IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 22-0903
Boone County No. AGCR114235
Boone County No. OWCR114992

STATE OF IOWA,
Appellee,

v.

KADIN MILLER,
Appellant.

APPEAL FROM
THE DISTRICT COURT OF BOONE COUNTY
THE HONORABLE
DISTRICT COURT JUDGE STEPHEN A. OWEN

FINAL BRIEF FOR APPELLANT

LUCAS M. TAYLOR
ANDERSON & TAYLOR, PLLC
213 4th St. Ste 100
Des Moines, Iowa 50309
Tel: (515) 282-8637
Fax: (888) 490-7617
E-mail: lucas@hawkeyedefense.com
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

On the 1st day of March, 2023, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant Appellant Kadin Jeffry Miller by placing one copy thereof in the United States mail, proper postage attached, addressed to said Appellant at 1622 S. Washington, Kokomo, IN 46902.

LUCAS M. TAYLOR
ANDERSON & TAYLOR, PLLC
213 4th St. Ste 100
Des Moines, Iowa 50309
Tel: (515) 282-8637
Fax: (888) 490-7617
E-mail: lucas@hawkeyedefense.com
ATTORNEY FOR APPELLANT

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ROUTING STATEMENT

Pursuant to Iowa Rule of Appellate Procedure 6.1101(3), it is appropriate for this case to be transferred to the Court of Appeals.

STATEMENT OF THE CASE

NATURE OF THE CASE, THE PROCEEDINGS AND DISPOSITION OF THE CASE IN DISTRICT COURT

This is an appeal by Defendant-appellant Kadin Jeffry Miller, from his conviction, judgment and sentence following his plea to Harassment in the First Degree in violation of Iowa Code §708.7(1)(a)(5) in Boone County case number AGCR114235 and Operating While Intoxicated in violation of Iowa Code §321J.2 in Boone County case number OWCR114992.

On February 4, 2021, a criminal complaint was filed charging Miller with Harassment in the First Degree. (Criminal Complaint AGCR114235; App. 42). A trial information was filed on April 15, 2021 charging Miller with the same. (Trial Information; App. 43). During the pendency of this case, Miller was charged with Operating While Intoxicated and Possession of Controlled Substance, Marijuana, Second Offense in violation of Iowa Code §124.401(5) on February 8, 2022 in Boone County. (Criminal Complaint OWCR114992; App. 53).

On February 25, 2022, after plea negotiations had been exhausted, Miller pled as charged in the former case. (Plea AGCR114235; App. 70). Before a sentencing hearing was held, a plea agreement was reached in the OWI case. (Plea OWCR114992; App. 74). Both cases were heard for sentencing on May 25, 2022.

For Case number AGCR114235, Miller was sentenced to the maximum sentence of incarceration for a period not to exceed two (2) years. For case number OWCR114992, Miller also received the maximum sentence of incarceration for a period not to exceed one (1) year. These sentences were set to run consecutively for a total sentence not to exceed

three (3) years with credit for any time served. (Order of Disposition; App. 85)

Miller filed a timely notice of appeal that same day. (Notice of Appeal; App. 91). In this appeal, Miller challenges the Court's finding that the offense was sexually motivated, pursuant to Iowa Code §229A.2(10). Miller also challenges the sentence imposed by the Court.

STATEMENT OF THE FACTS

On February 4, 2021, a criminal complaint was filed charging Miller with Harassment in the First Degree in violation of Iowa Code Section 708.7(2)(a)(2). The allegation was that between May and July 2019 Miller had recorded a female that was nude engaging in a sex act and disseminated the video on the website Pornhub without consent of the female. (Criminal Complaint AGCR114235; App. 42). A Trial Information was filed on April 15, 2022. (T.I., App. 43). The Trial Information affirmed the aforementioned charge.

On January 4, 2022 a Motion to Bifurcate Proceedings was filed on Miller's behalf. The issue at hand was regarding the determination of sexual motivation underlining the proceedings. (Motion to Bifurcate; App. 45). The State filed a resistance on January 7, 2022. (Resistance to Motion to

Bifurcate; App. 49). On February 21, 2022 the Court entered an order granting the motion however declining the defense's request to have the jury decide the question of guilty and the District Court decide the issue of "sexual motivation". (Order 02/21/2022; App. 57)

On February 8, 2022, Miller was charged with Operating While Intoxicated as well as Possession of Controlled Substance – Marijuana, Second Offense. (Criminal Complaints OWCR114992; App. 53).

After exhaustive plea negotiations, Miller opted not to go to trial in the former case and instead pled guilty as charged on February 25, 2022. (Plea AGCR114235; App. 70). Miller admitted in his written plea that:

> "That between May and July of 2019, I was in a relationship with Josie Goebel. Our relationship ended on bad terms. I had in my possession a video recording of Goebel and myself engaged in sexual intercourse. On or about September of 2019. I posted the video on the internet. I knew Goebel had not consented to the posting of the video. My intent was to get back at her for our relationship ending on bad terms by annoying her with the video being public. The video was posted while I was in Boone County Iowa."(Plea AGCR114235; App. 70).

No plea agreement was made and thus the parties were free to argue for any legal sentence (Plea AGCR114235; App. 70). Miller objected to the minutes of testimony. (Plea AGCR114235; App. 70). The Plea included that

Miller did not admit nor stipulate that the crime was “sexually motivated” pursuant to the previous bifurcation proceedings. (Plea AGCR114235; App. 70).

At sentencing for the former case, a plea agreement was reached in Miller’s pending OWI case. That same day, Miller plead guilty to Operating While Intoxicated with the State’s agreement to dismiss the second count of Possession of Controlled Substance. (Plea OWCR114992; App. 74).

