IN THE SUPREME COURT OF IOWA

STATE OF IOWA Plaintiff-Appellee, v. BRANDON WILLIAM LEE, Defendant-Appellant	Supreme Court No. 22-2100

APPEAL FROM THE IOWA DISTRICT COURT
FOR LINN COUNTY
HONORABLE CHRISTOPHER L. BRUNS, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

MARTHA J. LUCEY
State Appellate Defender

SHELLIE L. KNIPFER
Assistant Appellate Defender
sknipfer@spd.state.ia.us
appellatedefender@spd.state.ia.us

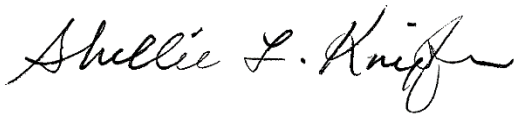
STATE APPELLATE DEFENDER
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX
ATTORNEYS FOR DEFENDANT-APPELLANT

FINAL

CERTIFICATE OF SERVICE

On the 21st day of November, 2023, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Brandon Lee, No. 6492625, Anamosa State Penitentiary, 406 North High Street, Anamosa, IA 52205.

APPELLATE DEFENDER'S OFFICE



SHELLIE L. KNIPFER
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
sknipfer@spd.state.ia.us
appellatedefender@spd.state.ia.us

SLK/lr/08/23
SLK/ls/11/23

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities:

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. This court should overrule *Copenhaver* which stated there was no single-larceny rule. In the alternative, even under the holding of *Copenhaver* the state failed to establish sufficient evidence that Lee had the intent to commit two separate and distinct thefts which is necessary for a finding of two robberies. Therefore, the court imposed an illegal sentence and should have combined the two convictions for robbery in the first degree.

Authorities

State v. Crawford, 972 N.W.2d 189, 198 (Iowa 2022)

State v. Copenhaver, 844 N.W.2d 442, 444, 452 (Iowa 2014)

State v. Bruegger, 773 N.W.2d 862, 872 (Iowa 2009)

Iowa R. App. 6.907

State v. Sanford, 814 N.W.2d 611, 615 (Iowa 2012)

State v. Torres, 495 N.W.2d 678, 681 (Iowa 1993)

State v. McCullah, 787 N.W.2d 90, 93 (Iowa 2010)

State v. Jorgensen, 758 N.W.2d 830, 834 (Iowa 2009)

State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976)

In re Winship, 397 U.S. 358, 364 (1970)

State v. Petty, 925 N.W.2d 190, 195 (Iowa 2019)

Hill v. United States, 368 U.S. 424, 430, 82 S.Ct. 468, 472, 7 L.Ed.2d 417, 422 (1962)

Iowa Code § 711.1 (2022)

1. **The single-larceny rule is still good law contrary to *Copenhaver* and applies to the present case. There was only one place and one taking resulting in one intent to commit a theft.**

Iowa Code section 714.3 (1979)

State v. Chrisman, 514 N.W.2d 57, 59 (Iowa 1994)

State v. Amsden, 300 N.W.2d 882, 884 (Iowa 1981)

52A C.J.S. Larceny § 53, at 479-80 (1968)

Iowa Code § 714.2

State v. Copenhaver, 844 N.W.2d 442, 444, 452 (Iowa 2014)

Ronald C. Carlson and John L. Yeager, Criminal Law and Procedure, § 324, at 99 (Supp. 1993)

2. **In the alternative, even under *Copenhaver*, there was still only one unit of prosecution for robbery. Therefore, the district court erred in sentencing Lee to two robberies.**

State v. Copenhaver, 844 N.W.2d 442, 444, 452 (Iowa 2014)

