be affirmed.

IV. THE DISTRICT COURT CORRECTLY ALLOWED DR. DENNERT'S EXPERT TESTIMONY.

Error Preservation

The State does not contest error preservation. Trial Tr. Vol. IV p. 25, lines 7-23.

Standard of Review

Evidentiary rulings are reviewed for an abuse of discretion. *State v. Neiderbach*, 837 N.W.2d 180, 190 (Iowa 2013).

Merits

The district court correctly overruled Krogmann's objection to Dr. Dennert's testimony regarding his understanding of the diminished responsibility defense. Krogmann contends testimony was inadmissible commentary on the law, the purpose of the defense, and its application in court. The district court committed no error.

Expert witnesses may provide the factfinder with an opinion that "embraces an ultimate issue to be decided;" but the witness may not express an opinion on the defendant's guilt or innocence. *State v. Smith*, 522 N.W.2d 591, 593 (Iowa 1994); see Iowa R. Evid. 5.704. A "fine line" often arises in specific intent crimes between an expert's "opinions which improperly express guilt or innocence in cases involving specific intent crimes and those which properly compare or

characterize the defendant's conduct based on the facts of the case so as to assist the jury in understanding the evidence or to determine a fact in issue." *State v. Dinkins*, 553 N.W.2d 339, 341 (Iowa Ct. App. 1996). One formulation of the "line" is that although the expert may discuss how certain facts are associated with the party's theory generally, the expert cannot opine that the defendant possessed the intent at issue. *See State v. Oppedal*, 232 N.W.2d 517, 524 (Iowa 1975) (narcotics officer could not testify to his opinion the defendant possessed a quantity of drugs with intent to deliver, such opinion was tantamount to permitting the witness to testify he had an opinion as to defendant's guilt).

In this case, the prosecutor's question to Dr. Dennert was neither improper nor a comment on the defendant's guilt or innocence. Dr. Dennert testified to his understanding of diminished responsibility. Trial Tr. Vol. IV p. 26, lines 3-9. He testified:

> My understanding is 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.

Trial Tr. Vol. IV p. 26, lines 3-9. Dr. Dennert did not provide an opinion on whether Krogmann was guilty of the crimes charged or

whether a legal standard had been met. He simply stated his understanding of the defense. Trial Tr. Vol. IV p. 26, lines 3-9. The district court properly allowed the testimony.

Even if it could be argued that the court should have sustained the objection, Dr. Dennert's testimony did not affect a substantial right of the defendant. Iowa R. Evid. 5.103. The district court instructed the jury on diminished responsibility in instruction 28. Jury Instr. 28; App. 96. Because a jury is presumed to follow the court's instructions, Krogmann cannot establish substantial rights were affected by the testimony. *State v. Hanes*, 790 N.W.2d545, 552 (Iowa 2010) (jurors are presumed to follow instructions). In addition, given the strength of the State's case, Krogmann cannot show that the doctor's testimony had any impact on the verdict.

V. THE DISTRICT COURT CORRECTLY DENIED THE DEFENDANT'S MOTION FOR A NEW TRIAL; THE GREATER WEIGHT OF EVIDENCE SUPPORTS THE JURY'S VERDICT.

Preservation of Error

The State does not contest error preservation as Krogmann preserved error by filing a motion for new trial alleging the verdict was contrary to the weight of the evidence and receiving an adverse

verdict. Order Post-Trial Mot. (10/5/21); Sent. Tr. p. 7, line 6 through p. 9, line 23; App. 67.

Standard of Review

> Trial courts have wide discretion in deciding motions for new trial. . . Nevertheless, we caution trial courts to exercise this discretion carefully and sparingly when deciding motions for new trial based on the ground that the verdict of conviction is contrary to the weight of the evidence.

State v. Ellis, 578 N.W.2d 655, 659 (Iowa 1998). This remedy has been described as "extraordinary." *State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006).

Merits

Krogmann next argues that the greater weight of credible evidence supports his claim that he was not capable of forming specific intent and that he is entitled to a new trial. This claim must also be rejected.

