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 DELAWARE COUNTY
THE HONORABLE LINDA M. FANGMAN, JUDGE

APPLICATION FOR FURTHER REVIEW

BRENNA BIRD
Attorney General of Iowa

MARTHA E. TROUT
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
martha.trout@ag.iowa.gov

JOHN BERNAU
Delaware County Attorney

SUSAN KRISKO
ISRAEL KODIAGA
Assistant Attorneys General

ATTORNEYS FOR PLAINTIFF-APPELLEE

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW

I. DID THE COURT OF APPEALS ERR IN REVERSING AND REMANDING KROGMANN'S CONVICTION AFTER FINDING THAT THE DISTRICT COURT SHOULD HAVE ADMITTED EXHIBIT A, THE DEFENDANT'S VIDEO INTERVIEW, BECAUSE IT DID NOT CONSTITUTE HEARSAY, THE VIDEO WAS THE "BEST EVIDENCE," AND ITS EXCLUSION WAS NOT HARMLESS?

STATEMENT SUPPORTING FURTHER REVIEW

The Court of Appeals erred in reversing Robert Krogmann's convictions for attempted murder and willful injury causing serious injury. The Court of Appeals' decision is in conflict with several decisions of this court and the rules of evidence on several important matters. Iowa R. App. P. 6.1103(1)(b)(1). The Court of Appeals incorrectly determined that the district court erred when it failed to admit defense Exhibit A, a videotape of Krogmann's interview with Division of Criminal Investigation Agent Jack Liao. The Court of Appeals determined the Exhibit A was admissible because it was not hearsay. *State v. Krogmann*, No. 21-1617, 2023 WL2395429, at *4-7 (Iowa Ct. App. Mar. 8, 2023). The Court of Appeals agreed with the defendant's claim that the exhibit was not offered for the truth of the matter asserted and should be played for the jury with a limiting instruction. *Id.* The Court of Appeals failed to consider the risk posed by playing the entire video even with the limiting instruction. *State v. Elliott*, 806 N.W. 660, 674 n. 4 (Iowa 2011) (recognizing that even with a limiting instruction the error could not be cured); *State v. Martin*, 587 N.W.2d 606, 610 (Iowa Ct. App. 1998) (even with the "admonishing instruction" was insufficient to prevent unfair prejudice).

The Court of Appeals also erred when it found that Exhibit A was the "best evidence" and should have been admitted to show his demeanor in support of his diminished responsibility defense. The Court of Appeals misconstrued what constitutes the "best evidence." The "best evidence" does not require a party to produce the 'best' evidence possible with respect to a disputed fact but rather is a rule regarding the authenticity of the document or writing. *State v. Schlenker*, 234 N.W.2d 142, 145 (Iowa 1975) (the rule excludes testimony designed to establish the terms of a document, and requires the document's production instead, but does not exclude testimony which concerns the document without explaining its terms); *State v. Davis*, 229 N.W.2d 249, 251 (Iowa 1975). Finally, the Court of Appeals erroneously found that the exclusion of the evidence was not harmless. In so doing, the Court of Appeals failed to consider the entire record of case which was compelling. *State v. Parker*, 747 N.W.2d 196, 209 (Iowa 2008) (when a nonconstitutional error is claimed, the test is whether the rights of the objecting party have been "injuriously affected by the error" or the party "suffered a miscarriage of justice").

This Court should grant further review to clarify the law regarding assertions for hearsay purposes and whether the entire interview of a defendant discussing the crime qualifies as non-assertive conduct to support his mental defense. This Court should also grant review to determine whether the videotape constitutes the "best evidence" when a party to the interview provided testimony about the interview. In addition, Krogmann's expert reviewed the video and used the video to formulate an opinion on the defendant's capacity to form specific intent and testified about her findings at trial. Finally, this Court should grant review to review whether the exclusion of the evidence in light of all the evidence in the record was not harmless.

STATEMENT OF THE CASE

Nature of the Case

The State seeks further review of a decision of the Court of Appeals. Iowa R. App. P. 6.1103

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.*

The State re-tried Krogmann in August of 2021. Trial Tr. Vol. I p. 1, lines 1-25. A Black Hawk County jury again convicted Krogmann of the charged offenses. Trial Tr. Vol. V p. 95, line 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 notice of appeal from these convictions. Not. of Appeal (11/1/21); App. 74.

