SUPREME COURT NO. 21-1617
DELAWARE COUNTY CASE NO. FECR007326

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

v.

ROBERT PAUL KROGMANN

Defendant-Appellant.

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

RESISTANCE TO PLAINTIFF-APPELLEE'S APPLICATION FOR FURTHER REVIEW

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PROOF OF SERVICE

On April 7, 2023, I served this brief on all other parties by EDMS to their respective counsel.

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CERTIFICATE OF FILING

I certify that I did file this proof brief with the Clerk of the Iowa Supreme Court by EDMS on April 7, 2023.

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I. THE COURT OF APPEALS CORRECTLY FOUND THAT THE VIDEO OF KROGMANN'S POST-ARREST INTERVIEW WAS ADMISSIBLE

The Court of Appeals correctly found that exhibit A, the video of Krogmann's post-arrest interview with Agent Liao, was not hearsay, and thus should have been admissible at trial. The Court of Appeals also found that the video was admissible under the best evidence rule. Because the district court's error in excluding the video was not harmless, Krogmann is entitled to a new trial.

The analysis is straightforward. Krogmann admitted to shooting Smith. The only issue at trial was whether Krogmann had the capacity to form specific intent. At trial, Krogmann offered exhibit A to show his mental state on the day of the shooting, including his ability to answer questions, his demeanor, and his physical manifestations of mental illness. During the State's case-in-chief, Agent Liao testified that Krogmann could "track and understand," (8/19/21 TT Vol. 3, p. 101, l. 4-6), was "able to follow the conversation," (8/19/21 TT Vol. 3, p., p. 101, l. 7-8), and volunteered information, (8/19/21 TT Vol. 3, p. 101, l. 9-13). Liao testified Krogmann's questions and comments were not "unusual" or uncommon. (8/19/21 TT Vol. 3, p. 101, l. 18 – 25). Liao opined Krogmann had no "signs of intoxication or impairment." (8/19/21 TT Vol. 3, p. 107, l. 15). Liao thought Krogmann could "track" what he was talking about, (8/19/21 TT Vol. 3, p. 107, l.

6-11), he stayed "on topic" when asked questions, (8/19/21 TT Vol. 3, p. 107, l 12-15), and he was "able to respond" to the communications. (8/19/21 TT Vol. 3, p. 107, l. 20-22).

Liao asked several times if he could "see the transcript" before answering questions about the interview. (8/19/21 TT Vol. 3, p. 114, l. 17; p. 115, l. 18.) He admitted he did not remember the interview word-for-word. (8/19/21 TT Vol. 3, p. 115, l. 22 – p. 116, l. 2). The parties debated what was said about the gun. (8/19/21 TT Vol. 3, p. 116, l. 13 – p. 120, l. 6.) During these exchanges at trial, Liao was shown an unofficial transcript of the videotaped interview by the State. (8/19/21 TT Vol. 3, p. 110, l. 2-3).

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

The Court of Appeals agreed. Its opinion is not in conflict with any other cases, and further review is not warranted.

A. Krogmann's statements were not offered for the truth of the matter asserted.

Krogmann's statements were not offered for the truth of the matter asserted, and thus they were not hearsay. The State has yet to identify a single statement that was offered for its truth. Indeed, the Court of Appeals noted that "at oral argument, the State had difficulty identifying a statement that Krogmann offered to prove the truth of the matter asserted." (Slip Op. 10). While the State continues to frame it as a hearsay issue, the substance of its application for further review appears to argue relevance instead. Specifically, the State now claims the video shows Krogmann's "various statements that have nothing to do with his mental defense in front of the jury" and then lists nearly two pages of assorted statements Krogmann made during his interview. (App. Further Review at 13-14). The State still does not identify any statement that was offered for its truth, and there is none. To the contrary, Krogmann made several statements to Agent Liao that were demonstrably not true.

The State goes on to "urge 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's Br. at 14) (quoting *State v. Mitchell*, 450 N.W.2d 828, 832 (Iowa 1990). The State's newfound reliance on relevance cannot be raised for the first time on appeal, let alone in an application for further review. *See Meier v. Senecaut*, 641

N.W.2d 352 (Iowa 2002). Even if this Court were to entertain the State's new relevance argument, the video was relevant to show Krogman's mental state at the time, including his ability to answer questions, his demeanor, and his physical manifestations of mental illness. As the Court of Appeals noted, "Bu the real reason sought to introduce the video was to show his demeanor during the interview to demonstrate his mental instability on the day of the shooting. And Krogmann's mental instability is at the heart of his defense." (Slip Op. at 10).