In *State v. Ellis*, this court distinguished the standard to be applied in evaluating motions for a judgment of acquittal during trial – evidence sufficient that a rational jury could convict the defendant beyond a reasonable doubt – from the standard to be applied in evaluating motions for a new trial -evidence that a greater amount of credible evidence supports one side of an issue than the other. *Id.*

The *Ellis* standard requires a trial court to examine the issue of credibility in determining whether a new trial is appropriate on the ground that the verdict was contrary to the weight of the evidence. *Id*. As noted, the power to grant a new trial on the basis of *Ellis* should be invoked only in exceptional case in which the evidence weighs heavily against the verdict. *Id*. at 658-59.

Here, the greater weight of the credible evidence preponderates in favor of – rather than against – the guilty verdicts. Krogmann contends that weight of the evidence did not support a finding that he had the specific intent necessary to commit attempted murder. Def. Brief at 64. He asserts that he did not have the specific intent to kill her because if he had, he would have done so. Def. Brief at 64. That is, he was alone in the house with a .44 caliber handgun, shot at her and had the opportunity to kill her but he did not. He even goes on to say that because he had more ammunition, the fact that he did not kill her is evidence that he lacked specific intent to kill her. The more likely explanation is he is either a bad shot even at close range or he derived pleasure from watching her suffer. In no way does the fact that he did not kill her evidence he was lacking specific intent.

Krogmann's argument is undermined by Jean Smith's testimony. The evidence of his intent to kill Jean Smith is compelling, if not overwhelming:

-He gained access to her home by claiming he wanted a hug and pulled out a .44 Magnum and pointed it at her. Trial Tr. Vol. II p. 39, lines 14-20.

-With the gun pointed at her, he told her they were both "going to die that day." Trial Tr. Vol. II p. 41, lines 1-3.

-Krogmann shot her the first time. Trial Tr. Vol. II p. 41, lines 4-12.

-She asked him to call 911 but he told her he could not do that. Trial Tr. Vol. II p. 42, lines 19-25. He told her he purposely left his phone in the car so he could not call 911. Trial Tr. Vol. II p. 42, lines 19-25, p. 43, lines 12-14. He did not want to spend the rest of his life in jail and was "gonna finish it." Trial Tr. Vol. II p. 42, lines 1-7.

-Krogmann shot her the second time. Trial Tr. Vol. II p. 42, lines 1-7.

-He told her he was going to kill her and then kill himself. Trial TR. p. 42, lines 8-15.

-Krogmann refused her pleas to call 911. Trial Tr. Vol. II p. 43, line 25 through p. 44, line 5.

-Krogmann shot her the third time. Trial Tr. Vol. II p. 45, lines 1-22. Again, he refused to get her phone to call for help and told her they were both going to die. Trial Tr. p. 45, lines 1-22.

-He threatened to shoot her again if she tried to get her phone on her own. Trial Tr. Vol. II p. 46, lines 12-20.

-Krogmann told her "I really didn't think it would take this long for you to die." Trial Tr. Vol. II p. 45, line 23 through p. 46, line 2.

If this evidence is not enough to evidence his specific intent, the State also introduced testimony from Krogmann's then-boss, Martin Steffen, who called Krogmann on March 12, 2009, the night before the shooting to ask him if he could pick up a John Deere planter in Sigourney, Iowa, two and a half hours away. Trial Tr. Vol. III p. 84, line 15 through p. 85, line 23. Krogmann said he could not do that. Trial Tr. Vol. III p. 84, line 15 through p. 85, line 23. On the morning of the crime, Krogmann agreed to pick up a check from a customer who was in nearby Manchester. Trial Tr. Vol. III p. 85, line 24 through p. 86, line 25. Krogmann had already decided he was going to Jean Smith's house to harm her on March 13, 2009, and needed to stay around the Manchester area to carry out his plot.

Krogmann also contends that his expert, Dr. Tracy Thomas, "demonstrated there must be reasonable doubt as to Krogmann's ability to form specific intent." Def. Brief at 66. Dr. Thomas's testimony is less than clear, however. She testified that Krogmann lacked the capacity to form specific intent. Trial Tr. Vol. IV p. 85, line

14 through p. 86, line 1. The district court, in rejecting the motion for new trial, stated:

> The Court had an opportunity to hear both experts as well as judge their appearance, their demeanor. And the Court finds that there obviously was a question of credibility, and the Court finds that there is more credible evidence that supported the State.
>
> The Court found Dr. Thompson to be vague in what she knew, what she relied upon. Basically when she was asked about any evidence that was detrimental to Mr. Krogmann, she didn't remember hearing that, wasn't told that information. And so the Court finds that there was more credible evidence as far as the experts are concerned.
>
> In addition, just the fact and the facts alone – the gun that was used, the amount of times that the victims was shot, the statements that Mr. Krogmann made before the shooting, during the incident – the Court finds that there was definitely credible evidence that supports the jury's finding.