The Iowa Court of Appeals reversed Krogmann's convictions for attempted murder and willful injury causing serious injury. *Krogmann*, No. 21-1617, 2023 WL2395429, at *8. The Court of Appeals found that Exhibit A was not hearsay, it was the "best evidence" of Agent Liao's interview of Krogmann, and the exclusion of the exhibit was not harmless. The State seeks further review by this Court.

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. 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. 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 had concealed the gun because she did not see it when he entered her house. Trial Tr. p. 40, lines 13-24.

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. And then he 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. 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.

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 and he did. Trial Tr. Vol II p. 45, lines 1-22. He 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 but he ended the call after a short conversation. Trial Tr. Vol. II p. 49, lines 2-17.

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. Officers later arrested Krogmann at his home without incident. Trial Tr. Vol. III p. 13, line 3 through p. 16, line 17.

ARGUMENT

I. THE COURT OF APPEALS DID NOT MERELY ERR IN ITS RESOLUTION OF HEARSAY, THE BEST EVIDENCE RULE, AND HARMLESSNESS. IT MISAPPLIED THESE RULES IN A MANNER THAT REQUIRES THIS COURT'S ATTENTION.

This court should grant further review for three reasons. First, this Court should grant further review to clarify whether an interview of a defendant discussing the crime is hearsay or qualifies as non-assertive conduct which should be admitted to support his diminished responsibility defense. Second, this Court should grant review to determine whether the videotape constitutes the "best evidence" when the accuracy of the video is not at issue. Finally, this Court should grant review to review whether the exclusion of the evidence amounted to harmless error in light of all the evidence in the record.

A. Hearsay and Assertions.

Hearsay is "a statement, other than the 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. 5.801(c). At issue in this case is the basis for Krogmann's claim for admission of the exhibit. He asserted, and the Court of Appeals agreed, that he did not seek to admit the video for the "truth of the matter asserted" but to show his "demeanor during the interview to demonstrate his mental instability on the day of the shooting." *Krogmann*, No. 21-1617, 2023 WL2395429, at *5. Thus, according to the Court of Appeals, the video was not hearsay. This decision is problematic for several reasons.

First, at trial, Krogmann argued that he "would have to play the whole video" to establish his mental health defense. Tr. Vol. III p.

125, line 22 through p. 127, line 1. Under the Court of Appeals' ruling, the entirety of the 54-minute video (which is of low quality and difficult to hear), should be played for the jury. Exhibit A. In allowing the jury to watch the entire video, the Court of Appeals is allowing Krogmann's to make various statements that have nothing to do with his mental defense in front of the jury. These include Krogmann's inquiries into whether Jean Smith is "okay" (1:40-1:47), (37:32-37:40), the *Miranda* warning (1:48-3:07)(4:00-4:58), (48:15-50:58), Krogmann saying he "went over to talk to her" (4:50-5:03), that he "loved her so much" (5:33-5:35), (8:27-8:31), (28:27-28:35), (29:08-29:18), he "was so good to her and wanted to marry her" (8:58-9:03), (28:32-28:47), she "let him in" (10:20-10:22), she "didn't' want me" (11:12-11:20), his gun was in his truck on the passenger seat (12:07-12:23), (31:58-32:13), she told him to leave and move on with his life (13:00-13:20), he wanted to tell her "how much it hurt him" (13:30-13:39), "she didn't care" (14:55-15:00), he was "tired" (15:37-15:40), he shot her (16:10-16:20), (47:07-47:24), she should have "just told him" (16:35-16:46), she said he wanted a pillow (17:44-17:52), called his son Jeff (18:10-18:19), he called 911 from her cell phone (21:00-21:12), that he "sometimes" carries a gun (26:42-

26:52), the gun was in his truck and he did not recall when he put it in the truck (27:00-27:22), he kept the gun for the "varmints at the farm" (27:40-27:52), he made up his mind to talk to her that morning (28:13-28:24), inquired about counsel (39:49-40:12), (48:15-50:58), long pauses where Krogmann shifts in the chair and does not respond but sighs (39:36-41:15), said "if she'd just told me the truth" (42:10-42:20), he could not reach in the truck to get the gun (44:40-44:44), and she did not run because she had nowhere to go (47:45-47:48). The video does not assist the lay jury in deciding whether Krogmann suffered from diminished responsibility. Rather, the introduction of these statements would allow Krogmann to "testify" without being subject to cross examination.

