IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 22-1440

STATE OF IOWA,
Plaintiff-Appellant

vs.

JEROME BAILEY,
Defendant-Appellee.

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

DEFENDANT-APPELLEE'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I e-filed the Defendant-Appellee's Final Brief with the Electronic Document Management System with the Appellate Court on the 7th day of September 2023.

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I hereby certify that on the 7th day of September 2023, I did serve the Defendant-Appellee's Final Brief on Appellee, listed below, by mailing one copy thereof to the following Defendant-Appellee:

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF ISSUES

I. The Court Correctly Dismissed the Trial Information, as Mr. Bailey Made a Reasonable Settlement Offer for a Wrong That Was Perpetrated Against Him.

ROUTING STATEMENT

This appeal should be retained by the Iowa Court of Appeals because it concerns the application of existing legal principles in accordance with Iowa R. App. P. 6.1101(3)(a). The court reviews a district court's grant of a motion to dismiss a charge in a trial information for the correction of errors at law. State v. Gonzalez, 718 N.W.2d 304, 307 (Iowa 2006) (citing State v. Johnson, 528 N.W.2d 638, 640 (Iowa 1995)).

CASE STATEMENT

The State charged Jerome Bailey with extortion in violation of Iowa Code §§ 711.4(1)(b), (c), & (d). The minutes alleged that Mr. Bailey sent an email to Teresa Coombs stating:

> I first want to thank you for doing the right thing in compensating us for our recent complaints with Iowa Civil Rights. Your attorney will be able to check to verify that our recent settlement covers any complaints that could have all been included before 03/20, end of March 2020. This current complaint that I bring to your attention today is both a criminal & a civil matter involving discrimination. 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.

Conf. App. 11. Mr. Bailey then detailed how his current apartment was a childcare facility, that Coombs had sent a registered sex offender to serve him with a no-trespass notice, and that Mr. Bailey considered that a crime against him and his family. He offered to settle the matter with Coombs, saying:

> My offer is $10,000 dollars 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 complaints both civil & criminal!

Conf. App. 11-12.

Mr. Bailey moved to dismiss the extortion charge. The district court granted the motion and dismissed the trial information, based on its finding that Bailey's email "[did] not legally rise to the level of extortion as defined in Iowa Code § 711.4(1) and [is] subject to the defense set out in Iowa Code § 711.4(3)." App. Pg 19-21.

FACTUAL BACKGROUND and COURSE OF PROCEEDINGS

Mr. Bailey once lived in a rental property in Forest City managed by Coombs. Conf. App. 8. The relationship broke down and Mr. Bailey filed a civil rights complaint against Coombs and her employer for racial discrimination. Conf. App. 8 Coombs and her employer ultimately settled the case with free rent in exchange for Mr. Bailey dismissing the complaint. Conf.

App. 8 Coombs decided not to renew Bailey's lease and decided to write a letter to Mr. Bailey to inform him that he could not be on any of the properties. Conf. App. 8

In April 2020, Coombs delivered that letter to Mr. Bailey with the help of Zachary Vulich. Conf. App. 8-9. Mr. Bailey was no longer staying at any of Coombs' residential properties, so Coombs and Vulich wandered around town until they found Mr. Bailey's vehicles at his new residence. Conf. App. 9 Vulich personally handed the notice to Bailey. Then, Vulich and Coombs left. Conf. App. 9 Mr. Bailey's minor son Emmanuel and his grandchildren were at his home at this time. Conf App 55 .

Mr. Bailey reported that Vulich falsely identified himself as a law enforcement officer. Vulich recorded a video of the interaction, but there was no audio, and ultimately law enforcement declined to charge Vulich or Coombs. Conf App 65-67 On August 9, 2020, Bailey sent the following 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. Your attorney will be able to check to verify that our recent settlement covers any complaints that could have all been included before 03/20, end of March 2020. This current complaint that I bring to your attention today is both a criminal & a civil matter involving discrimination. 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.