Sent. Tr. p. 9, lines 2-14. The district court followed the law and correctly denied the motion for new trial.

VI. THE DISTRICT COURT'S INSTRUCTION ON SPECIFIC INTENT IS A CORRECT STATEMENT OF LAW.

Preservation of Error

The State does not contest error preservation as Krogmann objected to the instruction and obtained an adverse ruling. Trial Tr. Vol. V p. 21, line 16 through p. 22, line 9.

Standard of Review

An appellate court reviews challenges to jury instructions for correction of errors at law. *State v. Benson*, 919 N.W.2d 237, 241-42 (Iowa 2018).

Merits

The district court correctly instructed the jury on specific intent and the court's decision to inform the jury of the crimes that contained an element of specific intent correctly reflects the law. The district court must be affirmed.

The court is required to "instruct the jury as to the law applicable to all material issues in the case. . ." *State v. Bynum*, 937 N.W.2d 319, 327 (Iowa 2020). While the instruction given need not "contain or mirror the precise language of the applicable statute, [the instruction] must be a correct statement of the law." *State v. Schuler*, 774 N.W.2d 294, 298 (Iowa 2009).

Here, Krogmann complains that the court erred when it instructed the jury that "all assaults are specific intent crimes for the purpose of diminished capacity and prohibiting argument about diminished capacity only applying to attempted murder and willful injury." Krogmann's argument lacks merit.

The district court instructed the jury on the elements of each crime and the lesser-included offenses of each crime. Jury Instrs. 18-21, 23; App. 89-93. The district court's statement correctly reflected the law. That is, assault is a specific intent crime. *State v. Fountain*, 786 N.W.2d 260, 265 (Iowa 2010); *State v. Bedard*, 668 N.W.2d 598, 601 (Iowa 2003); *State v. Heard*, 636 N.W.2d 227, 231 (2001).

The fact that both attempted murder and willful injury, and the lesser included offenses include an element of assault, the court correctly instructed the jury on each of these crimes (attempted murder, assault with intent to inflict serious injury, and willful injury). Jury Instrs. 18-21, 23; App. 89-93. The court also instructed the jury that each of these offenses contain an element of specific intent as required by *State v. Benson*, 919 N.W.2d 237, 245 (Iowa 2018) (the district court's failure to provide a marshaling instruction explaining which form of intent applied to which charge rendered the instructions confusing and misleading).

Ordinarily, a defendant would appreciate the fact that the State must prove specific intent to prove a crime occurred especially when the defendant raised a defense of diminished responsibility. *Fountain*, 786 N.W.2d at 266-67 (specific intent is a higher burden

for the State to prove). The diminished responsibility defense "allows a defendant to negate the specific intent element of a crime by demonstrating due to some mental defect she did not have the capacity to form that specific intent." *Anfinson v. State*, 758 N.W.2d 496, 502 (Iowa 2008).

Krogmann, however, argues that the question remains as to whether the legislative amendment to Iowa Code section 708.1 in 2002, which designated assault as a general intent crime, eliminated the defense of diminished responsibility or whether the amendment had no effect. Def. Brief at 72. This is not an open question. Assault includes an element of specific intent. *Fountain*, 786 N.W.2d at 265; see also *State v. Beck*, 854 N.W.2d 56, 64 (Iowa Ct. App. 2014) (the controlling authority holds that the defense of diminished responsibility is available where specific intent must be proved). The district court correctly instructed the jury in accordance with the law.

Krogmann is not entitled to a new trial. He cannot demonstrate prejudice because the court correctly instructed the jury. *Benson*, 919 N.W.2d at 241 (erroneous jury instructions warrant reversal when prejudice results. The court's instructions reflect the current state of the law. The district court must be affirmed.

VII. THE DISTRICT COURT CORRECTLY INSTRUCTED THE JURY THAT IT COULD INFER THE DEFENDANT'S INTENT FROM USE OF A DANGEROUS WEAPON.