Iowa Code § 714.1

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because appellant has raised requiring clarification by the supreme court. Lee asks this court to revisit the claim in *State v. Copenhaver* that the single-larceny rule no longer exists in Iowa. 844 N.W.2d 442, 451-52 n.2 (Iowa 2014). The Appellant asks the court to adopt the partial concurrence and partial dissent in *Copenhaver* which argued the single-larceny rule was still valid law in Iowa. *Id.* at 453-56 (Mansfield, J., concurring in part and dissenting in part, joined by Waterman, J. Arguing that the single-larceny rule still applies in Iowa.). Even though Lee is guilty of only one robbery under both *Copenhaver* and the single-larceny rule, it would be beneficial to unit prosecution for a theft analysis to hold the common sense single-larceny rule is still good law in Iowa.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by the Defendant-Appellant, Brandon William Lee, from the judgment and sentence following appellant's convictions for two counts of the offense robbery in the first degree, in violation of Iowa Code sections 711.1(1)(b) and 711.2 (2022) (counts 1, 2); willful injury causing serious injury, in violation of section 708.4(1) (2022) (count 3); willful injury causing bodily injury, in violation of section 708.4(2) (2022) (Count 4); theft in the first degree, in violation of sections 714.1(1) and 714.2 (2022) (count 5); and impersonating a public official, in violation of section 718.2 (2022) (count 6). The Honorable Christopher L. Bruns presided at the trial and sentencing in Linn County District Court.

Course of Proceedings in the District Court: On January 18, 2022, Lee was charged by trial information with the offenses: two counts of the offense robbery in the first degree, in violation of Iowa Code sections 711.1(1)(b) and

711.2 (counts 1, 2); two counts of willful injury causing serious injury, in violation of sections 708.4(1) (2022) (counts 3 and 4); theft in the first degree, in violation of sections 714.1(1) and 714.2 (2022) (count 5); and impersonating a public official, in violation of section 718.2 (2022) (count 6). (Trial Information, 1/18/22)(App. pp. 4-8).

On July 12, 2022, a jury trial commenced. Lee moved for judgment of acquittal on all counts. (7/18/22 tr. p.118 L.9-p.121 L.24). The district court denied the motions except for count 4 (willful injury causing serious injury); it found insufficient evidence of a serous injury. Count 4 would only be submitted to the jury as willful injury causing bodily injury. (7/18/22 tr. p.123 L.13-p.124 L.22). At the close of the evidence Lee again moved for judgment of acquittal, which was again denied on the remaining counts, which the district court denied. (7/18/22 tr. p.160 L.1-p.161 L.2, p.161 L.21-p.162 L.1). The jury returned verdict of guilty to each of the six charges. (Form of the Verdict, 7/20/22)(App. pp. 13-15).

On November 21, 2022, Lee appeared in open court, with counsel, and was adjudged guilty of two counts of robbery in the first degree (counts 1, 2); willful injury causing serious injury (count 3); willful injury causing bodily injury (Count 4); theft in the first degree; and impersonating a public official (count 6). (Judgment and Sentence, p.1, 11/21/22)(App. p. 16). For each of the robbery in the first-degree offenses, Lee was sentenced to 25 years with a 60 percent mandatory. For the offense willful injury causing serious injury, Lee was sentenced to ten years. For the offense willful injury causing bodily injury, Lee was sentenced to five years. For theft in the first degree, Lee was sentenced to 10 years. And for impersonating a public official, Lee was sentenced to two years. The two robbery offenses (counts 1 and 2) were ordered to be served consecutively to each other. The remaining counts (counts 3-6) were ordered to be served concurrently to each other and consecutively to the robbery convictions (counts 1 and 2). (*Id.* p.2)(App. p. 17).

Notice of appeal was timely filed. (Notice, 12/16/22) (App. p. 20).

Facts: The following evidence was presented at trial.

Sandy and Joe Henderson:

Sandy and Joe Henderson [hereinafter "Sandy" and "Joe"] lived at 1828 Maple Way Road, Coggon, Iowa until his passing on April 24, 2022. (7/13/22 tr. p.122 L.7-p.123 L.5). Joe had numerous health issues such as colon cancer that had spread to his liver and lungs and Lewy Body Dementia. (7/13/22 tr. p.123 L.18-p.124 L.16; 7/18/22 tr. p.84 L.22-p.85 L.17). The family stopped treatments for the cancer in October 2021 because it was not affecting the tumor and it was worsening his memory. (7/13/22 tr. p.126 L.17-p.127 L.12).