The Matter proceeded to sentencing on May 25, 2022. (Sent. Trans. Pg 1; Ll 20-21; App. 7). The defense filed a Sentencing Memorandum, which was received by the court. (Sentencing Memorandum AGCR114235; App. 77). The defense filed nine exhibits, which were admitted into evidence, including several letters of support from family and friends, an article titled "Out of Prison & Out of Work," and Dr. Tracy Thomas's curriculum vitae. (Sent. Trans. Pg 6; Ll 3-18; App. 9). The defense called one witness, Dr. Thomas. (Sent. Trans. Pg 8; Ll 8-9; App. 10).

Dr. Thomas is a forensic psychologist in private practice. (Sent. Trans. Pg 8; Ll 5-7; App. 10). She has a Ph.D. in clinical psychology and specializes forensic psychology. Pg 9; Ll 10-23; App. 11). Dr. Thomas is vastly qualified and experienced to deliver an opinion about this issue.

(Exhibit H AGCR114235; App. 93) (Sent. Trans. Pg 9-10; App. 11-12). In her practice, Dr. Thomas testified for both the defendants and the State of Iowa with roughly equal frequency. (Sent. Trans. Pg 11; Ll 12-19; App. 13).

Dr. Thomas prepared by reviewing the trial information, the minutes of testimony, relevant criminal history and met with Miller. (Sent. Trans. Pg 69; Ll 2-7; App. 32). The meeting with Miller consisted of clinical interview and psychological testing. (Sent. Trans. Pg 17; Ll 18-20; App. 16). The purpose of the interview was to determine several questions posed by defense counsel, including whether or not Miller was a sexual deviant and whether or not the crime was sexually motivated. (Sent. Trans. Pg 19; Ll 1-10; App. 17). Dr. Thomas determined Miller did not have paraphilic disorder. (Sent. Trans. Pg 19; Ll 1-10; App. 17). There were no indications that Miller had antisocial traits or psychopathy. (Sent. Trans. Pg 20; Ll 8-11; App. 18). Dr. Thomas did conclude that Miller has a low tolerance for stress. (Sent. Trans. Pg 22; Ll 8-12; App. 19). Based upon her investigation, Dr. Thomas concluded that Miller was not sexually motivated when he committed the offense. (Sent. Trans. Pg 23; Ll 1-4; App. 20). Dr. Thomas's opinion was based on the definition of "sexual motivation" in the code and case law. (Sent. Trans. Pg 14; Ll 13-18 ; App. 15). Dr. Thomas found no

evidence that Miller was sexually aroused or masturbating in response to his actions. (Sent. Trans. Pg 23; Ll 13-25; App. 20). Dr. Thomas discovered that Miller was angry about his breakup with Goebel; Miller believed he was the victim of the breakup, that he was cheated, and acted in this manner to embarrass her and regain his self-esteem. (Sent. Trans. Pg 24; Ll 1-11; App. 21). Dr. Thomas did not find any conclusive evidence that this was sexually motivated. (Sent. Trans. Pg 24; Ll 4-16; App. 21). Such signifiers would include naming the video in a manner that implies paraphilia. (Sent. Trans. Pg 25; Ll 4016; App. 22). Dr. Thomas believed the title of the video supported the conclusion that the video was uploaded for the purposes of revenge, as opposed to sexual motivation. (Sent. Trans. Pg 39; Ll 4-20; App. 23). Miller indicated the video was created with Goebel's knowledge. (Sent. Trans. Pg 43; Ll 18-22; App. 25). Dr. Thomas made a distinction between socially acceptable behavior and a paraphilic disorder. (Sent. Trans. Pg 44; Ll 1-10; App. 26). Dr. Thomas indicated that if he bragged to other witnesses that would suggest revenge motivation as opposed to sexual motivation. (Sent. Trans. Pg 55; Ll 1-6; App. 28).

The State called three witnesses, John Mayse, Andrew Leeck, and Amanda Moore. (Sent. Trans. Pg 63; Ll 23-24; App. 29). The State's

witnesses reaffirmed facts already admitted in the defendant's plea. The State also offered Exhibit 1, which was a copy of the video. (Sent. Trans. Pg 66; Ll 7-16; App. 30).

Officer Mays testified Josie Goebel denied consenting to a video being posted. (Sent. Trans. Pg 66; Ll 7-16; App. 30). Officers further testified that he interviewed Miller who denied knowledge of the video. (Sent. Trans. Pg 67; Ll 4-17; App. 31). Andrew Leeck testified to his conversation with Miller about the video, indicating that there "…wasn't much discussion. I didn't make any comments, and I don't believe [Miller] did either at the time so it was really out of nowhere, honestly." (Sent. Trans. Pg 69; Ll 2-7; App. 32). Amanda Moore testified that she recognized the individuals in the video. (Sent. Trans. Pg 72; Ll 17-25; App. 33). She further testified about the number of views on the video (Sent. Trans. Pg 73; Ll 6-7; App. 34).

Following the conclusion of evidence, Miller exercised his right of allocution. (Sent. Trans. Pg 95; Ll 16; App. 35). Goebel read her victim impact statement into the record. (Sent. Trans. Pg 96; Ll 7-16; App. 36).

In both cases, Miller was advised by counsel that he could not appeal a defect in the plea proceeding unless he filed a Motion in Arrest of

Judgment alleging a defect not later than 45 days after a plea is entered, or not later than five days before the date set for pronouncing sentence, whichever comes first. (Pleas; App. 70 & 74).

