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IN THE SUPREME COURT OF IOWA
Supreme Court No. 22–1440

STATE OF IOWA,
Plaintiff-Appellant,

vs.

JEROME BAILEY, SR.
Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WINNEBAGO COUNTY
THE HONORABLE GREGG R. ROSENBLADT, JUDGE

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. Bailey demanded that Coombs pay him $10,000 in exchange for "not asking for charges to be brought against [Coombs] by Hancock County Prosecutors" and not telling Coombs employer about her actions.

The district court granted Bailey's motion to dismiss the trial information that charged him with extortion under section 711.4(1)(b). It ruled that the defense in section 711.4(3) applied because "[t]he defendant's request here was for a settlement."

A. Did the court err in ruling that section 711.4(3) could apply to threats like these?

B. If not, did the district court err in dismissing the trial information for failing to allege extortion as a matter of law, based on a judicial finding of fact that Bailey had "reasonably believed" that he had a right to make these threats to collect $10,000?

<u>Authorities</u>

Jacobellis v. Ohio, 378 U.S. 184 (1964)
United States v. Coss, 677 F.3d 278 (6th Cir. 2012)
United States v. Didonna, 866 F.3d 40 (1st Cir. 2017)
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White v. Citizens Nat. Bank of Boone, 262 N.W.2d 812
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Iowa Code § 4.6(4)
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Iowa Code § 711.4(3)
Iowa Code § 720.1 (1977)
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Kermit L. Dunahoo, *The New Iowa Criminal Code*,
29 Drake L. Rev. 237 (1979–80)
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84 Colum. L. Rev. 670 (1984)

ROUTING STATEMENT

This appeal involves an issue of first impression: whether it is extortion to demand a sum of money (chosen out of thin air), and to threaten to report commission of a crime to prosecutors unless that demand is met. *See* Iowa Code §§ 711.4(1)(b) & (3). Thus, retention is appropriate. *See* Iowa R. App. P. 6.1101(2)(c) & (f).

It is also possible to resolve this appeal by applying established legal principles on motions to dismiss. The district court dismissed the trial information because it weighed the evidence in the minutes of testimony and made a finding of fact that Bailey had "a reasonable belief that his communication was legitimate." *See* Ruling (6/27/22) at 6–7; App. 18–19. This Court could simply hold that the district court erred by going beyond the question of whether the State had charged a crime as a matter of law. *See State v. Doss*, 355 N.W.2d 874, 880 (Iowa 1984) ("A motion that merely challenges the sufficiency of the evidence supporting an indictment is not a ground for setting aside an indictment."). But the issue of first impression will resurface when the trial court decides whether to submit an instruction on a defense under section 711.4(3). This is an opportunity to provide guidance on whether the defense in section 711.4(3) could ever apply on these facts.

STATEMENT OF THE CASE

Nature of the Case

This is the State's appeal from a ruling that granted a motion to dismiss a trial information. The State charged Jerome Bailey, Sr. with extortion, a Class D felony, in violation of Iowa Code section 711.4(1)(b), (c), & (d) (2020). The minutes allege that Bailey told Teresa Coombs that he had learned that Coombs sent a sex offender to Bailey's house to serve him with a no-trespass notice (while Coombs waited nearby). Bailey told Coombs that she could be charged with a crime—and he threatened to ask Hancock County prosecutors to file those charges, unless she paid him "$10,000 non-negotiable" by "5pm tomorrow." *See* Attachment (10/27/21) at 5–6; C-App. 11–12. And he threatened that, if she did not pay up, "a copy of [her] criminal behavior will also be sent to [her] employer at First Choice Realty." *Id.* She did not pay. Instead, she went to the police. Bailey was charged with extortion.

Bailey moved to dismiss this charge. The district court granted the motion and dismissed the trial information, based on its finding that Bailey's threats "do not legally rise to the level of extortion as defined in Iowa Code § 711.4(1) and are subject to the defense set out in Iowa Code § 711.4(3)." *See* Ruling (6/27/22) at 6–8; App. 18–20.

The State appeals because there are two problems with that ruling. First, section 711.4(3) is flatly inapplicable here because Bailey made an extortionate demand for an arbitrary amount of cash. And his threats had no connection to any claim of right, so they were inherently wrongful and objectively unreasonable. Therefore, as a matter of law, section 711.4(3) *cannot* apply here. Second, even if these were threats that *could* potentially fall within section 711.4(3), there would still be a fact question of whether Bailey "reasonably believed that he had a right to make such threats" and whether he had "a good faith claim" to the $10,000 that he was demanding. The district court erred by resolving those disputed factual issues against the State in its ruling on the motion to dismiss, instead of simply determining whether the facts alleged in the minutes were legally sufficient to charge a crime.

Statement of Facts

Some time ago, Bailey lived in a rental property in Forest City that Coombs managed. Bailey also did some odd jobs for Coombs. *See* Attachment (10/27/21) at 2; C-App. 8. Bailey caused plumbing issues by pouring grease down the sink in his apartment. Coombs informed Bailey that he would need to pay for the repairs. Bailey responded by filing a civil rights complaint against Coombs and her employer. *See*

id. Coombs and her employer decided to settle, "[i]nstead of losing a lot more money in attorney fees and the headache involved." *See id.* They gave Bailey "[two] months free rent and [his] deposit back" in exchange for Bailey dropping the complaint. *See id.*

Bailey had also told Coombs that he would file a civil rights complaint because she stopped using him for odd jobs. Bailey was confronting people who worked for Coombs at their job sites and "taking videos of them working." *See id.*

Coombs chose not to offer to renew Bailey's lease "due to the problems he was causing." *See id.* Coombs asked the Forest City PD "to send officers to stand by at the residence" when she did her final walkthrough of the apartment that Bailey had leased, "because of the intimidation tactics" that Bailey had been using towards her. *See id.* As Coombs did her walkthrough, Bailey "stayed outside and yelled at the officers." *See id.* Police advised Coombs that she could "notify [Bailey] with a letter that he cannot be on any of her properties." *Id.*

In April 2020, Coombs delivered that letter to Bailey with the help of "another guy that did some odd jobs for her, Zachary Vulich." *See id.* at 2–3; C-App. 8–9. Coombs and Vulich drove around until they spotted Bailey's vehicles, parked at his new residence. Vulich

went to Bailey's door and personally handed the notice to Bailey. Then, Vulich and Coombs left. *See id.*

Bailey contacted the Hancock County Attorney's Office and reported that Vulich falsely identified himself as a law enforcement officer. Vulich had apparently recorded a video of the interaction, which the Hancock County Attorney reviewed. There was no audio. The Hancock County Attorney declined to charge Vulich or Coombs. *See id.* at 54–56; C-App. 60–62; *accord id.* at 3; C-App. 9.