Preservation of Error

The State does not contest error preservation as Krogmann objected to the court's inclusion of the instructions and obtained an adverse ruling. Trial Tr. Vol. V p. 11, line 13 through p. 20, line 1.

Standard of Review

An appellate court reviews challenges to jury instructions for correction of errors at law. *State v. Benson*, 919 N.W.2d 237, 241-42 (Iowa 2018).

Merits

The district court correctly instructed the jury on the dangerous weapon inference over Krogmann's objection. Krogmann argued that the dangerous weapon inference applied only in first-degree murder cases and did not apply in this case to a charge of attempted murder. Krogmann's objection elevates form over substance.

At issue in this claim is whether the dangerous weapon inference applies in a case of attempted murder. The district court instructed the jury that:

> If a person has the opportunity to deliberate and uses a dangerous weapon against another, you may, but are not

> required to, infer that the weapon was used with specific intent to kill.

Jury Instr. 24; App. 94. In addition, the court instructed the jury that:

> A “dangerous weapon” is any device or instrument designed primarily for use in inflicting death or injury, and when used in its designed manner is capable or inflicting death. It is also any sort of instrument or device actually sued in such a way as to indicate the user intended to inflict death or serious injury, and when so used is capable of inflicting death.

Jury Instr. 25; App. 95. Krogmann argues that the “case law overwhelmingly applies this inference instruction” to first-degree murder cases. Def. Brief at 74-75. The appropriate analysis is not to look only at the level or type of offense but on the person’s intent at the time he or she committed the offense.

In *State v. Green*, 896 N.W.2d 770, 780 (Iowa 2017), the supreme court discussed the propriety of instructing the jury on the dangerous weapon inference. Although the *Green* case involved a first-degree murder prosecution, the language of the decision does not limit the application of the dangerous weapon inference instruction to first-degree murder cases alone. The court found:

> Malice aforethought, then, is a term of art used to describe a culpable state of mind, an essential element of the offense of murder that the state must prove to the jury beyond a reasonable doubt. *See State v. Reeves*, 670 N.W.2d 199, 207

> (Iowa 2003). However, it is often impossible for a jury to determine a defendant's state of mind without the aid of inference. *See State v. Serrato*, 787 N.W.2d 462, 469 (Iowa 2010). By instructing the jury that it may infer malice from the use of a dangerous weapon, courts present the jury with a straightforward example of how the State might prove the defendant's culpable state of mind. *The inference, which the jury is permitted but never required to make*, *see Sandstrom v. Montana*, 442 U.S. 510, 524, 99 S.Ct. 2450, 2459, 61 L.Ed.2d 39 (1979); *State v. Rinehart*, 283 N.W.2d 319, 323 (Iowa 1979), *exists because a rational juror could infer that one who uses a dangerous weapon intends to cause physical harm, and even to kill*. *See State v. Artzer*, 609 N.W.2d 526, 530 (Iowa 2000); *State v. Berlovich*, 220 Iowa 1288, 1294, 263 N.W. 853, 856 (1935); *see also State v. Ochoa*, 244 N.W.2d 773, 777 (Iowa 1976) ("It is presumed a person intends the natural consequences of his intentional acts."). If unjustified and unexcused, causing physical harm or death is a wrongful act, and therefore the intent to do these things is a state of mind that would constitute malice aforethought. *McCollom*, 260 Iowa at 988, 151 N.W.2d at 525. Thus, the jury may infer the defendant acted with malice aforethought by using a dangerous weapon, the natural consequence of which is physical harm or death.

Id. (emphasis added). If, as the *Green* court found, the inference exists because a "rational juror could infer that one who uses a dangerous weapon intends to cause physical harm and even death," the district court correctly instructed the jury on the inference in this an attempted murder case. *See also State v. Ambrose*, 861 N.W.2d 550, 560 (Iowa 2015) (explaining intent may be inferred "from the mere use of the instrument'); *State v. Smith*, 242 N.W.2d 320, 326 (Iowa 1976) (concluding "malice aforethought may be inferred from

the defendant's use of . . . a deadly weapon" in second-degree murder prosecution); *State v. Hephner*, 161 N.W.2d 714, 720 (Iowa 1968) (stating that use of a deadly weapon supports inference of intent to commit murder necessary for a conviction of assault with intent to commit murder). Moreover, in *State v. Brown*, No. 02-0086, 2003 WL 1967828, at *5 (Iowa Ct. App. Apr. 30, 2003), a prosecution for attempted murder, the Iowa Court of Appeals found the jury could infer specific intent to kill from the use of an automatic rifle that the defendant used to shoot and hit the victim.