A sentencing memorandum was filed confirming that Miller had no prior deferred judgments. (Defendant's Sentencing Memo.; App. 77). With both oral and written arguments submitted, the District Court made its ruling. Miller was given the maximum sentences in both cases for a total sentence of three (3) years. Further the court made the determination that there was a sexual motivation to the underlying offense in AGCR114235. (Order of Disposition; App. 85).

Any additional relevant facts will be discussed below.

ARGUMENT

I. IOWA CODE 814.6 SHOULD NOT APPLY TO A CONTESTED HEARING ON SEXUAL MOTIVATION, ALTERNATIVELY THERE IS GOOD CAUSE TO CONSIDER THIS APPEAL

Miller preserved this issue through contesting sentencing and by counsel's argument at sentencing. Although Miller pled guilty to Harassment First Degree, Miller made an adequate record to appeal the finding beyond a reasonable doubt that he committed a sexually motivated offense.

Because Miller is challenging a sentencing enhancement (specifically, the registration requirement) and not his guilty plea or conviction, the recent amendments to Iowa Code § 814.6(1)(a)(3) — barring an appeal from a guilty plea unless good cause is shown — do not apply. See *State v. Rigel*, 899 N.W.2d 740, 2017 WL 936135, at *3 (Iowa Ct. App. 2017) (noting that defendant challenging sexual motivation finding "is not challenging the plea proceeding; he is challenging his sentence"). The amendment to Iowa Code §814.6 was intended to prevent defendants who had admitted their guilt from then challenging that guilt on appeal, absent good cause.

That is not what Miller is doing in this appeal. He admitted he committed harassment and does not seek to withdraw that admission. He did not, however, admit that the offense was sexually motivated. Miller "went to trial" on this issue and must be allowed to appeal from the court's resolution of that contested issue.

If the Court sees fit to apply Iowa Code § 814.6(1)(a)(3), good cause exists to permit an appeal because the trial court erred in imposing the requirement that Miller register as a sex offender and the sentence was not an agreed upon plea deal. On July 1, 2019 our legislature implemented several new changes to the Iowa Code. Specifically, Iowa Code § 814.6(1)

was amended to disallow appeals from final judgments when a defendant plead guilty to a crime other than a class "A" felony. There was an exception to this rule change, "where the defendant establishes good cause." Iowa Code § 814.6(1)(2019). "Good cause" has been defined as "a legally sufficient reason," and is satisfied when a Defendant appeals a sentence that is neither mandatory nor agreed to in a plea bargain. *State v. Damme*, 944 N.W.2d 98, 100 (Iowa 2020). Because there was no agreed upon sentence, good cause has been established.

II. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE THAT MILLER COMMITTED THIS CRIME WITH SEXUAL MOTIVATION, AND THE COURT RELIED ON IRRELEVANT SPECULATION IN MAKING ITS FINDINGS AND DECISIONS.

Preservation of Error.

Miller is not challenging the plea proceeding, but is challenging his sentence. Specifically, he objects to the court's finding that the crime to which he pled was sexually motivated. Challenges to void, illegal, or procedurally defective sentences are not ordinarily subject to the normal rules of error preservation. *See State v. Thomas*, 520 N.W.2d 311, 313 (Iowa 1994).

Miller did not waive his right to have the court determine beyond a reasonable doubt whether the crime was motivated by sexual misconduct. Iowa Code § 692A. l 26 (1)(v)(2017). Miller was not required to file a motion in arrest of judgment in order to raise this issue on appeal, because he did not admit the allegations of sexual motivation. Iowa R. Crim. P. 2.24(3); *State v. Rigel*, No. 16-0576, 2017 WL 936135, (Iowa Ct. App. March 8, 2017). In addition, the record made it abundantly clear that this was a contentious issue before the District Court. (Sent. Tr. p. 5; Ll 3-17 App. 8).

Since the finding by the court that the crime was sexually motivated occurred during sentencing, error was preserved when Defendant challenged the sentence.

Standard of Review

This Court reviews sufficiency of the evidence for errors at law. Iowa R. App. P. 6.907; *State v. Keopasaeuth*, 645 N.W.2d 637, 639-640 (Iowa 2002). The Kansas Court of Appeals, interpreting a similar statutory provision to Iowa Code section 692A.126, utilized the legal standard governing sufficiency claims. *State v. Chambers*, 138 P.3d 405, 414 (Kan. Ct. App. 2006) (A court's finding of sexual motivation reviewed for

substantial evidence). Likewise, this Court reviews sentencing decisions for errors at law. *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000).

Discussion.

Miller was convicted of Harassment First Degree in violation of Iowa Code Iowa Code §708.7(1)(a)(5), an aggravated misdemeanor. (T.I. & Sentencing Order; App. 43 & 85). Even though this subsection of harassment has some sexual components (nudity, sex acts), it is not a sexual offense *per se*; therefore, the State was required to prove that the harassment was sexually motivated prior to requiring the sex offender registry. See *In re Det. of Blaise*, 770 N.W.2d 852 (Iowa Ct. App. 2009). According to Iowa Code §708.7(5), a defendant convicted of harassment under 708.7(1)(a)(5) may be required to register as a sex offender if it is determined that the crime was sexually motivated in accordance with Iowa Code §692A.126; The code provides, in relevant part:

> 1. If a judge or jury makes a determination, beyond a reasonable doubt, that any of the following offenses for which a conviction has been entered on or after July 1, 2009, are sexually motivated, the person shall be required to register as provided in this chapter: Iowa Code§ 692A.126(l)(v) (2017).