On the evening of January 9, 2022, Sandy and Joe were watching TV when she heard a knock at the door. (7/13/22 tr. p.131 L.10-21). Sandy answered the door to a man stating that he was a law enforcement officer investigating their son

Alan. He had a badge hanging from his neck. Sandy had not seen Alan in a while so she let the man into her home. (7/13/22 tr. p.132 L.1-11; 7/14/22 tr. p.40 L.13-17). Sandy did not know the man. (7/14/23 tr. p.118 L.21-23, p.119 L.12-18).

The man accused them of assaulting their son the night before, but Sandy told him they had not seen Alan in some time. (7/13/22 tr. p.132 L.12-p.133 L.12). Sandy stood up and said he smelled like smoke and demanded to know his name. The man then punched her on the left side of the head knocking her to the floor. (7/13/22 tr. p134 L.1-18). The man then attempted to tie Sandy's hands with a zip tie but Joe interfered. (7/13/22 tr. p.135 L.18-p.146 L.2, p.175 L.15-25). The man then attacked Joe. Sandy yelled at him to stop and he pushed her on to the couch and he pulled out a gun. Then he opened the door and yelled "you guys can come in now" but no one came. (7/13/22 tr. p.136 L.1-p.137 L.7).

Sandy testified that the man then fired the gun between

her and Joe. (7/13/22 tr. p.137 L.8-17). The man asked about the safe and Joe started wrestling with him. Sandy told him the safe was in the basement. (7/13/22 tr. p.137 L.22-p.138 L.4). He told Joe that he (Joe) was going to open the safe, but Joe resisted going to the basement. The man started beating Joe about the head and face causing bleeding. (7/13/22 tr. p.138 L.5-p.139 L.23, p.179 L.12-22). Sandy tried to call 9-1-1, but the man knocked the phone out of her hand, punched her, and threw her against the wall. Sandy testified that he pointed the gun at her and threatened to kill her. (7/13/22 tr. p.140 L.5-18). Then he pulled Joe down the hall and basement stairs. (7/13/22 tr. p.140 L.23-p.141 L.10; Ex.14 (trail of blood in hall))(Ex.App. p. 6).

Sandy ran to the neighbor's house and had them call 9-1-1. (7/13/22 tr. p.141 L.14-p.144 L.1). Law enforcement found Joe walking down the driveway. His face and head covered in blood. (7/14/22 tr. p.69 L.16-p.70 L.4). He was scared and disoriented. (7/14/22 tr. p.70 L.16). Joe told an

officer that his son Alan had come into the home and beat him. Joe said he recognized him by his voice (7/14/22 tr. p.73 L.9-p.74 L.4).

The EMTs examined Joe, finding him alert and oriented. (7/14/22 tr. p.78 L.25-p.79 L.9, p.108 L.20-21). Joe had lacerations and swelling about his head and face. (7/14/22 tr. p.85 L.12-24, p.96 L.13-17, p.108 L.12-p.109 L.4; Ex.36 (face); Ex.37 (back of head); Ex.38 (left ear))(Ex.App. pp. 13-15). Joe said his head and neck hurt. (7/14/22 tr. p.97 L.13-20, p.108 L.22-p.109 L.1). Joe told two EMTs that his son Alan attacked him. (7/14/22 tr. p.98 L.22-12, p.117 L.4-7, p.120 L.23-25).