Krogmann also contends that because the title of the uniform instruction states "700.8 Murder In the First Degree – Dangerous Weapon Inference" the court should not have instructed in this case for attempted murder. The district court correctly found that the "murder in the first-degree" language was simply a title created by the bar association and in no way limits the application of the instruction to first-degree murder cases. Trial Tr. Vol. V p. 17, lines 13-22. A title "cannot limit the plain meaning of the text." *State v. Shorter*, 945 N.W.2d 1, 8 (Iowa 2020); *State v. Kehoe*, 804 N.W.2d 302, 312 (Iowa Ct. App. 2011) (a headnote is no part of statutory law of the State and its inclusion in the statute adds nothing).

Krogmann is not entitled to a new trial because he cannot demonstrate prejudice from the district court's inclusion of the dangerous weapon inference instructions. The instruction was a correct statement of the law and applies to a prosecution for attempted murder. The district court must be affirmed.

VIII. THE DISTRICT COURT CORRECTLY DENIED THE DEFENDANT'S REQUEST TO MERGE THE CONVICTIONS FOR ATTEMPTED MURDER AND WILLFUL INJURY.

Preservation of Error

The State does not contest error preservation. *State v. Love*, 858 N.W.2d 721, 723 (Iowa 2015) (a district court's failure to merge convictions as required by statute results in an illegal sentence and such claims may be raised at any time).

Standard of Review

Review of an illegal sentence for lack of merger is for correction of errors at law. *Love*, 858 N.W.2d at 723.

Merits

Res Judicata

This court need not consider Krogmann's merger challenge as it is barred by res judicata. Res judicata encompasses the concepts of both issue and claim preclusion. *Colvin v. Story Cnty. Bd. of Rev.*,

653 N.W.2d 345, 348 (Iowa 2002); s*ee Barker v. Iowa Dep't of Pub. Safety*, 922 N.W.2d 581, 587 (Iowa 2019) ("Issue preclusion is a type of res judicata that prohibits parties 'from relitigating in a subsequent action issues raised and resolved in [a] previous action.' " (alteration in original) (quoting *Emps. Mut. Cas. Co. v. Van Haaften*, 815 N.W.2d 17, 22 (Iowa 2012))). *In re Det. of Millikin*, 964 N.W.2d 785 (Iowa Ct. App. 2021).

For a previous determination to have preclusive effect in a subsequent action, the party claiming issue preclusion must establish the following elements:

> the issue in the present case must be identical, (2) the issue must have been raised and litigated in the prior action, (3) the issue must have been material and relevant to the disposition of the prior case, and (4) the determination of the issue in the prior action must have been essential to the resulting judgment.

Barker v. Iowa Dep't of Pub. Safety, 922 N.W.2d 581, 587–88 (Iowa 2019).

Krogmann raised the identical issue in his earlier postconviction appeal. *Krogmann v. State*, 914 N.W.2d 293, 325-26 (Iowa 2018). The supreme court rejected Krogmann's claim that willful injury is a lesser included offense of willful injury. *Id*. The court stated:

> To determine whether one offense is a lesser included offense of another, such that imposition of consecutive sentences for both offenses would violate double jeopardy and the merger doctrine, we apply the legal elements test. *State v. Braggs*, 784 N.W.2d 31, 36 (Iowa 2010).
>
> [U]nder the legal test the lesser offense is necessarily included in the greater offense if it is impossible to commit the greater offense without also committing the lesser offense. If the lesser offense contains an element not required for the greater offense, the lesser cannot be included in the greater.
> *Id*. at 35–36 (alteration in original) (quoting *State v. Jeffries*, 430 N.W.2d 728, 740 (Iowa 1988) (en banc)). Importantly, this test is "purely a review of the legal elements and does not consider the facts of a particular case." *State v. Love*, 858 N.W.2d 721, 725 (Iowa 2015).
>
> Thus, because Krogmann's argument would require us to focus on the particular facts of his case as opposed to the statutory elements for attempted murder and willful injury, his argument does not have merit. Moreover, we find nothing in Krogmann's arguments, our recent caselaw, or the court of appeals decision to suggest that *Clarke* is no longer good law. We decline to overrule *Clarke's* holding that the "[a]pplication of the legal elements test plainly demonstrates that willful injury is not a lesser-included offense of attempted murder." 475 N.W.2d at 196. We affirm the decision of the court of appeals on the consecutive-sentences issue.