"Sexually motivated" means that “one of the purposes for the commission of the crime is the purpose of sexual gratification of the perpetrator of the crime.” Iowa Code §692A.101(29) (2017); Iowa Code§ 229A.2(10)(2022). Motives for committing a crime indicate that the question of motivation is limited to the criminal conduct itself. Iowa Code §692A.101(29) (2022); Iowa Code §229A.2(10)(2022). The code states:

Disseminates, publishes, distributes, posts, or causes to be disseminated, published, distributed, or posted a photograph or film showing another person in a state of full or partial nudity or engaged in a sex act, knowing that the other person has not consented to the dissemination, publication, distribution, or posting. Iowa Code 708.7(1)(a)(5) (2022). Importantly, this code section does not criminalize the act of photographing or recording a person without their consent. It does not make it illegal to keep, store, or possess a recording, video, audio, or photograph pertaining to nudity. The issue hinges on whether the defendant disseminated, published, distributed, or posted the material for sexual gratification. *See State v. Isaac*, 756 N.W.2d 817, 820 (Iowa 2008)(holding that defendant’s act of

masturbation was unrelated to proceeding exposure to an investigating officer).

A. The record contains no testimony, evidence, or exhibits establishing sexual motivation for this offense.

"When a defendant challenges the sufficiency of the evidence, he or she is asserting that the prosecution has not proven every fact necessary to establish the crime at issue, and thus, it has not established that the defendant, in fact, committed a crime." *State v. Crawford*, 972 N.W.2d 189, 198 (Iowa 2022), (quoting *McCoy v. People*, 442 P.3d 379, 385 (Colo. 2019)). Substantial evidence is evidence sufficient to convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *State v. Tipton*, 897 N.W.2d 653, 692 (Iowa 2017). In determining whether a verdict is supported by substantial evidence, evidence is viewed in the light most favorable to the State, including all "legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence." *Id*. (quoting *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005)). Intent can seldom be proved by direct evidence. *State v. Olson*, 373 N.W.2d 135, 136 (Iowa 1985). Consequently, proof of intent usually arises from

circumstantial evidence and inferences reasonably drawn from the circumstances. *Id*.

Miller admitted to the elements of First-Degree Harassment, but denied that his actions were motivated by sexual gratification. (Plea AGCR114235; App. 70). The state elected to present evidence and called the three witnesses listed in the minutes of testimony. Each of the witness' testimony was concise and direct. Leeck testified that Miller showed him the relevant video. (Sent. Trans. Pg 69; Ll 2-7; App. 32). Officer Mayse testified that Goebel did not give her permission for the video to be posted online. (Sent. Trans. Pg 63; Ll 23-24; App. 29). Moore testified as to the identities of the people in the video. (Sent. Trans. Pg 73; Ll 6-7; App. 34).

However, the State's elicited testimony is devoid of any circumstantial or direct evidence that speaks to Miller's intent. The only evidence presented (other than Miller's guilty plea) that directly links Miller to the video is Leeck's testimony. (Sent. Trans. Pg 69; Ll 2-7; App. 32). When asked about their conversation, Leck testified that "…wasn't much discussion. I didn't make any comments, and I don't believe he did either at the time so it was really out of nowhere, honestly." (Sent. Trans. Pg 69; Ll 2-7; App. 32).

In contrast to the State's evidence, the defense presented Dr. Thomas' testimony, which was solely focused on the motivation for Miller's actions. Dr. Thomas is exceptionally qualified and competent to provide an opinion on this issue. (Exhibit H AGCR114235; App. 93) (Sent. Trans. Pg 9-10; App. 11-12). Dr. Thomas concluded that the offense in question was not sexually motivated. (Sent. Trans. Pg 23; Ll 1-4; App. 20). Dr. Thomas drew her conclusion from multiple data points, including the statements of the defendants and other witnesses. (Sent. Trans. Pg 23; Ll 13-25; App. 20).

In other cases involving sexual motivation, the courts relied on an act, expert testimony, or an admission to establish beyond a reasonable doubt sexual motivation. In *In re Detention of May,* the issue was civil commitment of a sexually violent predator, and the State was required to prove that Blaise committed a prior act of Child Endangerment for his sexual gratification, as it was not a sex offense *per se*. 838 N.W.2d 869 (Iowa Ct. App. 2013). The defendant's own testimony revealed that he was sexually attracted to children and that he lied to gain unsupervised access to the children. *Id*. at 2. The state also presented evidence that the defendant committed the act with a sexual device, as well as expert testimony concluding that the offense was sexually motivated. *Id*.

The case law on indecent exposure is illustrative of the proof requirements. To establish the offense of indecent exposure, the State must prove that a defendant's exposure of his genitals was done "with the specific intent to arouse or satisfy the sexual desires of either party." Iowa Code §709.9 (2022). "The requisite intent to arouse or gratify the sexual desire of any person can be inferred from an accused's conduct, remarks, and all surrounding circumstances." *State v. Jorgensen*, 758 N.W.2d 830, 837 (Iowa 2008) (quoting *State v. Isaac*, 756 N.W.2d 817, 820 (Iowa 2008)). However, even deliberate action is excluded from criminal liability under the indecent exposure statute if the act is not itself intended to sexually arouse or gratify. *State v. Isaac*, 756 N.W.2d 817, 819-20 (Iowa 2008). In order to demonstrate sexual motivation, case law focuses on the defendant's behavior. *See Jorgensen*, 758 N.W.2d at 837 (evidence was sufficient to show that defendant's exposure of genitals was done to arouse his sexual desires where he was observed fondling his penis through his clothing and then openly masturbating in store) (emphasis added); *State v. Blair*, 798 N.W.2d 322, 326 (Iowa Ct. App. 20 11) (fact that defendant "was stroking his penis while standing in front of a bay window is sufficient evidence of [his] sexual motivation.") (emphasis added}. *See also United States v.*

Boston, 494 F.3d 660, 665 (8th Cir. 2007) (officer had probable cause to arrest under Iowa's indecent exposure statute in that officer's observation of defendant masturbating on public park trail demonstrated the requisite sexual motive).

