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 REPLY BRIEF

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RESPONSE TO APPELLEE'S ARGUMENT

I. At a minimum, the State has a right to trial. There is nothing in the minutes of testimony that would prove the applicability of this defense, as a matter of law.

Bailey argues that "the State has no right to trial" because the facts as alleged in the minutes of testimony do not disprove a defense under section 711.4(3). *See* Def's Br. at 20–22. But Bailey admits that section 711.4(3) contains an objective reasonableness requirement that limits the applicability of the defense. Bailey is correct that this defense only applies if he "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* Def's Br. at 13 (quoting Kermit L. Dunahoo, *The New Iowa Criminal Code*, 29 DRAKE L. REV. 237, 399–00 (1979–80)); State's Br. at 28–29. Bailey argues that the minutes of testimony did not carry the burden of disproving that defense, so he was entitled to dismissal of the charge.

Bailey is correct that, in some situations, a court can determine that an affirmative defense is established as a matter of law, from the facts alleged in the minutes of testimony. Bailey cites *State v. Jones*, where "the only issue" that determined the applicability of a defense under section 724.4(4)(f) was "whether a zippered gun container is a 'fastened' container as envisioned by the legislature." *State v. Jones*,

524 N.W.2d 172, 174 (Iowa 1994); Def's Br. at 20. Granting dismissal makes sense when a defense has that kind of cut-and-dry applicability, without any need for a fact-finder to decide between competing views of what actually happened, competing inferences about a defendant's knowledge/intent, or competing views on the objective reasonableness of a belief or course of action. But if the facts as alleged in the minutes would create a jury question on the applicability of the defense at trial, then dismissal is improper. *See, e.g.*, *State v. Hammes*, No. 22–0617, 2023 WL 387066, at *2 (Iowa Ct. App. Jan. 25, 2023) ("Whether the [slain] dog's conduct was encompassed within the statutory defense under section 351.27 is a question of fact that should have been left for consideration at trial after full development of the facts.").

That is why a motion to dismiss is "not a proper vehicle for the submission of affirmative defenses," except in limited situations where "the fact and nature of the affirmative defense 'affirmatively appear on the face of the complaint or petition.'" *See Lennette v. State*, No. 17–2019, 2018 WL 6120049, at *3 (Iowa Ct. App. Nov. 21, 2018) (quoting *Harrison v. Allied Mut. Cas. Co.*, 113 N.W.2d 701, 702 (Iowa 1962) and *Bickford v. Am. Interins. Exch.*, 224 N.W.2d 450, 454 (Iowa 1974)). So Bailey is incorrect when he says that the State must carry the burden of

disproving any defense under section 711.4(3) on a motion to dismiss. *See* Def's Br. at 21–22. The State will have that burden *at trial*. On this motion to dismiss, the question was whether Bailey carried *his* burden of showing "the matters stated do not constitute the offense charged" as a matter of law. *See* Iowa R. Crim. P. 2.11(8)(a). Bailey did not show that, *as a matter of law*, he subjectively believed that he had a right to threaten Coombs with criminal prosecution and public ridicule, unless she paid him $10,000. Indeed, even now, Bailey's appellate brief only asserts and defends a belief in a right to make a "settlement demand"—not any right to threaten to accuse Coombs of a criminal offense or to threaten to send the same accusations to Coombs's employer.

Bailey asserts a concern for civil litigators and laypeople who make ordinary settlement demands. He says "[t]he State is suggesting that it can take anyone who has ever made a settlement demand to trial, and that it is up to that person to testify that they believed that they had a good faith claim and sufficiently prove their defense." *See* Def's Br. at 21–23. Certainly not. An ordinary settlement demand has a nexus to a good-faith claim to property, compensation for property/services, or recovery of a debt. Most demand letters typically articulate the basis for believing that such a claim is reasonable. And settlement demands

rarely threaten a criminal prosecution or dissemination of information (which almost always precludes the existence of any nexus between the threat and the demand). *See* James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 714–15 (1984); *United States v. Jackson*, 180 F.3d 55, 70–71 (2d Cir. 1999). On a motion to dismiss a charge of extortion where the minutes of testimony allege an ordinary settlement demand, it is possible (and likely) that the defense set out in section 711.4(3) would be clearly established as a matter of law, in a way that would entitle the defendant to dismissal. But that should only occur where it is apparent on the face of the minutes that the defendant had a reasonable belief in a right to recover the amount demanded *and* to make each and every threat that accompanied the demand.