Krogmann, 914 N.W. 2d at 325. Krogmann acknowledges the court denied his previous challenge but asserts nothing more than the case was "wrongly decided." Def. Brief at 77. He offers no other basis to change the law nor cites any recent cases that have changed or overruled either his previous appeal or *State v. Clarke*, 475 N.W.2d

193, 196 (Iowa 1991). This claim lacks any merit. The district court must be affirmed.

IX. THE DISTRICT COURT CORRECTLY ASSESSED COSTS AGAINST THE DEFENDANT.

Jurisdiction

Krogmann does not have a statutory right to appeal from an order of restitution entered after the district court entered its judgment and sentence. Although Krogmann may seek review, he must do so in accordance with Iowa Code section 910.7(5) and file a petition for writ of certiorari. Iowa Code § 910.7(5). His claim does not merit consideration as a certiorari action because the court did not commit an error at law by ordering the payment of costs.

The State acknowledges that the court may consider his notice of appeal and a petition for writ of certiorari. Iowa R. App. P. 6.108. Although the court may consider the notice of appeal[1] as a petition for

---

[1] The district court entered the order regarding costs after Krogmann filed his first notice of appeal from the judgment and sentence on November 1, 2021. Not. of Appeal (11/1/21); App. 74. Krogmann filed a second notice of appeal from the restitution ruling on December 6, 2021. Not. of Appeal (12/6/21); App. 88. The supreme court granted Krogmann's request to consolidate both appeals on January 6, 2022. Sup. Ct. Nos. 21-1617 and 21-1841 Order (1/6/22).

writ of certiorari, the court should decline to grant it as the petition has no merit.

Preservation of Error

The State acknowledges that Krogmann raised the issue below. Resistance (10/6/21), Resistance (11/22/21), Order (11/29/21); App. 71-73, 82-83, 85-86.

Standard of Review

The court reviews restitution orders for correction of errors at law. *State v. Hagen*, 840 N.W.2d 140, 144 (Iowa 2013).

Merits

Restitution is a creature of statute. *State v. Hagen*, 840 N.W.2d 140, 149 (Iowa 2013). The framework for restitution is found in Iowa Code chapter 910. When ordering criminal restitution, a court applies the provisions of that chapter. *Id.*

Under the statute, "restitution" means "pecuniary damages, category "A" restitution, and category "B" restitution. Iowa Code § 910.1(10). As it pertains to this claim, category B restitution includes ". . . the payment of . . . court costs." Iowa Code § 910.1(2). Costs include "reasonable compensation as determined by the court" for an "expert witness called by the state in criminal cases." Iowa Code § 815.5.

Krogmann argues that the State's "total request for reimbursement of $13,958.72 for expert witness fees" is contrary to the provisions of Iowa Code sections 622.72 and section 815.13. Contrary to Krogmann's claims, the district court correctly assessed the expert witness fees against him.

Iowa Code section 622.72 provides:

> Witnesses called to testify only to an opinion founded on a special study or experience in any branch of science, or to make scientific or professional examinations and state the result thereof shall receive additional compensation, to be fixed by the court, with reference to the value of the time employed and the degree of learning or skill required; but such additional compensation shall not exceed one hundred fifty dollars per day while so employed.

Iowa Code § 622.72. Although this section appears to limit the amount of compensation at $150 per day, section 815.5 provides:

> *Notwithstanding the provisions of section 622.72*, reasonable compensation as determined by the court shall be awarded . . . expert witnessed called by the state.

Iowa Code § 815.5 (emphasis added). Thus, the district court correctly exercised its discretion in allowing the State to recover "reasonable compensation to Dr. Dennert" that exceeded $150 per day. *See State v. Lunardi*, No. 00-2045, 2002 WL 1331852 (Iowa Ct. App. June 19, 2022) (section 815.5 applies to expert witnesses called by the State).