Compared to other case law, the evidence before the court regarding sexual motivation is clearly lacking. The State's argument assumes that the crime itself, in addition to unfounded speculation regarding other acts, is sufficient to establish motivation. However, no overt or intentional acts of masturbation have been documented. There is no evidence that Miller masturbated prior to posting the video. There is no evidence that Miller has previously uploaded online sexual videos. There was no evidence that each viewing satisfied his sexual desires. Miller makes no admissions that suggest sexual motivation. The State did not present any expert testimony attesting to the sexual motivation of this crime. There is no evidence in the record to support sexual motivation consistent with the case law.

The only evidence is a recording and website containing sexually explicit content. Nonetheless, if the district court's ruling is upheld, this subsection of harassment would become a sexual offense *per se*, contrary to the legislative intent for this offense. *See State v. Coleman*, 907 N.W.2d

124, 136 (Iowa 2018)(When we interpret a criminal statute, our goal 'is to ascertain legislative intent in order, if possible, to give it effect). To be convicted of this offense, the recording or photograph must contain sexually explicit material, but the legislature did not make this a sexually motivated offense *per se*; it required more. Every conviction under this subsection involves some aspect of sexuality or nudity, but if that alone is sufficient to establish sexual motivation, the requirement for a separate determination would be rendered meaningless.

This ruling would also disregard the expert testimony of Dr. Thomas and the relevant research indicating that revenge is the primary motivation for this offense. Not only was there no evidence of sexual motivation in the record, but an expert in the field searching for evidence of motivation was also unable to identify any. (Sent. Trans. Pg 14; Ll 13-18 ; App. 15). Dr. Thomas testified that a common motivation for this offense is revenge. (Sent. Trans. Pg 13; Ll 7-17; App. 14). However, she did indicate that it is possible for someone to be sexually motivated (Sent. Trans. Pg 14; Ll 13-18; App. 15). Signs of motivation would include a common trend of posting videos, titles of the video, or demonstration of a sexual preference, such as voyeurism. (Sent. Trans. Pg 41; Ll 1-5; App. 24). However, those indicators

were not present. (Sent. Trans. Pg 43; Ll 1-7; App. 25). In addition, Dr. Thomas found that based upon her clinical assessment and interview of Miller, it appeared he was motivated by revenge, not for sexual purposes. (Sent. Trans. Pg 54; Ll 16-19; App. 27). Therefore, the State failed to prove beyond a reasonable doubt that this offense was sexually motivated.

B. The District Court erred by engaging in speculation and conjecture, as it lacked the necessary facts and evidence to support a finding the crime was sexually motivated beyond a reasonable doubt.

The Court's supporting facts rely on unreasonable inferences. "A reasonable inference may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work; a finding of fact must be an inference drawn from evidence rather than a mere speculation as to probabilities without evidence." *People v. Rekte*, 181 Cal. Rptr. 3d 912, 919 (Cal. App. 4th Dist. 2015). When evidence is based on an unreasonable inference, it is considered insufficient to support conviction. *Com. v. Rodriguez*, 925 N.E.2d 21, 26 (Mass. 2010). Even when two reasonable inferences are present, the evidence is still insufficient if one of the inferences establishes innocence. *Com. v. Williams*, 764 N.E.2d 889, 897 (Mass. App. 2002).

In making its decision and its determination, the court stated into the record a finding of facts:

> I think the facts are, I think Mr. Miller planned that event. I think the evidence would show that he knew the relationship was having some difficulty. He was clearly having sexual intercourse with Ms. Goebel for his sexual gratification at the time, and I think that carried on when he determined that he was going to distribute the video. I think the evidence establishes beyond a reasonable doubt. I think it further establishes it by the fact that he posted it on a pornography website where the only real purpose I can find for anyone going there would be sexual gratification, and he knew to go there so he could show it to Mr. Leeck. I think he is one of the more than 1,300 views shown. I don't know what an accolades or accomplishments are. I am not technically oriented, but I don't think you have to know what that means to see that Mr. Miller was taking satisfaction in that video on-line. (Sent. Trans. Pg 105-106; Ll 6-25; Ll 1-10; App. 39-40).

The Court's factual findings consist of several unfounded conclusions: The video recording of sexual intercourse and its publishing was preplanned; Miller knew the relationship was in trouble; the sexual gratification that Miller received during sexual intercourse continued when he published the video; Miller was one of the 1,300 people who viewed the video, suggesting he received sexual gratification from the website and viewing the video. (Sent. Trans. Pg 105-106; Ll 6-25; Ll 1-10; App. 39-40).

The district court's conclusions are not supported by any evidence in the record and appear to be the product of its imagination. To suggest that the video was recorded with the intention of publication would require either circumstantial or direct evidence, neither of which exists. This conclusion could have been supported if there had been a rapid turnaround between the video's recording and publishing. Despite the absence of a precise recording date in the record, it appears that there was a two to three-month delay between recording and website upload. According to the criminal complaint and minutes of testimony, sexual relations between Goebel and Miller only occurred during their relationship.[1]. Goebel indicated in her victim impact statement that the video was posted three months after the end of their relationship[2]. (Sent. Trans. Pg 97; Ll 14-16; App. 37). This is consistent with Miller's guilty plea, which states they were in a relationship from May to July 2019 and the video was posted in September 2019. (Plea AGCR114235; App. 70). The video was recorded during Miller and Goebel's relationship. (Plea AGCR114235; App. 70), (Criminal Complaint AGCR114235; App. 42).