The Court of Appeals deemed the video non-hearsay because it believed Krogmann did not offer it for the truth of the matter asserted. The State urges this Court to consider whether the "statement is truly relevant to the purpose for which it is being offered or whether the statement is merely an attempt to put before the fact finder inadmissible evidence." *State v. Mitchell*, 898 N.W.2d 801, 832 (Iowa 1990). Simply because some evidence may pertain to Krogmann's mental defense does not mean that the entire video should be shown to the jury. Here, the video affords Krogmann a backdoor opportunity to introduce his own self-serving statements without subjecting himself to cross-examination.

The Court of Appeals tries to fend off this criticism by finding that the video should be introduced for the "limited purpose of allowing the court to 'see the defendant and observe his demeanor.'" *Id.* at *6. The Court continues that when admissibility is limited, the court may instruct the jury accordingly as to its scope. *Id.* at *6. While this may work in certain cases with regard to limited testimony, the same does not apply here when a nearly hour-long video is at issue. Had the Court of Appeals limited the video to segments or simply suggested that the video be played with no audio, that would have staved off this challenge. Moreover, the Court of Appeals deemed the "potential danger of prejudice" with a limiting instruction to be a non-issue because Krogmann already admitted to the most prejudicial and incriminating fact. *Id.* at *6. But, that analysis is flawed. The fighting issue in the case was not whether he shot Jean Smith, the fighting issue was whether he could form the specific intent at the time he committed the crime. Jury Instr. 23. This interview, which occurred approximately three hours after the incident, provided him the opportunity to reflect on his actions. *See State v. Eads*, 166 N.W.2d 766, 773 (Iowa 1969) ("However, it is not only the defendant who is entitled to a fair trial. Society, too, represented by the prosecution, has an equal right to one."). As it stands, the Court of Appeals ruling is too unwieldly and allows for too many statements to be admitted, even with a limiting instruction.

B. Best Evidence Rule

The Court of Appeals also misconstrued the "best evidence rule." Stated simply, the rule had no application in this case. Iowa's "best evidence rule" allows admission of a duplicate writing recording, or photograph "unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate." Iowa R. Evid. 5.1003. The Court of Appeals found that the purpose of the rule is to "secure the most reliable information as to the contents of documents when those terms are disputed." *Id.* at *6. But, the Court of Appeals' belief that what might be the most persuasive evidence should not be conflated with the "best evidence rule." *See* 7 Laurie Kratky Dore, Iowa Practice Series: Evidence § 5.1000:0 (Westlaw 2018) (explaining that the "best evidence" doctrine concerns the method of proving the content of a document, and "it is now generally accepted that the doctrine is not a general rule of preference requiring that the party produce the 'best' evidence possible with respect to a disputed fact").

The authenticity of the video is not in dispute. As one federal court has noted:

> We, of course, are well aware of the fact that a tape recording cannot be said to be the best evidence of a conversation when a party seeks to call a participant in or observer of the conversation to testify to it. In that instance, the best evidence rule has no application at all.

United States v. Workinger, 90 F. 3d 1409, 1415 (9th Cir. 1996); *see also United States v. Bennett*, 363 F.3d 947, 953 (9th Cir. 2004) (concluding that witness's testimony when he did not observe alleged actions violated best-evidence rule and noting that rule applies when witness seeks to testify about contents of recording, particularly where witness was not privy to events on recording); *United States v. Fagan*, 821 F.2d 1002, 1009 n.1 (5th Cir. 1987) (characterizing as "completely without merit" best-evidence argument that sheriff should not testify regarding his recollection of interview because interview was taped and stating that rule was inapplicable where prosecution was trying to prove contents of conversation rather than contents of recording); *United States v. Gonzales-Benitez*, 537 F.2d

1051, 1053-54 (9th Cir. 1976) (the rule does not set up an order of preferred admissibility which must be followed to prove any fact); *United States v. Rose*, 590 F.2d 232, 236-37 (7th Cir. 1978) (it is settled that a person who hears, participates in , or eavesdrops upon an oral statement or a conversation which is also recorded may testify to its substance, despite the existence of the recording).
Agent Liao's testimony, as a participant in the interview, is sufficient to establish what was said. *Gonzales-Benitez*, 537 F.2d at 1054.