The minutes here do not show an ordinary settlement demand. Bailey never suggested that he thought that he may have a legal right to recover any money at all. He simply demanded that Coombs pay him $10,000 to purchase his silence. Neither Bailey nor the district court have identified any reason to think that Bailey subjectively believed that he had a right to threaten Coombs with accusations of criminal conduct (referred directly to prosecutors or to Coombs's employer) to back up that demand. Nor have they explained (or could they explain)

how a subjective belief in a right to make those particular threats could ever be objectively reasonable. *See* Ruling (6/27/22); Ruling (8/31/22).

Bailey challenges the State to refute the list of seven facts in the bulleted list in the district court's ruling. *See* Def's Br. at 21 (quoting Ruling (6/27/22) at 6–7); App. 18–19; *accord* State's Br. at 19. All of those statements are true. The problem is that none of them establish a defense to extortion. When Bailey sent the extortionate threats, he did not try to conceal his identity. He wanted Coombs to know who to pay. His history of conflict with Coombs and their previous settlement were reasons that he believed that she *would* pay, to make this just go away. Bailey leveraged that history with Coombs to make his threats credible. *Cf.* Minutes Attachment (10/27/21) at 10; C-App. 16 ("As you know, i fear nothing & noone."). And the arguable truth (not even actual truth) of allegations of criminal conduct is not a valid defense to extortion—"[t]he threatened party's guilt is wholly immaterial to the crime." *See* Dunahoo, 29 DRAKE L. REV. at 398–99; *accord Browning*, 133 N.W. at 333; *Debolt*, 73 N.W. at 499. As for Coombs's response, that is not especially probative of Bailey's subjective intent. It could be helpful in assessing the objective reasonableness of Bailey's belief in a right to make those threats in these circumstances. But her *actual* response

was to recognize his demand and threats as extortion, and to send his e-mails to law enforcement. *See* Attachment (10/27/21) at 9; C-App. 15. That fact is omitted from the district court's list of seven facts. So are all of the other facts and reasonable inferences that would tend to disprove a defense under section 711.4(3). The district court's role on a motion to dismiss is not to search for some (unargued) defense that could be raised and argued on the facts alleged in the minutes, then determine whether it believes or disbelieves that defense.

Bailey also says that "[t]he State's entire case is predicated on the fact that [he] made a factual error (misremembering the dates for the sex offender's visit and the designation of his home as a child care residence) and a legal error (confusing a child care home with a child care facility)." *See* Def's Br. at 17–18. Bailey is wrong on multiple levels. Remember, "[t]he threatened party's guilt is wholly immaterial to the crime." *See* Dunahoo, 29 DRAKE L. REV. at 398–99. *accord Browning*, 133 N.W. at 333; *Debolt*, 73 N.W. at 499. The legal error is irrelevant. The "factual error" matters, but not because Bailey "misremembered" anything—it matters because *he knew* that what he was saying about the order of events was false. He reminded Coombs: "Hancock County refused to prosecute you and [Vulich] at that time I requested *in April*."

See Att. (10/27/21) at 8 (emphasis added); C-App. 14. That preceded Coombs's response. Bailey also knew that his home was not licensed as a childcare home until May 26. *See id.* at 5; C-App. 11. So while his "non-negotiable" $10,000 demand was on the table, Bailey *knew* that it was impossible for Coombs to have committed whatever offense that he was threatening to tell prosecutors and her employer that she had committed. This is not a mere factual error—it is an admission that he knew that he had no claim to recover any debt in any amount, and no right to threaten *any* consequence if Coombs did not pay up.