On August 9, 2020, Bailey sent this e-mail to Coombs:

> . . . I first want to thank you for doing the right thing in compensating us for our recent complaints with Iowa Civil Rights. . . .
>
> It is because you did the right thing in our last complaint, that I'm giving you the opportunity to do what is right in this current complaint before asking Hancock County Prosecutors to bring charges against you. Also a copy of your criminal behavior will also be sent to your employer at First Choice Realty, due to your conduct being a safety issue to the public. Also a complaint with Iowa Civil Rights & other agencies will be included & asked to assist in charges against both you & your husband & your LLC, as you share marital assets, if you fail to agree to these non negotiable terms. . . .
>
> . . . I was told that you were inside the vehicle with Z. Vulich when he showed up at our residence. Attachment evidence will show that Mr. Zachary Scott Vulich is a Tier 3 Sex Offender! . . . Attachment evidence will show that Iowa Code in regards to Sex Offenders requires them not to be within 200 to 300 feet of any Child Care Facilities! Attachment evidence will show that [Bailey's wife] is

> Licensed through the State of Iowa to provide ChildCare at our residence . . . effective 05/26/20, roughly 5 days before both you & Mr. Vulich dangerous visit to our home & facility. According to Iowa Law, Mr. Vulich is in violation of the terms of his Sex Registry Rules & Regs! . . . Since you are the reason Mr. Vulich was at our home & facility, you can also be charged!
>
> . . . My offer is $10,000 non negotiable! This settlement will cover not asking for charges to be brought against you by Hancock County Prosecutors! This settlement will also cover me not involving your employer at First Choice! This settlement will also cover no complaints to Civil Rights or any other agencies! This settlement covers you, your spouse, & LLC, and ends all complains both civil and criminal!
>
> You have only until 5pm tomorrow 08/10/20 to respond. No response will be an indication of No & I will proceed!

Id. at 5–6; C-App. 11–12 (paragraph breaks added). Bailey's e-mail said that his home became a licensed childcare residence on May 26, 2020. That appeared to be accurate. *See id.* at 51–52; C-App. 57–58; *id.* at 55; C-App. 61 (Bailey repeating that fact in a different e-mail). But Coombs and Vulich delivered the letter before that, in April 2020. And Bailey knew that. *See id.* at 5; C-App. 11 (stating that he contacted both the Hancock County Attorney's Office and the Forest City Police about this incident during April 2020); *accord id.* at 55; C-App. 61.

Bailey sent Coombs two more e-mails that night. *See id.* at 7–8; C-App. 13–14. The next morning, at 10:46 a.m. Coombs responded. She told Bailey that she considered his complaint "without merit" and

that it was "extortion," and she had shared it with Forest City police. *See id.* at 9; C-App. 15. Bailey responded to that e-mail at 11:37 a.m.:

> . . . Thanks for your response. I expect you to act as a karen in regards to your calling of police! . . . There will be no further communication as I got the response I needed.

Id. at 10; C-App. 136. About an hour later, Bailey e-mailed the chief of the Forest City Police Department and the Hancock County Attorney. *See id.* at 11, 49; C-App. 17, 55. In Bailey's e-mail to the Hancock County Attorney, he said:

> . . . I am requesting charges against Mr. Vulich for violation of his Sex Registry requirements, & Mrs. Coombs for not vetting a very dangerous child predator. . . Mrs. Coombs response to my settlement offer was not a response from someone who did not know who they were dealing with, she obviously knew he was a danger & did not care! . . . Please let me know what new excuse you come up with if you refuse again to charge this dangerous individual & his accomplice. . . .

Id. at 49; C-App. 55. That e-mail also repeated the same statement that Bailey's house was licensed as a childcare home "as of 05/26/20, roughly 5 days before [Vulich's] and Mrs. Coombs now illegal visit." But in the same e-mail, he recalled that his previous communications with that office—just *after* that incident—had occurred "[i]n April." *See id.*; *accord id.* at 54; C-App. 60 (Bailey stating that the date on which Vulich "showed" at his residence was "April 01, 2020").

The Hancock County Attorney declined to file charges against Vulich (or Coombs) because Bailey's residence was not a registered child development home or child care facility under section 237A.1(5). DHS confirmed that it was "what [they] call [n]on-registered with a child care assistance agreement." *See id.* at 57–58; C-App. 63–64. So it would not be an exclusion zone under section 692A.113(1)(d) or (e), even if the child care enrollment had been in effect in April 2020. And, again, it did not even exist until May 2020. *Id.* at 51–52; C-App. 57–58.

Course of Proceedings

The State charged Bailey with extortion. *See* Trial Information (10/27/21); App. 4–5. Counsel was appointed, then replaced twice. Then, the district court granted Bailey's request to represent himself, with appointed counsel in a standby role. *See* Ruling (3/8/22); App. 6–8. Bailey moved to dismiss the charge. He argued that it would have been extortion if he had "threatened to *falsely* accuse another of a public offense," but his conduct was lawful because he threatened to report "valid allegations." *See* Motion to Dismiss (3/31/22); App. 9–10. He asserted "[t]his is analogous to a store catching a shoplifter or a vandal and agreeing not to press charges if damages are paid." *See id.*

The State resisted. It noted that Bailey did not threaten to accuse Coombs of a crime that she had actually committed—"[t]he alleged crime was not a crime at all." *See* Resistance (4/12/22) at 1–2; App. 11–12. It also pointed out that Bailey's reading of section 711.4 adds words to the statute in contravention of its plain meaning—it does not include "any requirement that the threats [to report a crime] contain false information." *See id.* at 1; App. 11. And it noted that Bailey was also charged with extortion by two other alternative means: making a threat "to expose any person to hatred, contempt, or ridicule" under section 711.4(1)(c), and making a threat "to harm [any person's] credit or business or professional reputation" under section 711.4(1)(d). *See id.* at 2; App. 12.