The safe had been left open because Joe could no longer open the safe, so Sandy left it open. (7/13/22 tr. p.187 L.1-17; 7/14/22 tr. p.44 L.5-14; Ex.20 (safe); Ex.21 (safe open)) (Ex.App. pp. 7-8). Missing from the safe after the man left were Ziploc bags full of $100 bills totaling over $50,000. (7/13/22 tr. p.187 L.22-p.188 L.2; 7/14/22 tr. p.16 L.17-p.17

L.23, p.23 L.17-p.24 L.7). Only one Ziploc bag/bank envelope with money was left in the safe with $2,800 in $100 bills. (7/14/22 tr. p.19 L.12-15, p.20 L.19-p.21 L.17, p.23 L.9-14, p.43 L.8-22; 7/15/22 tr. p.94 L.10-p.95 L.6; Ex.26 (envelope); Ex.27 (envelope with money))(Ex.App. pp. 9-10). Two empty Ziploc bags were found, one on the floor and one on top of some stuff. (7/14/22 tr. p.19 L.16-p.20 L.3; 7/15/22 tr. p.94 L.7-9). Law enforcement also found a zip tie in the living room. (7/15/22 tr. p.95 L.16-p.96 L.7; Ex.12 (zip tie))(Ex.App. p. 5).

Sandy testified that she ended up with a bruised left eye, a contusion on her head that required staples, and multiple bruises. (7/13/22 tr. p.153 L.2-7, p.158 L.4-9; 7/18/22 tr. p.78 L.3-p.79 L.22; Ex.3 (Sandy in hospital); Ex.5 (close-up Sandy's staples))(Ex.App. pp.3-4). Sandy said she did not experience any pain. (7/13/22 tr. p.156 L.12-p.157 L.6).

Joe had a broken upper jaw (maxilla), a fracture behind his eyes, cheekbone fracture, a midface face fracture (LeFort

fracture), displacement of the nasal bone, stitches in his head, and bruising. (7/14/22 tr. p.33 L.4-17; 7/18/22 tr. p.68 L.13-p.72 L. 4, p.73 L.7-p.74 L.8; Ex.34 (hospital photo Joe) (Ex.App. p. 11)). He was not able to eat solid food. (7/14/22 tr. p.33 L.16-19; 7/18/22 tr. p.88 L.15-p.9). On February 16th, Joe's dementia was so bad that he was moved to an assisted living facility where Joe later passed away from cancer. (7/14/22 tr. p.32 L.16-p.36 L.4).

On January 25th, Sandy found a hole in her living room window and the blinds that covered it and contacted law enforcement. (7/13/22 tr. p.162 L.12-p.167 L.21; 7/15/22 p.173 L.12-p.175 L.21); Ex.8B (hole in blinds); Ex.8C (hole in window); Ex.8D (exterior shot)).

Law enforcement believed that Alan Henderson was at Cadillac Lanes in Waterloo during the time of the robbery. They obtained a video of Henderson and his ex-wife at the bowling alley at 7:39 p.m. on January 9th. (7/15/22 tr. p.97 L.7-18, p.106 L.8-p.107 L.19; Ex.89 (bowling alley screenshot

19:39))(Ex.App. p. 17). Law enforcement testified that Henderson was at the bowling alley from 6:30 p.m. until 8:15 p.m. (7/15/22 tr. p.107 L.20-p.108 L.2).

Brandon Lee:

Lee admitted that on January 9, 2022, he left Scott Hepner's house and headed to Henderson's house in Coggon to assault Joe. (7/18/22 tr. p.135 L.17-p.136 L.6). He did not remember when he arrived. (7/18/22 tr. p.136 L.7-9). Lee admitted that he told Sandra he was a police officer. (7/18/22 tr. p.136 L.10-14). He was wearing a camo gaiter and jeans. (7/18/22 tr. p.136 L.15-18).

Lee claimed that their son Alan paid him with pain medication to beat his father, Joe. (7/18/22 tr. p.137 L.5-12; p.139 L.9-12, p.143 L.1-4, p.156 L.6-8). The person claimed to have been abused. (7/18/22 tr. p.137 L.9-12). When he arrived he said to Sandy something about them assaulting their son Alan. (7/18/22 tr. p.137 L.20-p.138 L.4). Lee punched Sandy and assaulted Joe. (7/18/22 tr. p.138 L.2-

12). Lee testified he had no intent of going anywhere else in the home and he did not stray from the living room area. (7/18/22 tr. p.138 L.12-17, p.141 L.14-16).