In addition, Krogmann's reliance on section 815.13 is also misplaced. Section 815.13 provides:

> *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 cost 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.

Iowa Code § 815.13 (emphases added). This section provides that the State initially pays for the cost of deposing its own witness but those costs are recoverable "from the defendant" when, as in this case, the defendant is convicted. Iowa Code § 815.13.

Krogmann contends that the award of these costs was also improper under Iowa Code section 625.14. Section 625.14 provides:

> *The clerk shall tax in favor of the party recovering costs the allowance of the party's witnesses*, the fees of officers, the compensation of referees, the necessary expenses of taking depositions by commission or otherwise, *and any further sum for any other matter which the court may have awarded as costs in the progress of the action, or may allow.*

Iowa Code § 625.14 (emphasis added). This provision allows for the taxation of costs against Krogmann as the district court "may allow." *Id*. The district court correctly required Krogmann to pay the cost of Dr. Dennert's deposition which he requested. Def. Notice of Depos. (11/15/19); App. 7. Even if this court finds that the award of costs is improper under section 625.14, the State submits that the more specific provision of section 815.5 prevails. *In the Interest of C.Z.,* 956 N.W.2d 113, 122 (Iowa 2021) (any tension between these statutes is resolved by our canon of construction that the specific provision controls over the general); Iowa Code § 4.7.

Krogmann also takes issue with the court's $230.56 award for Dr. Dennert's hotel costs. Def. Brief at 82. Krogmann argues that "there is no law that allows for the taxation of witness costs other than for testimony." The district court, however, relied on *Elwood, O'Donohue, O'Cooner & Stochl v. Iowa Dist. Ct. for Chickasaw Cty.*, No. 99-0375, at * 3 (Iowa Ct. App. Dec. 22, 2000), when it granted the State's request to include the cost of a hotel for Dr. Dennert. In *Elwood*, the Court of Appeals reversed the district court's denial of transportation and hotel costs for defense witnesses who travelled from out of state. *Id*. The *Elwood* court found it was appropriate to

reimburse an expert witness for his hotel room necessitated by the State's request to depose him. *Id.* In this case, the district court found it reasonable to reimburse Dr. Dennert's hotel cost because he also travelled from out of state to testify about the fighting issue in the case; Krogmann's ability to form specific intent. Order Re: Prosecution Costs. (11/29/21); App. 85-86. The district court acted in accordance with the law in ordering Krogmann to pay these costs. His claim must be rejected.

Finally, Krogmann argues the court improperly included the cost of sheriff's fees to serve a witness, Timothy Brandt, who was not called to testify at trial. According to the return of service, the sheriff attempted to serve the subpoena, however, the sheriff could not locate the potential witness. Brandt Return of Service (Exh. 53) (11/5/21); App. 97. The State is still entitled to collect these fees under Iowa Code section 910.1(2) as the service fees are "court costs" and these costs are attributable to Krogmann's convictions. *State v. McMurry*, 925 N.W.2d 592, 597 (Iowa 2019) (court costs in this case included a filing fee, two service fees, and two court reporter fees); *State v. Johnson*, 887 N.W.2d 178, 181, n.3 (Iowa Ct. App. 2016). In addition, from the context of the motion in limine hearing, it appears

that Timothy Brandt was a potential witness for the defense. 3/11/20 Mot. Tr. p. 26, line 1 through p. 30, line 9, Order in Limine (3/13/20); App. 36. If the defendant failed to provide an accurate address to the sheriff, he should bear the cost of that. The district court's order on restitution must be affirmed.

CONCLUSION

Krogmann's convictions for attempted murder and willful injury causing serious injury must be affirmed.

REQUEST FOR NONORAL SUBMISSION

This case involves routine challenges to the district court's discretion regarding the admission of evidence, jury instructions, a challenge to the weight of the evidence, as well as a sentencing and restitution challenge which can all be resolved by existing law. Oral argument is not necessary to resolve the issues. In the event that argument is scheduled, the State requests to be heard.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

MARTHA E. TROUT
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
martha.trout@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

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

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **11,115** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: September 14, 2022

MARTHA E. TROUT
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
martha.trout@ag.iowa.gov