At a hearing on the motion to dismiss, Bailey spoke at length about his unrelated allegations of official misconduct. *See* Transcript (5/3/22) 6:8–14:17. He described his e-mail demand for $10,000 as an "attempt to settle." *See id.* at 14:18–17:8; *id.* at 23:5–24:7. He also said it was not a threat at all. *See id.* at 24:8–22; *id.* at 30:19–31:3.

Bailey's standby counsel added this, on statutory interpretation:

> [T]his case is whether Mr. Bailey was threatening to accuse another of a public offense. The question is that only threatening a false accusation? I think the Court has to make that determination, because otherwise, essentially,

> anytime anyone said, hey, pay me back the money you owe me after you stole it from my house or I'm going to file a charge, would fall within the area of extortion or saying, you know, pay for the damage you did to my car when you intentionally keyed my car or I'm going to go file a criminal mischief charge. It would then make the person who was the victim of the crime the perpetrator of extortion.
>
> And there are two different readings of the Code. One would have that as a possibility and one would not. So in this case when the allegation is that Mr. Bailey was going to make a correct assertion to law enforcement . . . unless he received some type of remedy for his damages then is that within the contemplation of the extortion code.

Id. at 34:3–35:21. The State responded by pointing to its resistance, and by noting that it also charged Bailey under other alternative means of committing extortion. *Id.* at 42:9–25; Iowa Code § 711.4(1)(c) & (d).

In its ruling, the district court said there was a "sincere question" regarding "whether a layperson would be able to differentiate between a childcare facility and a childcare home without researching the Iowa Code." *See* Ruling (6/27/22) at 5; App. 17. It admitted that the State was right that the alternative of extortion defined in section 711.4(1)(b) does not require a threat to *falsely* accuse a person of a public offense. *See id.* at 5–6; App. 17–18. But the court found that section 711.4(3) was applicable and *had been proven*, based on its view of the facts:

> In this case, there are several facts which make Iowa Code § 711.4(3) applicable, ... In this case, these facts point to the defendant having a reasonable belief that his communication was legitimate.

> • The defendant did not at all attempt to conceal his identity.
>
> • The defendant referenced a past settlement with Teresa Coombs.
>
> • The parties had a history of landlord, tenant, employment, and civil rights disputes, as well as a prior settlement for those conflicts.
>
> • The parties were familiar with each other and had had conflictual communication in the past.
>
> • Zachary Vulich is a registered sex offender, and there is no dispute that Teresa Coombs brought him to the Bailey residence which was being utilized as a childcare home.
>
> • In response to the defendant's email, the Coombs responded, "I consider your current complaint also to be without merit."
>
> • The response also referenced the past settlement with the defendant.
>
> Given the review of the Minutes of Testimony and the relevant Iowa Code Sections, the Court concludes that the communications in this case do not legally rise to the level of extortion as defined in Iowa Code § 711.4(1) and are subject to the defense set out in Iowa Code § 711.4(3). . . . Communication between parties to a dispute may at times be forceful, intemperate, or demanding, but this is not always illegal. When a dispute is ongoing, individuals may reasonably believe that they have a right to make demands in order to recover property, receive compensation, or to recover a debt. When such a circumstance is present, there is an exception to the extortion statute.

Id. at 6–7; App. 18–19. Neither Bailey nor his counsel had mentioned or cited section 711.4(3) in any filing or in any argument at the hearing.

The State moved to reconsider. It provided additional authority to bolster its response to the argument that Bailey *did* actually make.

See Motion to Reconsider (7/8/22) at 1–2; App. 22–23. Then, it argued that the court should reconsider its ruling because "[t]he only relevant inquiry by the court" on a motion to dismiss under Rule 2.11(6)(a) is "whether the facts the State has alleged in the trial information and attached minutes charge a crime as a matter of law." *See id.* at 2; App. 23 (quoting *State v. Gonzalez*, 718 N.W.2d 304, 309 (Iowa 2006)). It argued that "the case should proceed to trial for the fact finder to determine if the State can prove all of the elements of the charge of extortion beyond a reasonable doubt." *Id.* at 2–4; App. 23–25. And it highlighted facts that tended to negate or counter any inference that Bailey had any reasonable belief that he was entitled to that $10,000 as a "debt to which [he] has a good faith claim." *See id.* at 2–4 & n.2.

Bailey resisted that motion. His typed filing recharacterized his e-mail as a threat to sue for money damages on various tort theories. *See* Resistance (7/25/22) at 1–2; App. 27–28.[1] His handwritten filing did not mention tort theories. It said that Coombs committed a crime, and that prosecutors violated their ethical duties by not charging her. *See* Resistance (7/11/22); App. 26.

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[1] That typed filing was "[w]ritten by standby counsel . . . at the direction of [Bailey]." *See id.* at 4 n.2; App. 30.

The district court denied the State's motion to reconsider. It noted that the State's resistance had "squarely rested on the issue of statutory interpretation." *See* Ruling (8/31/22) at 1; App. 32. It said that its ruling "thus focused on statutory interpretation of Iowa Code § 711.4, the issue posed by the parties." *See id.* at 2; App. 33. It did not address or defend the parts of its ruling that made findings of fact. It also declined to consider the State's arguments on the applicability of section 711.4(3), which was mentioned for the first time in its ruling. Instead, it chided the State for making arguments that were "not made of record prior to or at the hearing on the motion to dismiss." *See id.*

The State timely appealed from that ruling. *See* Notice of Appeal (9/2/22); App. 35–37; Iowa R. App. P. 6.101(1)(c); *see also* Iowa Code § 814.5(1)(a). Additional facts will be discussed when relevant.