Lee also testified that he only carried a BB gun to look like a police officer, but he claimed he never discharged the BB gun. (7/18/22 tr. p.138 L.21-p.139 L.5, p.156 L.20-22).

Lee vehemently denied ever asking for or taking any money that night. (7/18/22 tr. p.139 L.6-8, p.139 L.13-14, p.156 L.9-12). However, Sandra did try to offer her purse, but he did not take it. (7/18/22 tr. p.139 L.15-23).

Any further facts relevant to the appeal will be discussed in the argument below.

ARGUMENT

I. This court should overrule *Copenhaver* which stated there was no single-larceny rule. In the alternative, even under the holding of *Copenhaver* the state failed to establish sufficient evidence that Lee had the intent to commit two separate and distinct thefts which is necessary for a finding of two robberies. Therefore, the court imposed an illegal sentence and should have combined the two convictions for robbery in the first degree.

A. Preservation of Error: Error was preserved by Lee's motion for judgment of acquittal that there was insufficient evidence of intent to commit a theft and the trial court's denial thereof. (7/18/22 tr. p.118 L.16-p.119 L.3, p.124 L.5-15, p.160 L.1-15, p.161 L.21-p.162 L.1).

However, a defendant is not required to file a motion for judgment of acquittal to challenge the sufficiency of the evidence on direct appeal. *State v. Crawford*, 972 N.W.2d 189, 198 (Iowa 2022); *Id.* at 200 ("[A] defendant whose conviction is not supported by sufficient evidence is entitled to relief when he raises the challenge on direct appeal without regard to whether the defendant filed a motion for judgment of

acquittal. The government has no legitimate interest in imposing punishment on those not proven guilty of criminal conduct beyond a reasonable doubt.").

Further, Lee submits that the district court entered an illegal sentence because it should have combined the two robbery offenses because the state failed to prove two intents to commit a theft. *See State v. Copenhaver*, 844 N.W.2d 442, 444, 452 (Iowa 2014)(This court found substantial evidence to support the intent to commit two separate and distinct thefts and two assaults, therefore there was substantial evidence to support two robberies. Thus, the sentence for two robberies was not illegal.). An illegal sentencing may be raised at any time. *State v. Bruegger*, 773 N.W.2d 862, 872 (Iowa 2009) (where the claim is that the sentence itself is illegal the claim may be brought at any time).

B. <u>Standard of Review</u>: This court reviews sufficiency of evidence claims for a correction of errors at law. Iowa R. App. 6.907; *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa

2012). The jury's finding of guilt will not be disturbed if there is substantial evidence to support the finding. *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993). Substantial evidence is evidence that would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *State v. McCullah*, 787 N.W.2d 90, 93 (Iowa 2010) (quoting *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2009)). The evidence must at least raise a fair inference of guilt as to each element of the crime. *Id.* at 93. The ultimate burden is on the state to prove every fact necessary to constitute the crime with which a defendant is charged. *State v. Gibbs*, 239 N.W.2d 866, 867 (Iowa 1976) (citing *In re Winship*, 397 U.S. 358, 364 (1970)).

A claim that a sentence is illegal is reviewed for correction of errors at law. *State v. Petty*, 925 N.W.2d 190, 195 (Iowa 2019). "[T]he purpose of allowing review of an illegal sentence is 'to permit correction at any time of an illegal sentence, not to re-examine errors occurring at the trial or

other proceedings prior to the imposition of the sentence.' " *Bruegger*, 773 N.W.2d at 871-72 (quoting *Hill v. United States*, 368 U.S. 424, 430, 82 S.Ct. 468, 472, 7 L.Ed.2d 417, 422 (1962)).

C. <u>Merits</u>: The questions presented are: (1) whether *Copenhaver* should be overturned, and instead, the partial concurrence and partial dissent be adopted that the single-larceny rule is still valid law, and (2) if *Copenhaver* is still good law and under the facts of this case, there was not proof of two intents to commit a theft during the January 9, 2022 incident such there was sufficient evidence for two units of prosecution for robbery. Lee submits that the state only showed one intent to commit a theft, and therefore, there was only sufficient evidence for one unit of prosecution for robbery. The insufficient evidence of a second intent required the court to combine the two convictions for robbery. The court's failure to combine the convictions resulted in an illegal sentence. *Compare Copenhaver*, 844 N.W.2d at 444, 452

(Iowa 2014)(where sufficient evidence of two separate and distinct thefts and two assaults, the sentence for two robberies was not illegal.).