The *Mitchell* case quoted by the State addresses out-of-court statements offered to explain responsive conduct, which is not hearsay. *Mitchell* at 832. The Iowa Supreme Court found that in order for a statement to be admissible as showing responsive conduct, it must be relevant to some aspect of the State's case. *Id*. Here, exhibit A was not offered to explain responsive conduct. Nevertheless, Krogmann's statements and conduct in the interview did go directly to the "central factual dispute in the case" – Krogmann's mental capacity. *Mitchell* at 832.

The State also asserts that the Court of Appeals opinion is in conflict with decisions of this Court because it failed to consider the risk posed by playing the entire video even with the limiting instruction. (App. Further Review at 4). In support, the State cites to *State v. Elliott*, 806 N.W.2d 660, 674 n.4 (Iowa 2011), and *State v. Martin*, 587 N.W.2d 606, 610 (Iowa Ct. App. 1998). In *Elliott*, the Court noted in a footnote that "in some circumstances, limiting instructions are

inadequate to cure prejudice from the **erroneous admission of evidence**[.]" *Elliott* at 674 n.4 (emphasis added). Similarly, in *State v. Martin*, the Court of Appeals found that the admonishing instruction was insufficient to prevent unfair prejudice after the State offered inadmissible hearsay evidence detailing the suspect's description. *Martin* at 610.

Here, there is no erroneous admission of evidence – the Court of Appeals correctly found that Krogmann's statements were not hearsay. As such, it will not be error to admit exhibit A at Krogmann's retrial. The Court of Appeals only cautioned that the video should not be admitted without a jury instruction "limiting the scope of the jury's consideration of the exhibit." (Slip Op. at 15). In other words, the court's suggested use of a limiting instruction is not to correct error, but simply to clarify the purpose of the video to the jury. Because the video does not contain hearsay, no admonishing instruction is necessary, and the cases cited by the State are inapplicable.

B. Admission of exhibit A after Agent Liao testified about his recollection of the interview was required under the best evidence rule.

The Court of Appeals found the best evidence applied because the State and Krogmann largely disagreed as to how Krogmann acted during the interview – thus, the video showing Krogmann during the interview is the best evidence. (Slip Op. at 13-14). The State argues that the Court of Appeals misconstrued what

constitutes best evidence, in conflict with *State v. Schlenker*, 234 N.W.2d 142, 145 (Iowa 1975) and *State v. Davis*, 229 N.W.2d 249, 251 (Iowa 1975). (App. Further Rev. at 5). *Schlenker* dealt with a defendant who wanted the actual seized food items introduced into evidence instead of photographs of the food, and *Davis* makes no reference to the best evidence rule at all. In *Schlenker*, the court cited to S*chiltz v. Cullen-Schiltz & Assoc., Inc*., 228 N.W.2d 10, 19-20 (Iowa 1975), which pointed out that the best evidence rule was sometimes applied by the courts in areas of evidence besides writings. Indeed, the best evidence rule states: "An original writing, recording, or photograph is required to prove its content, unless these rules or a statute provides otherwise." Iowa R. Evid. 5.1002.

Additionally, more recent case law supports the Court of Appeals' conclusion that "after the State elicited testimony from Special Agent Liao about his interview with Krogmann the 'best evidence' rule required admission of exhibit A." (Slip Op. at 13). "A picture is worth a thousand words, although here, we have a video—a series of pictures," and "A video is often the best evidence of the [event] as opposed to someone describing it." (Slip Op. at 14) (quoting *Ransdell v. Huckleberry Ent., LLC*, No. 19-0545, 2020 WL 5650728 at *1, *7 (Iowa Ct. App. Sept. 23, 2020)). *See also State v. Evans*, 2020 Iowa App. No. 19-2083, LEXIS 1155 at *8 (Iowa Ct. App. 2020) (holding that the purpose of the best evidence rule "is to secure the most reliable information as to the contents of documents, when

those terms are disputed"); Charles McCormick, et al., McCormick on Evidence § 243 (4th ed. 1984). When law enforcement is allowed to testify about the contents of a video, over objection, when the video itself is available, that testimony violates the best evidence rule. *See, e.g., T.D.W. v. State*, 137 So. 3d 574 (Florida Ct. App. 2014) (summarizing Florida caselaw regarding testimony about contents of videos as violating the best evidence rule).

The State admits that the video shows "long pauses where Krogmann shifts in the chair and does not respond but sighs." (App. Further Review at 14). This conflicts with Agent Liao's trial testimony that Krogmann could "track" the conversation, stayed "on topic," and was "able to respond" to the communications. (9/19/21 TT Vol. 3, p.107, l.6-22). The video recording of the interview was the best evidence of what took place.

Ultimately, exhibit A is already admissible since it is not excluded by the hearsay rule. However, it is also admissible under the best evidence rule. The cases cited by the State do not support its request for further review.