ARGUMENT

I. The district court erred in granting the motion to dismiss the trial information.

Preservation of Error

Error was preserved when the district court granted dismissal over the State's resistance and denied the State's motion to reconsider. *See* Resistance (4/12/22); App. 11–12; Ruling (6/27/22); App. 13–21; Motion (7/8/22); App. 22–25; Ruling (8/31/22); App. 32–34. The State argued that section 711.4(3) could not apply to this conduct, and that even if it *could*, it should go to trial before a finder of fact. *See* Motion (7/8/22) at 2–4; App. 23–25. The district court overruled that motion. *See* Ruling (8/31/22); App. 32–34. That ruling preserved error. *See, e.g.*, *Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741, 751 & n.4 (Iowa 2006) (noting that district court did not address the specific issue raised in the motion to reconsider, but determining that "the issue was still adequately preserved for review on appeal" because the motion had "sufficiently alerted the district court" to the issue, and the court had specifically refused to rule on that issue); *Madden v. City of Eldridge*, 661 N.W.2d 134, 137–38 (Iowa 2003) (determining that "[t]he city's 1.904(2) motion was sufficient to preserve error" because it sought a ruling and the court had "refused to rule on the merits of the issue").

Standard of Review

Review of a ruling that grants a motion to dismiss is for correction of errors at law. *See Gonzalez*, 718 N.W.2d at 307. So is review of a ruling on questions of statutory interpretation. *See id.*

Merits

There are two problems with the trial court's ruling that granted Bailey's motion to dismiss. First, section 711.4(3) is flatly inapplicable because Bailey could not have an objectively reasonable belief that he had a right to make this demand and these threats "to recover a debt." As a matter of law, section 711.4(3) does not apply to a demand for an arbitrary amount of cash, and a threat to accuse someone of a crime and notify their employer unless that sum is paid. Second, even if his threats could potentially fall within section 711.4(3), there would still be a fact question of whether Bailey "reasonably believed that he had a right to make such threats" and whether he had "a good faith claim" that he was entitled to $10,000. The district court erred by resolving those disputed factual issues against the State in its ruling on Bailey's motion to dismiss, instead of simply determining whether the facts as alleged in the minutes were legally sufficient to charge a crime. *See, e.g.*, *Doss*, 355 N.W.2d at 880. Each of those is a reason to reverse.

A. The defense in section 711.4(3) cannot apply here because Bailey's threats were purely extortionate. Even if Bailey believed that he had a right to make these threats to demand $10,000 from Coombs, that belief would be objectively unreasonable.

Section 711.4(3) says: "It is a defense to a charge of extortion that the person making a threat . . . reasonably believed that the person had a right to make such threats in order to recover property, or to receive compensation for property or services, or to recover a debt to which the person has a good faith claim." *See* Iowa Code § 711.4(3). This statutory defense "removes typical settlement demands and litigation threats from the ambit of the extortion statute" because pursuing a settlement on a claim that would entitle the person to relief qualifies as taking action to recover a debt. *See Iowa Supreme Ct. Att'y Disciplinary Br. v. Stowers*, 823 N.W.2d 1, 12, 14 (Iowa 2012).

But Bailey could not have a *reasonable* belief that he had a claim that could entitle him to recover $10,000, nor a *reasonable* belief that he had a right to make these threats to settle a claim for that amount. This was an arbitrary sum of hush money, without any connection to the conduct that Bailey was threatening to report and publicize, and without any connection to any plausible claim to $10,000. As such, his demand and threats were purely extortionate, and thus unreasonable.

The legislature could have omitted any objective reasonableness requirement in section 711.4(3) by omitting the word "reasonably" and simply stating that it would be a defense to extortion if the defendant "believed that the person had a right to make such threats" for one of the listed permissible purposes. But it did not do that—it required that the subjective belief must be reasonable, before the defense can apply. The deliberate choice to limit the applicability of the defense by adding that language must be given effect. *See Bribriesco-Ledger v. Klipsch*, 957 N.W.2d 646, 650–51 (Iowa 2021) ("We interpret every word and every provision of a statute to give it effect, if possible."). Any reading that ignores that limitation on the applicability of this defense would convert the term "reasonably" to surplusage and should be rejected.

Stowers did not say much on this subject because it was clear, from the facts, that Stowers did not subjectively believe that he was pursuing settlement of a claim of right. *See Stowers*, 823 N.W.2d at 14–15. In a footnote, *Stowers* noted that the ABA model rules "do not prevent a lawyer from presenting or threatening criminal charges to settle a case provided that the criminal charge is related to the civil matter, the lawyer has a reasonable belief both the civil claim and criminal charges are justified, and such an agreement itself is not a

violation of the law." *See id.* at 14 n.4. This already requires some objectively valid basis for connection between the threatened charge, the demand, and the purported claim of right to compensation. But that footnote was dicta, because it was apparent that Stowers did not *subjectively* believe that he had a good faith claim to recover a debt from his lapsed (and never mentioned) lack-of-consortium claim. The opinion in *Stowers* did not have to decide whether it would have been *objectively* reasonable for him to believe that he had a right to threaten to "subject R.T. to public ridicule and harm his professional reputation," if he had subjectively believed that he was trying to settle a valid claim for lack of consortium. *See id.* at 13–15. So *Stowers* is not very helpful in interpreting the term "*reasonably* believed" in section 711.4(3).

A similar term is used in section 704.3: "A person is justified in the use of reasonable force when the person *reasonably believes* that such force is necessary to defend oneself or another from any actual or imminent use of unlawful force." *See* Iowa Code § 704.3 (emphasis added). Iowa courts have construed that term to mean that "the test of justification is both subjective and objective. The actor must actually believe that he is in danger and that belief must be a reasonable one." *See State v. Frei*, 831 N.W.2d 70, 74 (Iowa 2013) (quoting *State v.*

Elam, 328 N.W.2d 314, 317 (Iowa 1982)). The legislature used the same term in section 711.4(3), and it means the same thing: having a subjective belief in a right to make a particular threat is not a defense to extortion if that belief is not also objectively reasonable.

