IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff–Appellee, v. LASONDRA A. JOHNSON, Defendant–Appellant.	S. CT. NO. 21–1891

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
THE HONORABLE JOEL A. DALRYMPLE, JUDGE

APPELLANT'S REPLY BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On 26th day of June, 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 the Appellant at her known home address.

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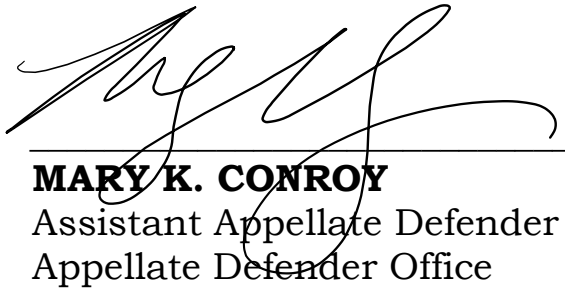

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Court Rules:

Other Authorities:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court erred in failing to accurately instruct the jury?

Authorities

Finna, Urban Dictionary, https://www.urbandictionary.com/define.php?term=finna (last visited June 19, 2023)

State v. Bentley, 757 N.W.2d 257, 262 (Iowa 2008)

State v. Ellison, 985 N.W.2d 473, 478 (Iowa 2023)

State v. Liggins, 557 N.W.2d 263, 267 (Iowa 1996)

Comment, Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 400.3 (June 2020)

Comment, Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 400.6 (June 2020)

State v. Benson, 919 N.W.2d 237, 245 (Iowa 2018)

State v. Shorter, 945 N.W.2d 1, 6 (Iowa 2020)

II. Whether the district court violated Johnson's constitutional rights by imposing $150,000 restitution award when the jury did not find she caused the death of Mills?

Authorities

State v. Davison, 972 N.W.2d 276 (Iowa 2022)

State v. Izzolena, 609 N.W.2d 541, 551 (Iowa 2000)

State v. Richardson, 890 N.W.2d 609, 619 (Iowa 2017)

State v. Lyle, 854 N.W.2d 378, 382 (Iowa 2014)

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

Iowa R. Crim. P. 2.24(5) (2020)

State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)

Blakely v. Washington, 542 U.S. 296, 304 (2004)

Iowa R. App. 6.107(1) (2020)

Iowa R. App. P. 6.108 (2020)

State v. Iowa District Ct. for Warren Cny., 828 N.W.2d 2013, 611 (Iowa 2008)

State v. Propps, 897 N.W.2d 91, 97 (Iowa 2017)

State v. Ambrose, 861 N.W.2d 550, 555 (Iowa 2015)

State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010)

State v. Crawford, 972 N.W.2d 189, 199 (Iowa 2022)

III. Whether the district court abused its discretion in determining Johnson's sentence by applying a fixed sentencing policy and by relying on improper considerations?

This issue is not addressed in the reply brief.

STATEMENT OF THE CASE

COMES NOW the Defendant–Appellant Lasondra A. Johnson, pursuant to Iowa Rule of Appellate Procedure 6.903(4), and hereby submits the following argument in reply to the State's brief filed on or about May 22, 2023. While the Defendant–Appellant's brief adequately addresses the issues presented for review, a short reply is necessary to address certain contentions raised by the State.

ARGUMENT

I. The district court erred in failing to accurately instruct the jury.

As discussed in the initial brief and argument, the district court incorrectly instructed the jury regarding Johnson's justification offense. The record does not contain evidence to support the proposition that Johnson was engaged in the illegal activity of assault when she fired the gun, the act for which she was on trial. Thus, Instructions 55 and 58 incorrectly outlined the law regarding her defense for the jury.

The State did not present any evidence at trial that Johnson was assaulting Mills or "engaged in an assault when she got her gun and fired." (State's Br. p. 12). To the contrary, the State's entire theory of the case was that the fight was over when Johnson, still angry about the prior tussle with Mills, got into her car, grabbed her gun, and purposefully shot Mills. In its opening statements, the State, explaining the evidence that it would produce, told the jury:

> *The evidence is going to show that at some point the fight was over*. The evidence is going to show that *there was no more physical altercation going on* and that the defendant, Lasondra Johnson, was back in her vehicle. *And as far as everyone else was concerned, it was done*.
>
> The evidence is going to show that it was not done for Lasondra Johnson. And at that time she made the choice to reach into her glove box, pull out her gun, aim it at Jada Mills, and pull the trigger killing her.

(9/15/21 p.52 L.9–19) (emphasis added).