C. The exclusion of exhibit A was not harmless error.

The State thinks that because Krogmann had an expert witness who testified as to her expert opinion on Krogmann's mental state, Krogmann was not prejudiced by the exclusion of exhibit A. The Court of Appeals addressed this, finding that "exhibit A goes to the heart of Krogmann's defense of diminished

responsibility. And the parties elicited conflicting expert testimony as to Krogmann's ability to form specific intent." (Slip Op. at 15).

It is also important because, unlike the defense expert, the State's expert, Dr. Dennert, formed an opinion about Krogmann without ever watching exhibit A. Dr. Dennert instead relied solely upon other peoples' characterizations of what happened that day. The jury was then asked to choose between these two expert's opinions. Exhibit A was therefore one of the two main points of contention between the two experts: whether exhibit A was relevant and supported their opinions, and whether testing of the defendant who raised a diminished capacity defense was necessary. So, not only was exhibit A relevant to the issue presented to the jury regarding the experts' disagreement, exhibit A was the only physical evidence of Krogmann's mental state on March 13, 2009.

In addition, exhibit A not only rebutted Dr. Dennert's testimony, it also rebutted Agent Liao's testimony. Exhibit A showed that Krogmann could not "track and understand," "follow the conversation," "stay on topic," "volunteer information," or properly answer Agent Liao's questions in the way Agent Liao testified. (8/9/21 TT vol. 3, p. 101, l. 1-p.107, l. 22). If these factors were not material to the State's case, then the State would not have asked Agent Liao all of those questions about Krogmann in the first place.

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

For all of these reasons, the exclusion of exhibit A was not harmless error, and the Court of Appeals properly granted Krogmann a new trial.

II. GRANTING FURTHER REVIEW WOULD REQUIRE EVALUATION OF THE ADDITIONAL CLAIMS NOT ADDRESSED BY THE COURT OF APPEALS AS TO WHY KROGMANN IS ENTITLED TO A NEW TRIAL

Because the Court of Appeals found that the admissibility of the video was alone grounds for a new trial, it did not reach Krogmann's "numerous remaining claims" that also support a new trial. (Slip Op. 15). The remaining claims include:

A. The district court erred in admitting the testimony of Sheriff John Leclere regarding his opinion on the reasons someone shoots another person.

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

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

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

The testimony was also highly prejudicial. The only question at trial for the jury was Krogmann's intent at the time he shot Smith. In determining that question, the jury was told by the sheriff that he thought the only intent could have been to kill Smith. This testimony was erroneously admitted, and highly prejudicial. As such, it should have been excluded from trial.

B. The district court erred in excluding evidence of the civil lawsuit and settlement.

Smith testified on direct about the circumstances that led her to stop working. She stated that she worked for "a short time until I figured out that I

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

The civil settlement was relevant, and admissible, even before this testimony. In general, civil settlements can be admissible in criminal trials. *See, e.g., Manko v. United States*, 87 F.3d 50 (2nd Cir. 1996). There was no Iowa rule of evidence that excluded the civil settlement from being admitted at trial, and it could have been used to show that the Defendant accepted responsibility for the consequences of shooting Smith, and it could have showed a bias by Smith in her testimony. (App. at 24-25).

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

C. The district court erred in its ruling allowing Dr. Dennert's expert testimony on a legal conclusion.

The State's expert, Dr. Dennert, was allowed to testify to his understanding of the law of diminished responsibility itself, and the purposes of the law.

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

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

This was clearly inadmissible commentary on the law, the purposes of the law, and how diminished responsibility is applied in court. Because it was testimony about the main fighting issue in the case – the application of diminished responsibility to the facts of this case – its admission was reversible error. *See Smith v. Wright*, 2014 Iowa App. LEXIS 560, *24-25 (Iowa Ct. App. 2014).

D. The verdict is contrary to the law and evidence.

The weight of the evidence presented in this case was not sufficient to satisfy the specific intent element of attempted murder. Krogmann had a .44 handgun, alone in a house with Ms. Smith. Even after he shot her, he had more live ammunition. He had the ability to kill her. He had the opportunity to kill her. But he did not kill her. Nothing intervened preventing him from killing her. No

person intervened preventing him from killing her. The only thing that must have been missing in this case was an intent to kill her.

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

The undisputed evidence at trial was that Krogmann called 911, within minutes of the shooting, and prevented Smith from dying from her injuries. He gave 911 the address, asked them to hurry, and pleaded to "please save her." He had three functioning bullets in a functioning gun that were turned over to his son, and ultimately police. All of this shows that Krogmann did not have the specific intent to kill Smith on March 13, 2009.

The weight of the evidence also did not overcome the diminished responsibility evidence at trial. Dr. Thomas demonstrated there must be reasonable doubt as to Krogmann's capacity to form specific intent. Dr. Thomas's opinion was that Krogmann could not form the specific intent to kill Smith at the time of the shooting. She is properly credentialed to make that forensic determination, she reviewed all of the relevant medical records, she did extensive testing of Krogmann, and she reviewed both the defendant's actions at the time of the shooting, as well as the recording of him immediately after the shooting, and determined that he lacked the capacity to form specific intent.