The Iowa Code defines robbery as when,

> 1. A person …, *having the intent to commit a theft*, the person does any of the following acts to assist or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property:
>
> a. Commits an assault upon another.
>
> b. Threatens another with or purposely puts another in fear of immediate serious injury.
>
> c. Threatens to commit immediately any forcible felony.

Iowa Code § 711.1 (2022)(emphasis added).

The jury was given identical instructions for count 1 and count 2, except that count 1 referred to Joe as being assaulted and count 2 referred to Sandy as being assault.

> Count 1
>
> The State must prove all of the following numbered elements of Robbery in the First Degree:
>
> 1. On or about the 9th day of January, 2022, the

defendant had the specific intent to commit a theft.

2. To carry out his intention to assist or further the commission of the intended theft or assist him in escaping from the scene, with or without the stolen property, the defendant:

a. Committed an assault on Joseph Henderson as defined in Instruction No. 22 and in committing the assault the defendant intended to inflict a serious injury upon another or caused bodily injury or mental illness to Joseph Henderson or used or displayed a dangerous weapon in connection with the assault or caused serious injury to Joseph Henderson, or

b. Threatened Joseph Henderson with, or purposely put Joseph Henderson in fear of immediate serious injury, or

c. Threatened to immediately commit a forcible felony.

3. The defendant:

a. Purposely inflicted or attempted to inflict a serious injury on Joseph Henderson or

b. Was armed with a dangerous weapon.

If the State has proved all of the numbered elements, the defendant is guilty of Robbery in the First Degree. If the State has failed to prove any one of the numbered elements, the defendant is not guilty of Robbery in the First Degree and then you will consider the charge of Robbery in the Second

Degree as explained in Instruction No. 21. (Instr. No.20 (robbery 1st Joe))(App. p. 7). An identical instruction was used for count 2 except Sandy's name was inserted where Joe's name had been, and the lesser included instruction number that corresponded. (Instr. No.23 (robbery 1st Sandy), No.24 (robbery 2nd Sandy))(App. pp. 11-12).

Interestingly, the first element, requiring the defendant had the specific intent to commit a theft, did not specify a victim.

The jury found Lee guilty of both counts. And the district court entered two separate judgments of guilty for each robbery conviction and sentenced Lee to two 25 years consecutive sentences. (Judgment and Sentencing, pp.1-2, 11/22/22)(App. pp. 16-17).

1. The single-larceny rule is still good law contrary to *Copenhaver* and applies to the present case. There was only one place and one taking resulting in one intent to commit a theft.

Lee submits that the single-larceny rule is still good law contrary to the claims of the majority in *Copenhaver* that the

single-larceny rule was rejected by the enactment of Iowa Code section 714.3 (1979) and by *State v. Chrisman*. 844 N.W.2d at 450 n.2 (citing *State v. Chrisman, 514 N.W.2d 57, 59 (Iowa 1994)).* Pertinent to this case, the single-larceny rule provided:

> Where several articles are stolen from the same owner at the same time and place, only a single crime is committed, and the taking of separate articles belonging to the same owner from different places in the same building, pursuant to a single criminal impulse, usually is held to constitute only a single larceny. Where the property is stolen from the same owner and from the same place by a series of acts, whether the acts of accused constitute several thefts or one single crime must be determined by the facts and circumstances of each case. If each taking is the result of a separate, independent impulse, each is a separate crime; but where the successive takings are all pursuant to a single, sustained, criminal impulse and in execution of a general fraudulent scheme, they together constitute a single larceny, regardless of the time which may elapse between each act.