This protracted time frame does not suggest an organized and planned approach between the recording and posting of the video. Miller

would have recorded and uploaded the video within hours or days, not months, if that was his intention. Similarly, it is preposterous to assume that Miller's sexual gratification lasted for months between recording and posting. Nor would it be reasonable to assume that the sexual pleasure derived from sexual activity would link the recording and uploading of the video. In this regard, the district court's conclusions exceed the bounds of logic.

Although not explicitly stated by the District Court, it was argued or perhaps accepted by the Court that Miller's sexual satisfaction can be inferred from the mere posting of the video on a pornographic website. Again, however, common sense suggests otherwise. Miller already owned the video and did not need to publish it in order to view it. Dr. Thomas also testified that the following was the more reasonable explanation for posting on a website:

> "When you look at the research on what they call revenge porn, general what we find is that people engage in this kind for revenge. They are angry, they are upset. They feel like they have been embarrassed or, you know, they feel like their self-esteem has taken a hit, so they engage in this behavior as a way to let their anger out to get back at the victim, to embarrass

them in the way person doing the revenge porn feels they have been embarred, so it is really based on anger and revenge."

(Sent. Trans. Pg 13; Ll 7-17; App. 14).

Dr. Thomas acknowledged that it is possible to be sexually motivated when engaging in this kind of behavior. (Sent. Trans. Pg 13; Ll 18-22; App. 14). She found no evidence to support sexual motivation, however. Trans. Pg 24-25; Ll 14-25; Ll 1-11 App. 21-22).

According to Dr. Thomas, it is more reasonable to conclude from the evidence that Miller was motivated by vengeance than by sexual gratification. However, even if the court accorded the same weight to other (albeit illogical) inferences, the conclusion would not change: there is insufficient evidence. "When two reasonable inferences can be drawn from a piece of evidence, ... such evidence only gives rise to a suspicion, and, without additional evidence, is insufficient to support guilt." *State v. Truesdell*, 679 N.W.2d at 618-19 (Iowa 2004). Even if the court concludes that the state's inference is not mere speculation, it cannot be deemed more reasonable than the other inference.

C. Conclusions Supporting Sexual Motivation Do Not Involve Prohibited Conduct Under Harassment Statute.

In determining that the offense was sexually motivated, the District Court considered the possibility that Miller received sexual gratification from watching the video. In addition, the State argued that uploading a video to a website for the sexual gratification of others could constitute sufficient proof of a violation of the statute. (Sent. Trans. Pg 13; Ll 7-17; App. 14).

However, both arguments miss the operative word of Iowa Code 229A.2(10), that the "… the purpose for the commission of the crime…." The crime is defined as "Disseminates, publishes, distributes, posts… showing another person in a state of full or partial nudity or engaged in a sex act, knowing that the other person has not consented to the dissemination, publication, distribution, or posting." Iowa Code 708.7(1)(a)(5) (2022). The analysis must focus on the act of publishing the video to the website.

The Iowa Supreme Court addressed a similar issue when addressing the indecent exposure statute. In *State v. Isaac*, the court had to determine whether there was sufficient evidence to convict a defendant who was caught masturbating by a law enforcement officer, despite his claim that his exposure to the officer was incidental. 756 N.W.2d 817, 818 (Iowa 2008). There was no dispute that the defendant masturbated in public. *Id*. Nonetheless, the defendant was masturbating prior to the officer's arrival,

and his exposure to the officer was accidental and not for sexual gratification. *Id*. at 820. The court ruled that it is insufficient to prove that a person was merely satisfying their own sexual desires; rather, the conduct must have been directed at another person. *Id*. at 820. Relevant to this case, the Court rejected the State's argument to combine the defendant's intent while masturbating out of the officer's view with his subsequent exposure to the officer. *Id* at 820.

Like in *Isaac*, the State and the District Court seek to conflate different actions, to the Harassment First Degree Statute. The state seeks to merge other actions, such as videotaping Goebel, masturbating to the video, and strangers doing the same online, with the criminal act of publishing the video. Whether the video was taken with or without Goebel's permission is irrelevant. It is inconsequential whether one person or 1300 watched the video under the law. The court can only consider the sexual gratification of the offender and cannot consider the sexual gratification of anyone else. *See* Iowa Code §229A.2(11) (defines sexually motivated)) The sole issue before the court is whether Miller uploaded a video to the Internet for his own sexual gratification. Therefore, the District Court could not rely on such

assumptions, even if they were proven, in determining whether the crime was sexually motivated.

Remedy:

Miller has always maintained that he was not sexually motivated in his actions, and he has placed the burden of proving sexual motivation on the State. The courts have acknowledged that there are circumstances in which the state may not present additional evidence on remand. *State v. Chapman*, 944 N.W.2d 864, 876 (Iowa 2020). The district court did not err in its rulings regarding evidence or procedure, but rather in determining whether the state had met its burden. The state attempted to provide evidence, but it simply does not exist. The state is not entitled to a second chance because this evidence is legally insufficient. *See State v. Gordon*, 732 N.W.2d 41, 43–44 (Iowa 2007) (holding the state was not entitled to amend trial information to include different convictions for a habitual offender enhancement of remand); *Chapman*, 944 N.W.2d 864, 876 (Iowa 2020), as amended (Aug. 18, 2020).

III. THE DISTRICT COURT ERRED WHEN IT RELIED UPON UNPROVEN CONDUCT IN DETERMINING MILLER'S SENTENCE

Preservation of Error:

A defendant may raise the issue of the sentencing court's reliance on improper factors on direct appeal despite the absence of an objection in the trial court. *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994); *State v. Young*, 292 N.W.2d 432, 434-35 (Iowa 1980) (improper factor claim reviewed despite lack of objection at sentencing).