Before the 1978 revisions to the criminal code, the crime of extortion used to require that a threat must be made "maliciously"—which meant that a threat must be "a wrongful act done intentionally, without just cause or excuse." *See State v. Debolt*, 73 N.W. 499, 499 (Iowa 1897) (citing Iowa Code § 3871 (1873)); *see also* Iowa Code § 720.1 (1977). The commission of a crime did not supply "just cause or excuse" for threats to report those crimes if the person did not pay up:

> Nothing in this statute makes it necessary, in order to constitute the offense defined, that the person threatened shall be innocent of the crime of which he is threatened to be accused. . . . [The defendants argue] that it is the duty of every citizen to accuse the perpetrators of a crime, before the proper tribunal, and that to declare an intention to do an act which it is the duty of the declarant to perform cannot be a crime. All that may be conceded without admitting that the indictment is defective in the respect claimed. The crime for which the statute provides is not the declaration by a person of an intent to bring an offender against the law to justice, but the malicious threatening to accuse a person of a crime or offense, "with intent thereby to extort any money or pecuniary advantage whatever." Whether the person against whom the threat is directed be guilty or innocent of the crime or offense specified in the threat is wholly immaterial to the commission of the crime by the making of the threat.

Debolt, 73 N.W. at 499 (citing *State v. Waite*, 70 N.W. 596, 597 (Iowa 1897)); *accord State v. Browning*, 133 N.W. 330, 333 (Iowa 1911) ("[I]t is apparent that one may be guilty under this section although he had the lawful right to arrest, or the duty perhaps of accusing another of a crime. It is misuse of these powers for malicious purposes and with intent to extort money which is aimed at"). Thus, a defendant's belief that the victim committed a crime did not change the fact that it was malicious—or inherently "wrongful"—to threaten to report that crime unless the victim paid a sum of money. *See* Iowa Code § 4.6(4) (noting that a court may interpret a statute by considering "former statutory provisions, including laws upon the same or similar subjects").

That requirement of "malice" is not present in section 711.4. In its place, the legislature added the defense in section 711.4(3). But the addition of that defense was not meant to overrule those prior cases.

> [T]he truth of the extortionist's claim or allegation is immaterial. For example, the crime of Extortion may be committed by a person who unlawfully threatens to accuse another of a public offense, even though the threatened party is guilty of the public offense. The threatened party's guilt is wholly immaterial to the crime.

Kermit L. Dunahoo, *The New Iowa Criminal Code*, 29 DRAKE L. REV. 237, 398–99 (1979–80). And Dunahoo explained this new defense in a way that gave full effect to the use of the term "reasonably believed":

> [T]he reasonableness of the defendant's belief is to be determined at the time of the threat. . . . It is sufficient if the defendant believed he had a right to make the threat *and* such belief would be so viewed by a reasonable person in the same light.

See id. at 400 (emphasis added). So in situations where it would be objectively reasonable to believe that there is a right to make a threat or demand for those specified purposes, section 711.4(3) could apply. But if it is objectively unreasonable to believe in a right to make that particular threat or demand to collect on a specified claim of right (or if it is objectively unreasonable to believe in any claim of right *at all*), then section 711.4(3) cannot be a defense to a charge of extortion.

When is such a belief objectively unreasonable? At a minimum, that would include threats and demands that would be deemed made "maliciously" under the predecessor statute—threats or demands that are inherently "wrongful" and are made "without just cause or excuse." *See Debolt*, 73 N.W. at 499. Those are the threats and demands that are inherently wrongful, purely extortionate, and objectively unreasonable as a matter of law—where any reasonable person would identify them as extortion. A fact-finder can apply its judgment and common sense in a close case, but Iowa courts would benefit from guidance on how to determine when the facts *foreclose* submission of such a defense.

The best approach looks at the connection between the threat, the demand, and the purported claim of right (or the lack of any such connection). When there is a real connection between the threat, the demand, and the claim of right, then it is possible for a person to have a reasonable belief in a right to make those threats. But without one, any threats become inherently wrongful and objectively unreasonable.

Section 711.4(3) enables a shopkeeper to threaten a shoplifter with theft charges, unless the shoplifter returns what they stole. *See* Iowa Code § 711.4(3) (permitting threats made "to recover property . . . to which the person has a good faith claim"). It enables a merchant or service provider to threaten a non-paying customer with theft charges under section 714.1(3), unless the customer pays what they owe. *See id.* (same defense, for threats made "to receive compensation for property or services"). And it enables a secured creditor to threaten a debtor with theft charges under section 714.1(5), if the debtor interferes with lawful efforts to execute on that secured interest and take possession. *See id.* (same defense, for threats made "to recover a debt"). However, even in those situations, the defense is only available to a person who had a reasonable belief that they "had a right to make *such threats*" to achieve their specifically enumerated objective. *Id.* (emphasis added).

The connection between the threat, the demand, and a claim of right in good faith is what makes it *reasonable* for the person to believe that they have a right to make those particular threats, for that purpose.

But section 711.4(3) would not permit any of those claimholders to back up legitimate demands by threatening to tell prosecutors about the commission of an unrelated crime, or by threatening to go public with evidence of a marital infidelity or sexual indiscretion. Why not? Because those would be purely extortionate threats, unconnected to the claim of right. So the claim of right cannot give the claimholder a right to make those threats. They are textbook extortion, so any belief in a right to make those threats is objectively unreasonable.

> [A]ssume that a woman threatens to reveal that a company is criminally polluting the air by secretly using a smokestack that is not properly equipped with pollution control devices. As a property owner who has suffered damage from the pollution, she possesses a small but legitimate claim against the company. If she threatens to report the polluter unless it turns itself in to the proper authorities, no blackmail has been committed. There is a perfect congruence between the advantage sought (the exposure and cessation of pollution) and the leverage used (the state's claim against the polluter). At the other end of the scale, if she asks for $1,000,000 to keep quiet about the pollution but seeks nothing for the public's benefit, the behavior is clearly blackmail. There is an almost total disjunction between the advantage sought and the leverage used. Any damages that she might be able to legitimately claim for the harm the pollution causes her are not likely to approach $1,000,000.