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

In addition, if Krogmann had the capacity to form specific intent to kill, as the State's expert opined, and he actually did have that intent, why then didn't Krogmann kill Smith? Capacity to form intent + intent + opportunity + ability would most certainly mean death, absent some sort of intervention. There was no intervention. Thus, the weight of the evidence demonstrates that either Krogmann did not have the capacity to form specific intent, or he actually did not form specific intent to kill Smith. Either way, Krogmann's motion for judgment of acquittal, or his motion for new trial, should have been granted.

E. The court erred in instructing that all assaults are specific intent crimes for the purposes of diminished capacity and prohibiting argument about diminished capacity only applying to attempted murder and willful injury.

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

The district court ruled the diminished responsibility defense must apply not only to the attempted murder and willful injury counts, but also to all of the assault alternatives. In short, it ruled that the amendment to Iowa Code 708.1 is meaningless, and the language in *State v. Fountain* can be ignored. *State v. Fountain*, 786 N.W.2d 260, 264-265 (Iowa 2010).

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

F. The court erred in denying defendant's objection to the dangerous weapon inference instructions in jury instructions 24 and 25.

The court erred in giving Instruction 24 and 25, the dangerous weapon inference instruction, over the objection of the Defendant. The model instructions are clear that the dangerous weapon inference is for murder in the first degree

cases. In fact, model instruction number 700.8 actually is titled "Murder In the First Degree – Dangerous Weapon Inference." There is no similar model instruction for other offenses.

The language of the model inference instruction also demonstrates it is not applicable. "If a person has the opportunity to deliberate…" and "used with malice, premeditation and specific intent to kill." There is no requirement of "deliberation" in Attempted Murder – yet this instruction adds in the element of deliberation. Attempted murder also doesn't have the elements of malice or premeditation, and so the modified instruction as given by the court here, simply deletes those requirements from the inference. (App. at 94). No authority allows for modification of the instruction.

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

G. The court erred in refusing to merge the counts.

This is the only "remaining claim" that the Court of Appeals did address: it held that it did not have the ability to overturn supreme court precedent and that Krogmann was barred by issue preclusion. (Slip Op. at 16).

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

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

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

Krogmann could not have been found guilty of willful injury causing serious injury without having committed the lesser offense of assault with intent to cause serious injury. Krogmann also could not have been found guilty of attempted murder without having committed the lesser offense of assault with intent to cause serious injury. Thus, he now stands punished, consecutively, twice, for the same assault with intent to cause serious injury. This violates the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution, article I, section 12 of the Iowa Constitution, and Iowa Code section 701.9.

H. Costs were assessed in error.

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

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

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

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

If this Court accepts further review and ultimately affirms Krogmann's conviction, the assignment of costs must be reversed.

III. IF THIS COURT GRANTS FURTHER REVIEW, IT SHOULD ALSO REVIEW THE COURT OF APPEALS FINDING THAT KROGMANN DID NOT PRESERVE ERROR ON THE RULE OF COMPLETENESS

At trial, Krogmann additionally argued that exhibit A was admissible because Agent Liao "opened the door" to the admissibility of the video. (8/19/21 TT Vol. 3, p.122-27). While the Court of Appeals acknowledged that, "the rule of

completeness in Iowa Rule of Evidence 5.106 might be characterized as posing an open-the-door concept" Krogmann did not specifically cite to the rule of completeness at trial, and thus did not preserve error. (Slip Op. at 9 n.4) (citing *State v. Huser*, 894 N.W.2d 472, 507 (Iowa 2017)). The State did not contest error preservation on appeal. And, Krogmann had argued explicitly to the district court that the "rule of completeness" was applicable to Exhibit A under Iowa R. of Evidence 5.106 in his Motion for New Trial (App. 47). Krogmann believes that by requesting the admission of exhibit A after the State opened the door at trial, and by explicitly raising the rule and citing the applicable evidentiary rule in his Motion for New Trial, that error on this issue was preserved.

Exhibit A was admissible from the outset as non hearsay. However, the State also opened the door to its admissibility under the rule of completeness. If this Court accepts further review, it should also find that exhibit A was admissible under Iowa Rule of Evidence 5.106.

CONCLUSION

For all of these reasons, Robert Krogmann asks this Court to deny further review. Alternatively, if this Court does grant further review, it must also rule on Krogmann's remaining claims that the Court of Appeals did not reach. This Court should also find that Krogmann preserved error on the rule of completeness.

COST CERTIFICATE

I hereby certify that the costs of printing this brief was $0 because it was electronically submitted.

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