Conf App 11. Mr. Bailey then detailed how his current apartment was a child care facility. Alarmed that Coombs had sent a registered sex offender to serve him with a no-trespass notice, Mr. Bailey informed Coombs that he considered her actions to be a crime against him and his family. He offered to settle the matter with Coombs, saying:

> My offer is $10,000 dollars 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 complaints both civil & criminal!

Conf App 11. Mr. Bailey's home became a licensed childcare residence on May 26, 2020. Conf App 11 _Mr. Bailey initially believed that his home had become a child care facility prior to Coombs' and Vulich's visit, stating "Attachment evidence will show that Myeshia is Licensed through the State of Iowa to provide Childcare at our residence located 122 Wilson Way, Forest City, lowa,.50436, *effective 05/26/20, roughly 5 days before both you & Mr. Vulich dangerous visit to our home & facility*." Conf App 11 (emphasis added).

Mr. Bailey sent Coombs two more emails and Coombs responded, saying she considered his complaint "without merit" and that it was "extortion," and she shared it with Forest City police. Conf App 15 .

Mr. Bailey e-mailed the chief of the Forest City Police Department and the Hancock County Attorney. Conf App 17, 55. Mr. Bailey stated:

> I am requesting charges against Mr. Vulich for violation of his Sex Registry requirements, & Mrs. Coombs for not vetting a very dangerous child predator before having him fake law enforcement & endanger our home by showing at our residence, especially after she had already delivered the message earlier that day via email as you know! 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!

He also wrote:

> Please let me know what new excuse you come up with if you refuse again to charge this dangerous individual & his accomplice. My family does plan to fully cooperate with this matter! Please let me know if there is any additional information needed to move forward, or what my family needs to do for you to do your job! Thanks.

Conf App at 55 Id.

The Hancock County Attorney declined to file the charges that Mr. Bailey requested after DHS determined that Mr. Bailey's home was not a registered child development home or child care facility, but rather what DHS classified as non-registered with a child care assistance agreement. Conf App 62-63.

The State focused specifically on the difference between a "childcare facility" and a "childcare home," asserting that "[a]lthough the distinction appears minor, it is significant." App 13, In response, the Court wondered how

there could be any "sincere question" regarding "whether a layperson would be able to differentiate between a childcare facility and a childcare home without researching the Iowa Code." App 18.

The Court did not say that any defense had been proven, but found that based upon the facts alleged in the minutes of testimony, which the court was required to accept as true (see State v. Gonzalez, 718 N.W.2d 304, 307 (Iowa 2006), Iowa Code § 711.4(3) was applicable. This was based on the following facts:

- Mr. Bailey did not attempt to conceal his identity.
- Mr. Bailey 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 Teresa Coombs brought him to the Bailey residence which was being utilized as a childcare home.
- Coombs responded, "I consider your current complaint also to be without merit."
- Coombs' response also referenced the past settlement with the defendant.

The court reasoned further: "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." App 18-19 .

The State timely filed a Motion to Reconsider, which the court denied. App 22-23; App 32. The State timely appealed. App 35.

ISSUES

I. The Court Correctly Dismissed the Trial Information, as Mr. Bailey Made a Reasonable Settlement Offer for a Wrong That Was Perpetrated Against Him.

A. Error Preservation

Mr. Bailey agrees that the State has preserved error.

B. Standard of Review

The court reviews a district court's grant of a motion to dismiss a charge in a trial information for the correction of errors at law. State v. Gonzalez, 718 N.W.2d 304, 307 (Iowa 2006). The court reviews questions of statutory interpretation for the correction of errors at law, accepting the facts alleged by the State in the trial information and attached minutes as true. Id. The court reverses the dismissal of the charge at issue only if the facts the State has alleged charge a crime as a matter of law. Id.

C. Mr. Bailey Had a Reasonable Belief That He Had a Right to Demand Compensation.

Iowa Code § 711.4(3) states:

> It is a defense to a charge of extortion that the person making a threat other than a threat to commit a public offense, 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.