James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 714–15 (1984); *accord United States v. Coss*, 677 F.3d 278, 286–87 (6th Cir. 2012) (adopting a reading of 18 U.S.C. § 875(d) that "criminalized only *wrongful* threats," so that extortion does not occur where there is "a nexus between the threat and a claim of right").

Section 711.4(3) can be raised and may have merit as a defense in "borderline" cases where there is an arguable or tenuous connection between the threat, the demand, and the claim of right. *See* Lindgren, 84 COLUM. L. REV. at 713–16. In those borderline cases, there could be a jury question as to whether the defendant subjectively believed that they had a right to make those threats to enforce their claim of right, and whether it was objectively reasonable to believe in a right to make those threats. So it would be proper to instruct the jury on a defense under section 711.4(3) in those cases. The jurors would have to decide whether the asserted belief was reasonable, under the circumstances (and whether the defendant actually held that belief, at the time). But if there is no real connection between the threat, the demand, and the claim of right (whether or not it is valid), a trial court should refuse to instruct the jury on the affirmative defense under section 711.4(3). *See, e.g.*, *State v. Bynum*, 937 N.W.2d 319, 327–29 (Iowa 2020).

The Second Circuit adopted this kind of approach in *Jackson*, after holding that wrongfulness was an implied element of extortion under 18 U.S.C. section 875(d). It explained why that wrongfulness element was proven by establishing a lack of connection between the threat, the demand, and any alleged claim of right:

> We . . . view as inherently wrongful the type of threat to reputation that has no nexus to a claim of right. There are significant differences between, on the one hand, threatened disclosures of such matters as consumer complaints and nonpayment of dues, as to which the threatener has a plausible claim of right, and, on the other hand, threatened disclosures of such matters as sexual indiscretions that have no nexus with any plausible claim of right. In the former category of threats, the disclosures themselves—not only the threats—have the potential for causing payment of the money demanded; in the latter category, it is only the threat that has that potential, and actual disclosure would frustrate the prospect of payment. Thus, if the club posts a list of members with unpaid dues and its list is accurate, the dues generally will be paid; if the consumer lodges her complaint and is right, she is likely to receive her refund; and both matters are thereby concluded. In contrast, if a threatener having no claim of right discloses the victim's secret, regardless of whether her information is correct she normally gets nothing from the target of her threats. And if the victim makes the demanded payment, thereby avoiding disclosure, there is nothing to prevent the threatener from repeatedly demanding money even after prior demands have been fully met.
>
> Where there is no plausible claim of right and the only leverage to force the payment of money resides in the threat, where actual disclosure would be counterproductive, and where compliance with the threatener's demands provides no assurance against additional demands based on renewed threats of disclosure, we regard a threat to reputation as

> inherently wrongful. We conclude that where a threat of harm to a person's reputation seeks money or property to which the threatener does not have, and cannot reasonably believe she has, a claim of right, or where the threat has no nexus to a plausible claim of right, the threat is inherently wrongful and its transmission in interstate commerce is prohibited by [18 U.S.C.] § 875(d).

United States v. Jackson, 180 F.3d 55, 70–71 (2d Cir. 1999). The Sixth Circuit examined *Jackson* and was "convinced of the virtue of the Second Circuit's reasoning," so it adopted the same approach. *See Coss*, 677 F.3d at 286. The Fourth Circuit agreed those two opinions were "persuasively reasoned," and it followed suit. *See United States v. White*, 810 F.3d 212, 223–25 (4th Cir. 2016).

An advantage of this approach is that it aligns well with intuitive understandings about which threats and demands are pure extortion, which are not extortion, and which may qualify as extortion depending on a fact-finder's view of reasonableness under the circumstances (and its view of whether the purported reasonable belief was sincerely held). *See State v. Pauling*, 69 P.3d 331, 332–37 (Wash. 2003) (holding that any threat and demand with a "lack of nexus" to alleged claim of right is "inherently wrongful," and so the defendant committed extortion by "threatening to disseminate . . . nude photos of a former girlfriend to collect a valid $5,000 small claims court judgment" which she owed)

cf. United States v. Hobgood, 868 F.3d 744, 747–48 (8th Cir. 2017) ("Assuming that the statute includes this element, Hobgood's threats were 'wrongful' in the sense that they had no causal nexus to a claim of right. His threats to disseminate information that KB was an exotic dancer and prostitute were not related to why he thought she owed him an apology."). This approach provides an analytical framework for the defense under section 711.4(3) that aligns with common law and common sense, without resorting to "I know it when I see it." *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

For the rest of Division I.A, the State will assume, for the sake of argument, that Bailey *actually believed* that he had a claim to $10,000 and that he had a right to make these threats to collect that $10,000. Even if that were true (and even if established as a matter of law), the affirmative defense in section 711.4(3) would still be inapplicable as a matter of law because of the lack of a connection between the threat, the demand, and Bailey's asserted claim of right. Bailey threatened to report Coombs's participation in abetting a sex-offender violation to prosecutors and to her employer "due to [her] conduct being a safety issue to the public." *See* Attachment (10/27/21) at 5; C-App. 11. But he demanded that Coombs pay *him* $10,000. *Id.* at 5–6; C-App. 11–12.

Paying $10,000 to Bailey would do nothing to protect the public (or Coombs's employer). To the contrary, Bailey demanded $10,000 in exchange for *concealing* the act that allegedly endangered the public. Bailey tried to bargain away that alleged public safety interest for an arbitrary sum of hush money. *See* Lindgren, 84 COLUM. L. REV. at 702 (explaining that "when a [defendant] threatens to turn in a criminal unless paid money," that is typically extortion because the defendant "is bargaining with the state's chip" and the victim "pays to avoid the harm that the state would inflict"); *accord Browning*, 133 N.W. at 333; *Debolt*, 73 N.W. at 499. Any argument that Bailey reasonably believed that he was pursuing a settlement would be fatally undermined by the fact that Bailey lacked any authority to "settle" any criminal charges. If Coombs paid $10,000 to Bailey, that would not stop any prosecutor from filing charges against Coombs, if they decided it was warranted. Nor would it have stopped Bailey from demanding *more* hush money, if he thought Coombs would pay up *again* to buy his continued silence. That illustrates the "total disjunction between the advantage sought and the leverage used." *See* Lindgren, 84 COLUM. L. REV. at 714–15. The lack of any real connection between Bailey's threats, his demand, and his alleged claim of right made his threats inherently wrongful, to

the point where no reasonable person could have believed that he had a right to make them—which means section 711.4(3) cannot apply.