If this were a verdict from a bench trial, then the district court—as finder of fact—would be entitled to weigh evidence and determine which inferences it believed were most reasonable. But in a ruling on a motion to dismiss, that is flatly improper. The issue before the court is whether the information and minutes of testimony allege an offense. What the district court should have done was recognize that the facts alleged in the minutes (at the very least) would support an inference that Bailey did not reasonably believe that he had a right to $10,000 or any right to make the particular threats that he made. Even if they might *also* support an alternative competing inference if viewed in a different light, that is not a valid reason to grant a motion to dismiss.

II. A belief in a right to make a threat and demand is objectively unreasonable when there is no nexus between the threat, demand, and claim of right.

The State's initial brief analyzed section 711.4 and leading cases and authorities on defenses to extortion. Bailey quotes the part of that analysis that recognizes *some* situations where it would be reasonable to believe in a right to pair a demand with a threat to accuse someone of criminal conduct: essentially, when the alleged offense deprived the rightful owner of money/property, the rightful owner may threaten to report the offense unless the offender returns the money/property or otherwise stops interfering with that claim of right. *See* Def's Br. at 14 (quoting State's Br. at 30). Bailey seems to approve of that. Bailey also does not criticize the notion that it would be objectively unreasonable for any rightful owner "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." *See* State's Br. at 31. He even seems to embrace the idea. He does not argue that the nexus requirement is a poor way to assess the objective reasonableness of a belief for purposes of section 711.4(3). Instead, he argues that the underlying facts of the cases that developed and adopted the nexus requirement "involve a combination of threats

to expose sexual images or unrelated embarrassing information in order to get payment on a debt or money with no injury"—and that the facts of his case are different. *See* Def's Br. at 17–18.[1]

This helps to illustrate how the nexus requirement is intuitive and analytically useful. Bailey does not argue that any of those cases were wrongly decided or that any threats made in those cases were not objectively wrongful or unreasonable (not even *Mendoza v. Hamzeh*). Nor should he. It is intuitive and obvious that those specific threats are wrongful and unreasonable, even when they accompany an otherwise valid demand. *See, e.g.*, *State v. Pauling*, 69 P.3d 331, 332–37 (Wash. 2003) (extortion committed by "threatening to disseminate . . . nude photos of a former girlfriend to collect a valid $5,000 . . . judgment" which she actually owed). The nexus requirement helps to put that intuitive grasp of wrongfulness and unreasonableness into words, so that it can be explained to lawyers and laypeople alike.

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[1] Of course, the facts in *Mendoza v. Hamzeh* are closely analogous. *See* State's Br. at 37–38 (quoting *Mendoza v. Hamzeh*, 215 Cal. App. 4th 799, 806, 155 Cal. Rptr. 3d 832, 836 (2013)). Bailey argues that *Mendoza* is "of almost no help to the court" because the California law does not contain a defense like section 711.4(3). *See* Def's Br. at 19–20. But it is still persuasive authority to show that other courts view threats like this as inherently wrongful. California courts have also rejected Bailey's suggestion that laws against extortion may be unconstitutional. *See generally Flatley v. Mauro*, 139 P.3d 2 (Cal. 2006).

Bailey argues that "the State has far too strict a standard for a 'reasonable' nexus." *See* Def's Br. at 18. But Bailey is proposing that there should be no reasonableness standard at all. His argument only goes to purported reasonableness of a belief that Coombs committed a crime and that he had "a valid cause of action against Coombs." *See* Def's Br. at 15–18. Of course, the State's nexus argument—that these threats were objectively unreasonable because they lacked a real nexus to that claim of right—already assumed that Bailey reasonably believed that Coombs committed a crime. *See* State's Br. at 35. Still, much like the district court, Bailey does not defend the objective reasonableness of the alleged belief that he had a right to make *these specific threats* in connection with his alleged claim. Even his argument that defends the $10,000 demand as non-arbitrary only says that it is impossible to forecast possible entitlement to non-economic or punitive damages. *See* Def's Br. at 18–19. Under Bailey's view, a demand for *any* amount would be non-extortionate, because who knows what a jury might do? And in Bailey's view, his belief that he may have a valid cause of action would make it reasonable to make *any* threat to back up that demand—so he does not need to identify how the specific threats that he made are reasonable (and the district court did not need to do that, either).