By its terms, Section 711.4(3) "removes typical settlement demands and litigation threats from the ambit of the extortion statute." Iowa Supreme Ct. Att'y Disciplinary Bd. v. Stowers, 823 N.W.2d 1, 12, 14 (Iowa 2012). The rationale behind this policy choice is clear: "because settlements are favored, commencing a lawsuit or adding a claim to gain leverage for a settlement, or in the expectation of a settlement, is not an abuse of that process. Reis v. Walker, 491 F.3d 868, 871 (8th Cir. 2007).

The burden of disproving a Section 711.4(3) defense "correctly" falls upon the State. Kermit L. Dunahoo, *The New Iowa Criminal Code*, 29 DRAKE L. REV. 237, 399 (1979–80). A defendant who invokes this defense is "'not required to act with infallible judgment,' but only, under the circumstances, as a reasonable man. 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." Id. at 399–400.

That is where this case should have ended. The Forest City Police Department should have refused to file a criminal complaint, the Hancock County Attorney's office should have refused to file felony charges, and the

State should have refused to appeal. Instead, an unpleasant email may find itself part of a felony case that must be decided by the Iowa Supreme Court.

The State acknowledges that the extortion statute allows for individuals to threaten criminal charges in order to try to secure what they think belongs to them:

> 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").

Appellant's Br. at 29. The Model Penal Code also includes a similar defense:

> It is an affirmative defense to prosecution based on paragraphs (2), (3) or (4) that the property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was honestly claimed as restitution or indemnification for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services.

Model Penal Code, § 223.4.

A statute criminalizing the making of threats in general could be unconstitutionally vague or overbroad, and limiting such a statute with a scienter requirement ensures that its application is sufficiently constrained to

reach only nonprotected speech. United States v. Coss, 677 F.3d 278, 289–90 (6th Cir. 2012). If a statute is susceptible to more than one construction, one of which is constitutional and the other not, the court adopts the construction which will uphold the statute. Santi v. Santi, 633 N.W.2d 312, 316 (Iowa 2001).

As part of their case for why the settlement defense does not apply to Mr. Bailey's conduct, the State cites a variety of law review articles and cases, distinguishing wrongful and extortionate threats from those that are done with a nexus to the claim of rightful recovery. James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 714–15 (1984); United States v. Coss, 677 F.3d 278, 286–87 (6th Cir. 2012); United States v. Jackson, 180 F.3d 55, 70–71 (2d Cir. 1999); United States v. White, 810 F.3d 212, 223–25 (4th Cir. 2016); State v. Pauling, 69 P.3d 331, 332–37 (Wash. 2003); United States v. Hobgood, 868 F.3d 744, 747–48 (8th Cir. 2017).

To determine whether Mr. Bailey acted reasonably, to the Court must consider things from his perspective, where he was not required to act with infallible judgment, but only as a reasonable man. See *The New Iowa Criminal Code* at 399. From Mr. Bailey's perspective, he has suffered racial discrimination in his housing and employment, and he has successfully settled those claims with his former employer and property manager. Conf App 9

Con App 10. Now, his former employer is driving around town, looking for his new residence, so she can give him a letter. Conf App 9 This letter is delivered to Mr. Bailey's home – where his children and grandchildren are staying – in the hands of a registered sex offender. Conf App 9, 55. Mr. Bailey feels rightfully concerned with this individual being at his home, and also believes that this individual was making false claims to being law enforcement. Conf App 9 . But when Mr. Bailey tries to go to law enforcement for help, he finds himself turned away because there is not an audio recording of this sex offender claiming to be a police officer. Conf App 60-62.

Worried about his children and grandchildren, as well as his house's status as a child care residence, Mr. Bailey consults the Iowa Code. Upon learning that Iowa Code § 692A.113(1)(d) makes it illegal for a sex offender to come to his home where he is providing child care, Mr. Bailey comes to the conclusion that he has a valid cause of action against Coombs. Operating under that assumption, Mr. Bailey lands upon what he considers a fair number and sends out an offer to his former employer, outlining his settlement offer.