That is not to say that Krogmann could not use the video to assist his expert in forming her opinion as to whether Krogmann was able to form specific intent. *See* 7 Laurie Kratky Dore, Iowa Practice Series: Evidence § 5.1002:2 (Westlaw 2018) (explaining that Iowa Rule of Evidence 5.703 an expert witness may base an opinion on facts or data not admitted in evidence if reasonably relied upon by experts in the field). That is what happened in this case. Krogmann's expert formed her opinion that he could not form specific intent based upon her review of his medical records and the video. Tr. Vol. IV p. 84, line 14 through p. 86, line 1. The Court of Appeals erred in finding that the video should have been admitted.

C. Harmless error

Finally, the Court of Appeals erred in finding that the exclusion of Exhibit A did not constitute harmless error. Reversal of a ruling which admits or excludes evidence is not necessary unless a substantial right of a party is affected. Iowa R. Evid. 5.103(*a); State v. Paredes*, 775 N.W.2d 554, 571 (Iowa 2009). To determine whether a substantial right of a party has been affected when a nonconstitutional error occurs, we employ harmless error analysis and ask: " 'Does it sufficiently appear that the rights of the complaining party have been injuriously affected by the error or that he has suffered a miscarriage of justice?' " *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004) (quoting *State v. Trudo*, 253 N.W.2d 101, 107 (Iowa 1977)). In considering harmless error, " '[W]e presume prejudice—that is, a substantial right of the defendant is affected—and reverse unless the record affirmatively establishes otherwise.' " *Newell*, 710 N.W.2d 6, 19 (Iowa 2006) (quoting *Sullivan*, 679 N.W.2d at 30).

The Court of Appeals found that reversal was required because Exhibit A went "to the heart of Krogmann's defense of diminished responsibility." *Krogmann*, No. 21-1617, 2023 WL2395429, at *7.

But, that finding fails to take into account that the video was not the only evidence he presented of his mental state at the time of the crimes. He had an expert who testified and gave her expert opinion on Krogmann's mental state. Tr. Vol. IV p. 84, line 14 through p. 86, line 1. His family members also provided testimony about his mental state prior to his commission of the crimes. Tr. Vol. IV p. 142, line 20 through p. 146, line 20, p. 153, line 24 through p. 154, line 5, p. 155, line 7 through p. 160, line 10, p. 166, line 1 through p. 169, line 15. These concerns led the family to remove his guns from the house. Tr. Vol. IV p. 176, line 8 through p. 182, line 25. This is not an instance where Krogmann was hamstrung by the exclusion of the video. Rather, he presented ample evidence to establish the defense. *State v. Jordan*, 779 N.W.2d 751, 756 (Iowa 2010) (reversal required when defendant's ability to raise a defense stymied when there was no other evidence of his mens rea); *State v. Paredes*, 775 N.W.2d 554, 571 (Iowa 2009) (error was not harmless when the defense was a general denial and the exclusion of the statements would have answered the jury's likely questions of where the child's mother was and why she did not testify).

In addition, the Court of Appeals failed to consider the strength of the State's case in its decision regarding his ability to form specific intent. This evidence includes:

> -Gaining 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. Vol. II 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.

The evidence of Krogmann’s guilt is strong, overwhelming even, yet there is no consideration of Krogmann’s statements to Jean Smith at the time he committed the offense. *State v. Newell*, 710 N.W.2d 6, 19-20 (Iowa 2006)(no prejudice will be found where the evidence in support of the defendant’s guilt is overwhelming); *State v. Holland*, His actions and his statements “when the act was done” demonstrate his intent. Jury Instr. 23. Because there was ample evidence of his diminished responsibility defense in the record and the State presented compelling evidence of guilt, if the district court erred in excluding the video, the error was harmless. The Court of Appeals must be reversed.

CONCLUSION

The Court of Appeals decision reversing Krogmann’s convictions must be reversed and the convictions reinstated.

REQUEST FOR ORAL SUBMISSION

The State requests to be heard in oral argument.

Respectfully submitted,

BRENNA BIRD
Attorney General of Iowa

Martha E. Trout

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 **4,181** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: March 28, 2023

Martha E. Trout

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