Standard of Review:

Review of a sentence imposed in a criminal case is for correction of errors at law. Iowa R. App. P. 6.907; *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). "A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as the trial court's consideration of impermissible factors." *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998); *State v. Sailer*, 587 N.W.2d 756, 762 (Iowa 1998).

Discussion.

When sentencing a defendant, a court may not consider facts, allegations, or offenses that are not established by the evidence or admitted by the defendant. *Witham*, 583 N.W.2d at 678; *State v. Black*, 324 N.W.2d 313, 316 (Iowa 1982). Offenses and allegations that are not proven by the State or admitted to by the defendant, but considered by the court, amount to

improper sentencing considerations. *See Black*, 324 N.W.2d at 315-17; *State v. Gonzalez*, 582 N.W.2d 515,517 (Iowa 1998).

To constitute reversible error, there must be some showing that the sentencing judge was not "merely aware" of the improper factor, but also "impermissibly considered" or "relied on" it in rendering the sentence. *State v. Ashley*, 462 N.W.2d 279, 282 (Iowa 1990). Where such a showing is made, however, the reviewing court will vacate the defendant's sentence and remand for resentencing even if it was "merely a secondary consideration." *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000); *See also State v. Lovell*, 857 N.W.2d 241, 243 (Iowa 2014).

Here, the court in making its findings, speculated facts into existence. The Court speculated that Miller preplanned the event due to relationship difficulties; Miller's sexual gratification carried on when he determined he was going to distribute the video; that Miller was one of the 1,300 views on the video; and that Miller was taking satisfaction with the video being online. (Sent. Trans. Pg 105-106; Ll 6-25; Ll 1-10; App. 39-40). As thoroughly discussed in section II (B), the conclusions and statements are not supported by the evidence.

A district court cannot speculate facts into existence and then rely upon them. *State v. Fetner*, 959 N.W.2d 129, 136 (Iowa 2021) In Fetner, the court determined that the sentencing judge drew certain unsupported conclusions based on speculation. *Fetner*, 959 N.W.2d 129, 136 (Iowa 2021). The district court drew the unsavory conclusion that the defendant ran a daycare while under the influence of controlled substances by combining two facts: a statement from defense counsel that the defendant ran a daycare and the fact that the defendant used marijuana. *Id*. As noted by the Supreme Court, nothing in the record "connected the dots between his marijuana use and employment..." *Id*. Like *Fetner*, the District Court created facts and then relied upon them.

The appellate court will set "aside a sentence and remand [the] case to the district court for resentencing if the sentencing court relied upon charges of an unprosecuted offense that was neither admitted to by the defendant nor otherwise proved." *State v. Sailer*, 587 N.W.2d 756, 762 (Iowa 1998) (quoting Black, 324 N.W.2d at 315) (internal quotation marks omitted). Because the record affirmatively establishes the sentencing court considered an unproven conduct Guise's sentence should be vacated and his case

remanded for resentencing in front of a different judge. See *Lovell*, 857 N.W.2d at 242-43.

IV. WHETHER THE COURT ABUSED ITS DISCRETION WHEN SENTENCING MILLER

Standard of Review and Preservation of Error:

"Constitutional claims are reviewed de novo. *State v. Naujoks,* 637 N.W.2d 101, 106 (Iowa 2001)." *State v. Willard*, 756 N.W.2d 207, 211 (Iowa 2008).

"If the sentence imposed is within the statutory limits, as it is here, we review for an abuse of discretion." *State v. Majors*, 940 N.W.2d 372, 385–86 (Iowa 2020).

Error was preserved in this case when Defense Counsel advocated for a lesser sentence and subsequent filing of a Motion to Reconsider.

Discussion.

"A discretionary sentencing ruling, similarly, may be [an abuse of discretion] if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside

the limited range of choice dictated by the facts of the case. *Id.* at 138 (alteration in original) (quoting *People v. Hyatt*, 316 Mich. App. 368, 891 N.W.2d 549, 578 (2016), *judgment affirmed in part and reversed in part by People v. Skinner*, 502 Mich. 89, 917 N.W.2d 292, 295 (2018)). "Sentencing decisions of the district court are cloaked with a strong presumption in their favor." *State v. Crooks*, 911 N.W.2d 153, 171 (Iowa 2018); *see also State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002)." *State v. Majors*, 940 N.W.2d 372, 385–86 (Iowa 2020).

"We reiterate that our role on review is for abuse of discretion. An abuse of discretion may exist if the sentencing court fails to consider a factor, gives significant weight to an improper factor, or arrives at a conclusion that is against the facts. *Id.* at 138. But if the court follows our outlined sentencing procedure by conducting an individualized hearing, applies the *Miller/Lyle/Roby* factors, and imposes a sentence authorized by statute and supported by the evidence, then we affirm the sentence. *Goodwin v. Iowa Dist. Ct.*, 936 N.W.2d 634, 637 (Iowa 2019); *see also Seats*, 865 N.W.2d at 552–53 (explaining our review for abuse of discretion and emphasizing the discretionary nature of judges). As we stated in *Formaro*, Judicial discretion imparts the power to act within legal parameters

according to the dictates of a judge's own conscience, uncontrolled by the judgment of others. It is essential to judging because judicial decisions frequently are not colored in black and white. Instead, they deal in differing shades of gray, and discretion is needed to give the necessary latitude to the decision-making process. This inherent latitude in the process properly limits our review. Thus, our task on appeal is not to second guess the decision made by the district court, but to determine if it was unreasonable or based on untenable grounds." *Id.*