In theory, if there had been some reasonable basis for a belief that Bailey could receive $10,000 or more in restitution as a result of a criminal prosecution, this might be a borderline case. *See* Lindgren, 84 COLUM. L. REV. at 702 & n.166 (noting potential for borderline case if defendant "also has a personal stake in restitution" for the offense). But it was immediately obvious that no property had been damaged and no costs were incurred as a result of this alleged crime. Bailey's asserted claim of right was based solely on his recent discovery that Vulich was a registered sex offender. All that meant (in Bailey's view) was that it was possible to charge Vulich and Coombs with a crime. *See* Attachment (10/27/21) at 8; C-App. 14. But Bailey had not even *noticed* that crime, for months—it had no effect. No reasonable person would think that they would be entitled to $10,000 in restitution or civil damages, even if they believed that Coombs committed a crime. So this alleged claim of right could not make it objectively reasonable for Bailey to believe in a right to make this demand or those threats.

The California Court of Appeals held similar threats were acts of "criminal extortion as a matter of law" for anti-SLAPP purposes:

> Hamzeh threatened to report Mendoza "to the California Attorney General, the Los Angeles District Attorney, the Internal Revenue Service regarding tax fraud, [and] the Better Business Bureau," and to disclose the alleged wrongdoing to Mendoza's customers and vendors if Mendoza did not pay "damages exceeding $75,000." Regardless of whether Mendoza committed any crime or wrongdoing or owed Chow money, Hamzeh's threat to report criminal conduct to enforcement agencies and to Mendoza's customers and vendors, *coupled with a demand for money*, constitutes "criminal extortion as a matter of law," . . .

Mendoza v. Hamzeh, 215 Cal. App. 4th 799, 806, 155 Cal. Rptr. 3d 832, 836 (2013) (last excerpt quoting *Flatley v. Mauro*, 139 P.3d 2 (Cal. 2006)). If a person threatens to report a crime unless they receive a cash payment in an arbitrary, unrelated amount, that is pure extortion and it is *per se* unreasonable. *See id.*; *Flatley*, at 139 P.3d at 21–24.

Section 711.4(3) produces the same result. Even if a person truly believes he has a right to make this kind of purely extortionate threat for an arbitrary sum of cash, such a belief is always unreasonable—so it is never a defense to a charge of extortion. *See* Iowa Code § 711.4(3). It is always unreasonable because there is a lack of any real connection between the threats, the demand, and their purported claim of right. *See Jackson*, 180 F.3d at 70–71; *Coss*, 677 F.3d at 286–87; Lindgren, 84 COLUM. L. REV. at 714–15. Thus, the district court erred in holding that section 711.4(3) could apply at all, under these circumstances.

B. At best, there would be a disputed fact issue on whether Bailey truly believed he had a right to make these threats to demand $10,000, and the defense could be submitted to a jury. But it would still be error to dismiss the trial information.

The district court's ruling lists a series of facts that, in its view, supported a conclusion that Bailey subjectively believed that he had a right to make these threats to demand $10,000. *See* Ruling (6/27/22) at 6–7; App. 18–19. The biggest problem is that this is a factual question that should be resolved by a finder-of-fact on the evidence presented at trial—it does not undermine the legal sufficiency of the charge.

There are other problems worth noting, too. First, none of those facts establish that it was *objectively* reasonable for a person to think that they had a right to threaten to report a crime to prosecutors and to a victim's employer, if the victim does not pay hush money. Even in a borderline case, this would be a question for the jury to resolve. *See, e.g.*, *State v. Ross*, 573 N.W.2d 906, 912–13 (Iowa 1998) (approving a jury instruction for this defense to extortion that could not be proven without a finding that "a reasonable person under the circumstances would believe they had a right to make the threat"). Second, none of the cited facts show that Bailey reasonably (or unreasonably) believed that he had a real claim to $10,000 in potential damages or restitution.

The lack of any connection between the facts that Bailey asserted and the amount that he demanded is a fatal flaw in this defense—if he did not reasonably believe that he had a good-faith claim to $10,000, then he could not reasonably believe he had a right to make these threats contingent upon a demand for $10,000. But the district court's order does not even mention the amount of money that Bailey demanded. *See* Ruling (6/27/22) at 6–7; App. 18–19. At a minimum, that fact would be enough to support a verdict that rejects the claim-of-right defense.

Third, it is obvious from these facts that Bailey did not even *subjectively* believe that Vulich and Coombs committed a crime—or that if he did, that belief was not objectively reasonable given the facts that Bailey already knew. The district court mused that "the difference between a childcare facility and a childcare home . . . may not be evident to a layperson. *See id.* at 7; App. 19. Maybe so. But Bailey knew that his residence was *neither* of those things until May 26, 2020—which was *after* Vulich served the no-trespass notice on April 1, 2020. *See* Attachment (10/27/20) at 51–52; C-App. 57–58 (listing effective date as 05/26/2020). Bailey knew that Vulich served the notice on April 1, and he knew that his communications with prosecutors about charging Vulich with impersonating a law enforcement officer were also in April.

See id. at 5; C-App. 11; *id.* at 8; C-App. 14; *id.* at 12; C-App. 18; *id.* at 14; C-App. 20; *id.* at 49; C-App. 55; *id.* at 54; C-App. 60. But when he discussed the childcare assistance payments that (in his view) made it a crime for Vulich to deliver the notice, he repeatedly stated that their childcare designation was "effective 05/26/20, roughly 5 days before both [Coombs] and Mr. Vulich dangerous visit." *See id.* at 5; C-App. 11; *accord id.* at 49; C-App. 55 (attaching printout and claiming that it would establish that his home was also a daycare "as of 05/26/20, roughly 5 days before [Vulich's] and Mrs. Coombs now illegal visit"). So even under Bailey's view of the law, his claim depended on May 26 preceding April 1. There is no way that he actually believed that. And even if he did, that belief would never be objectively reasonable.