Unfortunately, Mr. Bailey misremembers the dates, believing that his home was classified as a child care facility prior to the sex offender's visit. He informs Coombs: "Attachment evidence will show that Myeshia is Licensed through the State of Iowa to provide Childcare at our residence located 122

Wilson Way, Forest City, lowa,.50436, *effective 05/26/20, roughly 5 days before both you & Mr. Vulich dangerous visit to our home & facility*." Con App 11 (emphasis added).

The State argues unpersuasively that Mr. Bailey's good-faith settlement offer was in fact "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." Appellant's Br. at 23. The State has cited a number of cases about the "nexus" requirement to a legal wrong, and should know better. In the cases where courts have found there to be no "nexus" between a legal right and a threat, the facts generally 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. See, e.g., State v. Pauling, 69 P.3d 331, 332–37 (Wash. 2003) (threaten to expose nude photographs unless a $5,000 default judgment is paid); United States v. Coss, 677 F.3d 278, 286–87 (6th Cir. 2012) (threaten to sell photos of John Stamos using drugs unless he paid them money); United States v. Jackson, 180 F.3d 55, 70–71 (2d Cir. 1999) (threaten to tell newspapers she was Bill Cosby's daughter unless he paid her money); United States v.

Hobgood, 868 F.3d 744, 747–48 (8th Cir. 2017) (threaten to tell others that the victim was an exotic dancer and prostitute unless she apologized to him).

The problem with the State's case is not that nobody else understands that there must be a nexus between the claimed right and the threat, but that the State has far too strict of a standard for a "reasonable" nexus. The State's entire case is predicated on the fact that Mr. Bailey made a factual error (misremembering the dates for the sex offender's visit and the designation of his home as a childcare residence) and a legal error (confusing a childcare home with a child care facility). The State asserts that in order to avoid extortion charges, persons making settlement demands must not only reasonably believe that they have the right to make such threats, but they have to make sure that they are perfect legal theories, both factually and legally. The public policy implications of this argument are alarming. Parties may refuse to make settlement demands altogether if one ill-advised email will run them the risk of extortion charges.

The State argues that Mr. Bailey's demanded settlement amount number is not reasonable because it is "arbitrary." While this appears throughout the State's brief and filings, there is never a citation for it. What the State fails to acknowledge is that most settlement demands involve individual judgment and, as such, may always be viewed by the other party as

"arbitrary." There is no precise formula for determining damages for physical or mental pain and suffering. Miller v. Rohling, 720 N.W.2d 562, 570 (Iowa 2006). Damages for pain and suffering cannot be measured by any exact or mathematical standard and rest in the sound discretion of the jury. Id. Punitive damages come to plaintiffs as purely incidental and by the grace and gratuity of the law, as punishment to the wrongdoer, and as an example and deterrent to others, but they are granted or denied in the exercise of discretion by the jury. Sebastian v. Wood, 66 N.W.2d 841, 844-45 (Iowa 1954); see also Ryan v. Arneson, 422 N.W.2d 491, 496 (Iowa 1988) ("[L]egal precedent is of limited value in evaluating the damage award of a specific case.").

The State cites Mendoza v. Hamzeh, 215 Cal. App. 4th 799, 806, 155 Cal. Rptr. 3d 832, 836 (2013) for the proposition that "[i]f 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." Appellant's Br. at 37. That case is of almost no help to the court. First, there is nothing in the case regarding arbitrary, unrelated amounts and their reasonableness or lack thereof. See Mendoza v. Hamzeh, 215 Cal. App. 4th 799, 806, 155 Cal. Rptr. 3d 832, 836 (2013). Secondly, the statute in question, California Penal Code Section 519 made it so "when the threat to report a crime is coupled with a demand for money, the threat becomes illegal, regardless of whether the

victim in fact owed the money demanded." Id. This is in sharp contrast with the Iowa Code, which explicitly permits threats of criminal charges made "to recover property . . . to which the person has a good faith claim." Iowa Code § 711.4(3).