"'"In applying the abuse of discretion standard to sentencing decisions, it is important to consider the societal goals of sentencing criminal offenders, which focus on rehabilitation of the offender and the protection of the community from further offenses." *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). Sentencing courts in Iowa generally have broad discretion to rely on information presented to them at sentencing. *See State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983) ("[W]hatever Iowa statutes leave to the courts in matters of sentencing should be the responsibility of the sentencing judge."); *State v. Gartin*, 271 N.W.2d 902, 910 (Iowa 1978) ("[T]he decisions of the trial court are cloaked with 'a strong presumption in [their] favor,' and '[u]ntil the contrary appears, the presumption is that the

discretion of the [trial] court was rightfully exercised.' " (Alterations in original.) (quoting Kermit L. Dunahoo, *The Scope of Judicial Discretion in the Iowa Criminal Trial Process*, 58 Iowa L. Rev. 1023, 1024 (1973))); *State v. Delano*, 161 N.W.2d 66, 71 (Iowa 1968) (holding the sentencing court may rely on any information to which the defendant did not object). A court "should weigh and consider all pertinent matters in determining proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character and propensities[,] and chances of his reform." *State v. Cupples*, 260 Iowa 1192, 1197, 152 N.W.2d 277, 280 (1967)." *State v. Headley*, 926 N.W.2d 545, 550 (Iowa 2019).

Miller is 26 years old and is the son of James and Jenea Miller. (Def. Sent. Memo. AGCR114235; App. 77). James and Jenea divorced while Miller was still young. (Def. Sent. Memo. AGCR114235; App. 77.) When Miller was thirteen years old, his father was involved in a traumatic motorcycle accident, causing permanent brain damage. (Def. Sent. Memo. AGCR114235; App. 77). Due to the severity of the accident, Miller's relationship with his father began to deteriorate. (Def. Sent. Memo. AGCR114235; App. 77). Miller was subjected to horrendous treatment because of his stepfather's actions, which included the death of Miller's pets.

(Exhibit C. AGCR114235; App. 92). According to his family, his attachment issues stemmed from his difficult childhood. Miller informed the undersigned that his highest level of education was a high school diploma. (Def. Sent. Memo. AGCR114235; App. 77).

However, Miller's mental health and well-being deteriorated as the case progressed. Miller, as stated in a letter written by Gabrielle Anderson, began to have suicidal thoughts. (Def. Sent. Memo. AGCR114235; App. 77). The gravity of Miller's actions began to weigh on him, resulting in his act of drinking and driving prior to a hearing in this matter. (Def. Sent. Memo. AGCR114235; App. 77).

Miller has been able to maintain stable employment. (Def. Sent. Memo. AGCR114235; App. 77). Currently, Miller works at Tastefully Indiana as a baker's assistant. (Def. Sent. Memo. AGCR114235; App. 77). Although Miller enjoys his job at the bakery, he hopes to transition to full time carpentry in the near future.

However, the Court in its ruling, ignored these factors involving Miller, instead, found that Goebel had received "irreparable harm." (Sent. Trans. Pg 108; Ll 12-13; App. 41). The District Court also found that Leeck (who was not a victim in this case) had been affected in a "tremendous way

as well." (Sent. Trans. Pg 108; Ll 15-16; App. 41). However, this contrasted the Court when finding that Miller was remorseful in his statement allocution. (Sent. Trans. Pg 108; Ll 1-2; App. 41). Found that Miller was on the lower end of minimal criminal history. (Sent. Trans. Pg 101; Ll 22-23; App. 38).

There were other, less invasive options for the court. There were halfway houses, work release programs, and intensive probation, that would have provided Defendant with oversight and accountability. Further, it would have provided resources for a young father to utilize to ensure long-term success rather than incarcerating with experienced, long-term criminals.

CONCLUSION

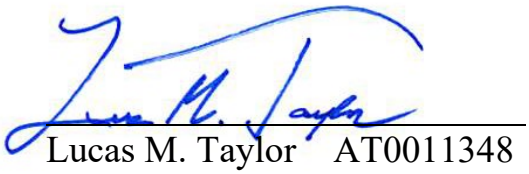
The appropriate remedy after consideration of all the fact and errors in this case is to vacate the sentence in this matter and remand for further proceedings.

For the above-mentioned reasons, Defendant/Appellant Kadin Miller respectfully requests the appellate court find Defendant's criminal conviction was in error and that the judgment in this matter should be vacated.

REQUEST FOR ORAL SUBMISSION

Appellant Kadin Miller does request that his counsel be heard orally by the court regarding all matters addressed herein.

Respectfully Submitted,



Lucas M. Taylor AT0011348
ANDERSON & TAYLOR, PLLC
213 4th Street, Suite 100
Des Moines, IA 50309
Phone: (515) 282-8637
Facsimile: (888) 490-7617
Email: lucas@hawkeyedefense.com
ATTORNEY FOR APPELLANT

CERTIFICATE OF COST

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/s/ Lucas M. Taylor

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because the brief contains 7,551 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman 14 pt. font.

/s/ Lucas M. Taylor 3/1/2023
Lucas M. Taylor Date

[1] The Minutes of Testimony, though objected to, contain police reports written in the matter. The testimony at sentencing is substantially consistent to reports, with the additional information of "Josie stated that she dated Kadin from May to July of 2019 and had sexual relations with him".

[2] The appellant does not concede a "Victim Impact Statement" is proper evidence to be considered for the Court but only brings it up as it corroborates defendant's written plea of guilty. *State v. Phillips*, 561 N.W.2d 355, 359 (Iowa 1997).