State v. Amsden, 300 N.W.2d 882, 884 (Iowa 1981)(quoting 52A C.J.S. Larceny § 53, at 479-80 (1968)).

> The prevailing rule is that where several articles, stored in the same place, are taken by a single larcenous act, the mere fact that some of them

> belong to one person and some to another does not dissolve the act into separate crimes. There is authority, however, holding that, where two or more articles belonging to different owners are stolen at the same time and place, the theft of the property of each owner is a separate crime and may be prosecuted as such, or that such a theft may be prosecuted, at the pleasure of the state, either as one offense or as several distinct offenses.
>
> Where articles belonging to different owners are taken at different times or from different places, it is usually held that each taking is a distinct and independent larceny, although there is only a short space of time and distance between the acts.

Id. at 884-885 (quoting 52A C.J.S. Larceny § 54, at 480-81 (1968)). Thus, taking or takings of possession may be charged as one theft if certain requirements are met. Generally, if a property is taken from the same place at the same time (i.e., in one act) it is one theft.

Amsden was attempting to interpret the newly enacted Iowa Code section 714.3.

> Value. The value of property is its normal market or exchange value within the community at the time that it is stolen. If money or property is stolen by a series of acts from the same person or location, or from different persons by a series of acts which occur in approximately the same location or time

> period so that the thefts are attributable to a single scheme, plan or conspiracy, such acts may be considered a single theft and the value may be the total value of all the property stolen.

Id. at 882-83 (quoting § 714.3 (1979)). Section 714.3 permits the state to prosecute theft either individually or in aggregate if certain requirements are met. The first situation is if the property is taken by a series of acts from the same target – either a person or location. The second situation allowing for aggregation is where there are different victims but the takings were by a series of acts which occurred in approximately the same location or time period as part of a single scheme, plan, or conspiracy. Under either circumstance sameness is the underlying requirement for allowing one unit of theft prosecution: the same person, the same location, or the same location or time for a single scheme, plan, or conspiracy.

The passing of section 714.3 did not replace the single-larceny rule. It is an aggregation statute also for determining value. It provides the *option* for the state to pursue one theft

charge when, for example, a perpetrator targets the same person over and over. The statute does not even require that the theft be from the same place. Section 714.3 provides the state the *option* to pursue higher degrees of theft by aggregating the value of each individual taking. *See* Iowa Code § 714.2 (degrees of theft based on value); *Chrisman*, 514 N.W.2d at 59-60 (§ 714.3 confers "a power, not a duty").

However, the single-larceny rule is not optional and more limited. The single-larceny rule is about single, sustained, criminal impulse. When multiple items are taken from the same person at the same location (or same building), it is one theft even though multiple acts of taking were involved.

In *Chrisman* this court analyzed the units of theft prosecution under both section 714.3 and the single-larceny rule. It found that the state was not required to apply section 714.3 and charge him with only one theft. *Id.* at 59-60. It went on to find that the single-larceny rule did not control because even though Chrisman victimized one person he

broke into two separate buildings. *Id.* at 60.

But the important point here is that *Chrisman* was written in 1994 – well after the enactment of section 714.3. So clearly this court still recognized the single-larceny rule to still be good law. The majority in *Copenhaver* misapplied the quotation "the prosecution is not required to accumulate thefts no matter how closely they may connect." *Copenhaver*, 844 N.W.2d at 451 n.2 (quoting *Chrisman* 514 N.W.2d at 59 (quoting Ronald C. Carlson and John L. Yeager, *Criminal Law and Procedure*, § 324, at 99 (Supp. 1993))). That statement was made in reference to section 714.3 being a permissive statute, not a requirement. *Chrisman*, 514 N.W.2d at 59-60 (§ 714.3 confers "a power, not a duty").

Therefore, this court should overrule the claim in *Copenhaver* that this court has rejected the single-larceny rule. *Chrisman* did not find the single-larceny rule had no application in Iowa law. Quite the opposite. It applied both the section 714.3 and the single-larceny rule, finding neither

principle required a result of finding only one theft by the defendant.