But the biggest problem with the district court's order is that, if nothing else, it resolved a factual issue on the sufficiency of evidence to disprove a defense under section 711.4(3)—which is not something that a district court may do in ruling on a motion to dismiss a charge. *See* Motion to Reconsider (7/8/22) at 2–4; App. 23–25. "A motion that merely challenges the sufficiency of the evidence supporting [a trial information] is not a ground for setting [it] aside." *Doss*, 355 N.W.2d at 880 (citing *State v. Graham*, 291 N.W.2d 345, 349 (Iowa 1980)).

This is even worse than an ordinary motion to dismiss that alleges an insufficiency of evidence to support an element of a charge—instead, this pertains to a defense, which the State had no burden to disprove at the charging stage. *See, e.g.*, *State v. Delay*, 320 N.W.2d 831, 834 (Iowa 1982) (citing *State v. Moorhead*, 308 N.W.2d 60, 62–63 (Iowa 1981)) ("There is no burden on the State to negate an affirmative defense unless the defendant meets his initial burden by producing sufficient evidence that the defense applies.").

The trial information set out facts which, if accepted as true, support a reasonable conclusion that Bailey committed extortion as defined in section 711.4(1)(b), (c), and (d). The State did not need to disprove a defense under section 711.4(3) during a motion to dismiss. Rather, "the State is entitled to proceed with its case to prove these allegations beyond a reasonable doubt" at trial, and "failure of such proof will require the finder of fact to acquit." *See Gonzalez*, 718 N.W.2d at 309; *accord State v. Jackson Thomas*, No. 21–0795, 2022 WL 10827015, at *5 (Iowa Ct. App. Oct. 19, 2022).

Even if someone could make a convincing case that Bailey truly did believe that he had a right to threaten criminal prosecution and professional repercussions if Coombs did not pay him $10,000, that

case should be made to a finder of fact at trial. That finder of fact may choose to reject every statement that asserts such a claim of right as non-credible, under the circumstances. *See United States v. Didonna*, 866 F.3d 40, 47–48 (1st Cir. 2017) (finding evidence was sufficient to support conviction for extortion and noting that the jury "could have regarded [the defendant's] statements" that asserted a claim of right to sum of money that the victim owed to him "as self-serving attempts to gild his criminal act with a specious veneer of legitimacy").

Bailey's typed resistance to the motion to reconsider asserted that Bailey's e-mail tried to settle a tort claim about trespass against "quiet enjoyment" of his property. *See* Resistance (7/25/22) at 2; App. 28 (quoting *Cohen v. Hayden*, 163 N.W. 238, 239 (Iowa 1917)). But quiet enjoyment is something completely different. *See Duck Creek Tire Service, Inc. v. Goodyear Corners, L.C.*, 796 N.W.2d 886, 895 (Iowa 2011) (citing *Cohen*, 163 N.W. at 239). Bailey also argued that he could have sued Coombs for trespass that caused emotional distress. *See* Resistance (7/25/22) at 2; App. 28. But he never alleged that Vulich trespassed by coming to his door, handing him a notice, and leaving. He did not mention that in any of his e-mails—not when he told Coombs about the basis for his threats and his $10,000 demand

(which did not include a trespass claim), nor when he discussed how he previously accused Vulich of impersonating law enforcement (but not trespassing). *See* Attachment (10/27/21) at 5–8; C-App. 11–14; *id.* at 11–16; C-App. 17–22; *id.* at 53–56; C-App. 59–62. This is like *Stowers*, where the fact that Stowers "never mentioned any consortium claim in his email . . . or other contemporaneous communications" provided strong proof that Stowers "did not email R.T. to pursue settlement of a consortium claim" and could not rely on section 711.4(3). *See Stowers*, 823 N.W.2d at 14–15. Here, any finder of fact could consider similar omissions as strong proof that Bailey never subjectively believed that he had any tort claim that could support a right to demand $10,000.[2] The district court erred by prematurely resolving that issue of fact.

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[2] No lawyer would believe that Bailey could win damages, either. *See White v. Citizens Nat. Bank of Boone*, 262 N.W.2d 812, 817–18 (Iowa 1978) (discussing actual causation for compensatory damages for trespass, and noting that punitive damages for trespass require a heightened showing of "total disregard of the plaintiff's rights"); *cf. Amsden v. Grinnell Mut. Reinsurance Co.,* 203 N.W.2d 252, 255 (Iowa 1972) (listing the elements of prima facie claim of intentional infliction of emotional distress, including "[o]utrageous conduct by the defendant"); *Roalson v. Chaney*, 334 N.W.2d 754, 756–57 (Iowa 1983) (quoting *Restatement (Second) of Torts* § 46(1), comment d, at 72–73 (1965)) ("Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.").

The district court's order that granted the motion to dismiss was in error. It assumed that the State had the burden of disproving a defense under section 711.4(3) at that early stage—even when neither Bailey nor his counsel cited section 711.4(3) in any written filing or in any argument at the hearing on that motion. And it failed to recognize that a rational fact-finder could infer that Bailey did not really believe that he had any claim of right to $10,000, and that his true purpose was to use baseless threats to extort an arbitrary sum of hush money. It also failed to recognize that a belief in a right to make these threats would not be *per se* reasonable—at best, a finder of fact would be able to consider and reject a defense that such a belief would be reasonable, under the circumstances. And even that assumes that it would not be better to reject the belief as *unreasonable*, as a matter of law. *See Ross*, 573 N.W.2d at 913 ("[W]e have serious reservations that defendants charged with . . . extortion may ever advance alleged criminal conduct on the part of their victims as a defense to their extortion."); Lindgren, 84 COLUM. L. REV. at 702; *Debolt*, 73 N.W. at 499. The district court erred by granting Bailey's motion to dismiss the trial information, and this Court should correct the error by reversing that ruling and order.

CONCLUSION

The State respectfully requests that this Court vacate the district court's ruling that granted Bailey's motion to dismiss, and remand for further proceedings consistent with that order.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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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:

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