This illustrates why a nexus requirement is sorely needed, to give effect to section 711.4(3)'s deliberate choice to limit applicability of this defense to cases where a defendant "*reasonably* believed that the person had a right to make *such threats*." *See* Iowa Code § 711.4(3) (emphasis added). Bailey's argument thrives in the existing blind spot of Iowa precedent on this defense—in the absence of any guidance that distills the reasonableness requirement into words, a district court has no way to assess reasonableness other than "I know it when I see it." And district courts may incorrectly conclude (as this district court did) that section 711.4(3) does not require an *objectively reasonable* belief in a right to make the specific threats at issue. This Court should stop that from happening by adopting the nexus requirement as a baseline for objective reasonableness of a belief asserted under section 711.4(3).

The State's argument is not that all settlement demands must be supported by "perfect legal theories, both factually and legally." *See* Def's Br. at 18. They just have to be supported by a reasonable belief in the right to make both the demand and any accompanying threats. This is what section 711.4(3) requires, by its express terms. The nexus requirement from Lindgren, *Jackson*, *Goss*, and *White* provides a way to apply that, and to provide intelligible guidance to the bench and bar.

When the State calls Bailey's demand for $10,000 "arbitrary," what it means is that there is no nexus between the amount that Bailey chose to demand—a flat $10,000—and any reasonable claim of right. It is arbitrary and presumptively unreasonable because of the "total disjunction between the advantage sought and the leverage used." *See* Lindgren, 84 COLUM. L. REV. at 714–15. Did Bailey suffer $10,000 of damages in the two days between when he learned of Vulich's status as a sex offender and when he sent those demands? *See* Attachment (10/27/21) at 8; C-App. 14. No, clearly not. Did he expect to recover $10,000 in a tort claim? No—he did not mention any such claim, and no reasonable person could think that he would be entitled to $10,000 from Coombs in this scenario. *Cf. Iowa Supreme Ct. Att'y Disciplinary Br. v. Stowers*, 823 N.W.2d 1, 14 (Iowa 2012). He did not expect that, if his offer was refused, he would have a right to recover a debt of $10,000 through legal process. Instead, Bailey expected that he would be able to *retaliate* against Coombs if she refused his offer—and he hoped that would be enough to motivate her to pay up. Otherwise, no $10,000. So this is clearly a case where "there is no plausible claim of right and the only leverage to force the payment of money resides in the threat," and the threat is "inherently wrongful." *See Jackson*, 180 F.3d at 70–71.

Even if Bailey subjectively believed that he had a right to threaten to accuse Coombs of a crime (and to send that accusation to prosecutors and Coombs's employer) if she did not pay him $10,000, that belief was objectively unreasonable as a matter of law. Bailey has not shown that he was entitled to dismissal under a section 711.4(3)—this limited record does not even establish that he would be entitled to a jury instruction on that defense at trial (but that is moot, because the trial record will surely contain different/additional evidence). Bailey's demand and threats had no nexus with the alleged claim of right—or, in other words, no reasonable person would believe that identifying a crime that Coombs committed (even *correctly*) would entitle Bailey to demand $10,000 in hush money from Coombs, or that it would entitle Bailey to threaten to accuse Coombs of that crime if she refused to pay. Even if Bailey subjectively believed he had a right to make this demand and these threats, the defense in section 711.4(3) still would not apply. As such, the district court erred in dismissing this charge.

CONCLUSION

The district court erred in granting Bailey's motion to dismiss. This Court should reverse and remand for further proceedings.

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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Dated: August 24, 2023

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