D. The State Has No Right to Trial

A statutory defense can be the basis of a motion to dismiss. See State v. Jones, 524 N.W.2d 172, 173 (Iowa 1994) (district court granted motion for bill of particulars requiring State to show why certain statutory defenses were inapplicable; after State provided bill of particulars, the district court granted motion to dismiss because a statutory defense applied).

When reviewing a district court's grant of a motion to dismiss a charge in a trial information, the court accepts the facts alleged by the State in the trial information and attached minutes as true. State v. Gonzalez, 718 N.W.2d 304, 307 (Iowa 2006). The court reverses the dismissal of the charge at issue only if the facts the State has alleged a crime as a matter of law. Id. In this case, the court can accept all of the facts of the case as true as alleged in the Minutes of Testimony, while also finding that the State has failed to properly allege a crime.

The State argues that "[t]he 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. 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." Appellant's Br. at 38. The problem with the State's argument is that all of these facts are in the Minutes of Testimony, which the court accepted as true. The State should feel free to state which of these "findings" was incorrect, based upon their own Minutes of Testimony, in their reply brief.

> • Mr. Bailey did not attempt to conceal his identity.
> • Mr. Bailey 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 Teresa Coombs brought him to the Bailey residence which was being utilized as a childcare home.
> • Coombs responded, "I consider your current complaint also to be without merit."
> • Coombs' response also referenced the past settlement with the defendant.

The State's argument that it should only be subject to the defense at trial is both legally incorrect and pragmatically impossible. Legally, the defense is an element of the offense and the burden is on the State to disprove it. See Kermit L. Dunahoo, *The New Iowa Criminal Code*, 29 DRAKE L. REV. 237, 399 (1979–80). If the State cannot disprove it at the filing of the

trial information, the State likely cannot disprove it at trial. Secondly, without the defense, extortion is a very broad crime. Most settlement demands and civil actions would, under the State's argued interpretation, involve threats "to expose any person to hatred, contempt, or ridicule" or "threats to harm the credit or business or professional reputation of any person" unless a settlement is paid. See Iowa Code § 711.4(1)(c), (d).

The 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. The State is also suggesting that it has a right to do so, and that it is somehow entitled to these judicial resources. Not only does this go against the public policy of encouraging settlement of civil matters, it is a waste of judicial resources.

Given how the State is evaluating these settlement demands, the trials that the State wants to have are going to mostly focus on whether the settlements demands are "reasonable," by which the State means devoid of any legal or factual error which would have made the civil claim deficient in any way. That is the standard that Mr. Bailey is being held to. The State would not only discourage settlement offers but wants to have jury trials not subject to motions to dismiss regarding whether a civil claim was factually and legally

sufficient. The State dismisses such cases as "[a] fact-finder can apply its judgment and common sense in a close case" and that "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." Appellee's Br. at 31. But in reality it is asking the court for the judicial resources to not only discourage settlement offers, but also to allow the State to prosecute any settlement offer where it thinks that settlement number is too "arbitrary" and to deny judges the opportunity to deem the settlement demand "reasonable."

The Court should not give the State the opportunity to prosecute every settlement demand. If the Minutes of Testimony establish that the defense would be valid, the court can decide that "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" on a motion to dismiss.

The court already allows defendants to ask for summary judgment for affirmative defenses in civil cases. Bank of the West v. Kline, 782 N.W.2d 453, 461 (Iowa 2010). If the court accepts the minutes of testimony as true and the minutes establish a defense as a matter of law, then there is no reason

the court should not apply the affirmative defense to a motion to dismiss as well.

ORAL ARGUMENT NOTICE

Counsel requests oral argument.

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This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) (no more than 14,000 words) because this brief contains 4, 509 words, excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, statement of the issues, and certificates.

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___*/S/ Alexander Smith*_____
Dated: September 7, 2023
Alexander Smith