Further, applying the single-larceny rule, this court should find that Lee only committed one theft, and therefore, only committed one robbery. The state's theory of the case is that Lee went to one location, the Henderson's home, and committed one taking of property from the safe. Under the single-larceny rule this is only one theft as there was only a single criminal impulse to commit a theft. *Amsden*, 300 N.W.2d at 884. Therefore, there could only be one robbery. Lee's second conviction for robbery (count 2) should be vacated.

2. In the alternative, even under *Copenhaver*, there was still only one unit of prosecution for robbery. Therefore, the district court erred in sentencing Lee to two robberies.

Even under *Copenhaver*, the two robbery convictions should have been combined and only one 25-year sentence imposed.

This court held in *Copenhaver*

> [T]he unit of prosecution for robbery requires the defendant to have the intent to commit a theft, coupled with any of the following – commits an assault upon another, threatens another with or purposely puts another in fear of immediate serious injury, or threatens to commit immediately any forcible felony.

Copenhaver, 844 N.W.2d at 450. In the present case, there is no dispute that Lee physically assaulted both Sandy and Joe. (7/18/22 tr. p.138 L.2-12). The sole issue is whether there was more than one intent to commit a theft.

In *Copenhaver* a defendant walked into a bank and approached each teller individually, leaving an interval of time between each act. *Copenhaver*, 844 N.W.2d at 450. This court looked at the individual and separate acts of taking possession of the cash from the cash drawers from different individuals. Each individual taking of possession, with an interval in between, was an independent and separate intent to commit a theft. *Id.*

Copenhaver argued there was only the intent to commit a theft from the bank. This court responded that theft is

defined as "when the person…[t]akes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof." *Id.* (quoting Iowa Code § 714.1). This court considered that actual acts of taking possession with intervals of time between in determining the number of intents to commit a theft.

> Each teller had possession of a bank drawer. Thus, each teller had possession of a bank drawer. Thus, each teller had possession of property of the bank. When Copenhaver approached each teller, he intended to take possession or control of the bank's property in the possession of the teller.

Id. This court concluded that because there were two separate and distinct acts of taking, then there was sufficient evidence of two separate and distinct intents to commit a theft. *Id.*

In the present case there was only one intent to commit a theft. Lee entered the house for the purpose of taking possession of the money in the safe. This is contrary to Copenhaver taking possession of money from each separate teller who each possessed a separate bank drawer. *See Id.* at

450. Further, there were no intervening acts. Lee simply went to the basement, took the money, and left. *Cf. id.* (intervening act of the second teller coming to her window after Copenhaver gave the first teller her money). In the present case there was only one safe with money. And it was that money that Lee intended to take possession of.

Therefore, there was one intent to commit a theft. Even though there were multiple acts as assault, there could only be one unit of prosecution for robbery.

> If a defendant intend to commit only one theft, and the defendant does one or more of the following -- commits an assault upon another, threatens another with or purposely puts another in fear of immediate serious injury, or threatens to commit immediately any forcible felony – only one robbery has occurred. This is true even if the defendant commits multiple assaults or a single assault on one person and threatens other person with or purposely puts another in fear of immediate serious injury while intending to commit a single theft. We find this to be the unit of prosecution for robbery.

Id. at 449. Thus, the district court entered an illegal sentence when it sentenced Lee for two counts of robbery in the first degree. *See id.* at 452.

CONCLUSION

For the reasons stated above, the defendant respectfully requests this court to vacate his second conviction for robbery (count 2), and remand for entry of a judgment for only one count of robbery.

REQUEST FOR ORAL SUBMISSION

Counsel requests to be heard in oral argument.

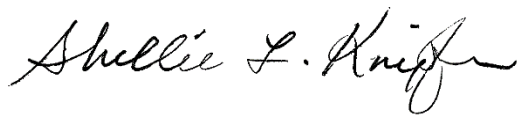
ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $2.20, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

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) because:

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 4,969 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).



Dated: 11/21/23

SHELLIE L. KNIPFER
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
sknipfer@spd.state.ia.us
appellatedefender@spd.state.ia.us