The State's opening statement was consistent with each of its witnesses, who testified that the fight was over when Johnson fired a shot. Shara Harrington testified the fight "didn't last that long" and it was over when Johnson "got back

in her vehicle." (9/16/21 p.21 L.4–23, p.46 L.22–p.47 L.15). Likewise, Sherry Harrington testified she thought the fight was over after Mills and Johnson were separated, which was why Sherry was walking back to the house when she heard the gunshot. (9/16/21 p.179 L.2–p.180 L.5, p.190 L.10–p.191 L.3 L.15). Gloria Boldon also testified the fight was over, and she had started walking away from Johnson's vehicle and back to her own car. (9/17/21 p.95 L.15–p.97 L.9). She testified that both she and Mills were walking away with their backs turned when she heard the gunshot. (9/17/21 p.107 L.15–p.108 L.19).

Nor do M.H.'s statements provide substantial evidence that Johnson was engaged in a continuous assault at the time she fired her gun. In her pretrial CPC interview, M.H. stated the fight was broken up and that her uncle Christopher pushed Johnson into her car. (Ex. M 14:42:40–14:42:55, 14:52:48–14:53:15). M.H. told the interviewer that Christopher mostly shut the door, but it was still open a little bit. (Ex. M 14:42:55–14:43:45). M.H. stated that she looked

up and then saw the gun. (Ex. M 14:43:40–14:44:00). M.H. stated Johnson said, "where your gun at now, bitch?" and then shot Mills. (Ex. M 14:42:55–14:44:20). M.H. stated Mills was not that close to Johnson's vehicle and was standing in the yard by the sidewalk. (Ex. M. 14:55:43–14:56:10). M.H. told the interviewer, "*We thought the fight was over*. Everyone was trying to go in the house." (Ex. M 14:52:59–14:53:08) (emphasis added). When explaining that she thought Johnson should stay in jail because she shot Mills, M.H. "shouldn't have pulled the trigger . . . if that's the case, then you could have got out of the car and said, 'nah, I ain't finna[1] take this no more' and *fought her again*." (15:04:05–15:04:45). This statement again supports M.H.'s prior statement that the fight was over when Johnson shot the gun.

At trial, M.H. testified by the time she went outside the two women had been separated and *no one was fighting*

[1] Urban Dictionary provides the definition of "finna" as "going to." Finna, Urban Dictionary, https://www.urbandictionary.com/define.php?term=finna (last visited June 19, 2023).

anymore. (9/17/21 p.25 L.10–17). M.H. testified Johnson was in the passenger side of her car and everyone else "was just standing there." (9/17/21 p.26 L.4–17). Mills "was in front of the [vehicle's] door but not as close as Chris was, and she was almost on the sidewalk." (9/17/21 p.26 L.20–p.27 L.1).

On direct examination, M.H. testified:

> Q. And you say the door was kind of cracked open. What door are you talking about?
> A. The passenger side.
> Q. Where Lasondra was sitting?
> A. Yes, ma'am.
> Q. Okay. What did you see after the door cracked open?
> A. (Unintelligible.)
> Q. What did you say?
> A. I seen the gun.
> Q. You seen a gun?
> A. Mm-hm. Yes, ma'am.
> Q. And where was -- can you kind of, maybe using your hands, show us where the gun was when you're talking about the crack in the door?
> A. In, like, the seal of the door.
> Q. In the seal of the door?
> A. Yes, ma'am.
> Q. Okay. Can you -- if you want to just look at me for a second. When you're looking at a door, is it on the side of the door?
> A. The top of it.
> Q. The top of the door?

A. Yes, ma'am.
Q. And did Lasondra Johnson say anything?
A. After she shot her or before?
Q. Before.
A. No.
Q. What did she say?
A. She had said pushed (unintelligible) --
(Court Reporter asked for clarification.)
Q. . . . Could you yell that please?
A. *She had said, "Where your gun at now, bitch?" And then she shot her.*
Q. She said, "Where your gun at now, bitch," and she shot who?
A. Jada.
Q. And then what happened?
A. After that Jada yelled, "Mama Sherry, that bitch shot me," and then everybody went in the house.
. . .
Q. *And when Lasondra Johnson shot Jada, were they still fighting?*
A. No, everything was done and over with.
Q. Was Jada trying to get into Lasondra's car at all?
A. No, ma'am.
Q. Was anyone trying to attack Lasondra Johnson when she shot Jada?
A. No, ma'am.

(9/17/21 p.27 L.5–p.28 L.19, p.29 L.15–22) (emphasis added).

Thus, both M.H.'s pretrial statements in the CPC interview and her testimony at trial is consistent with the other State's

witnesses' testimony that the fight was over when Johnson shot her gun.

Notably, the prosecutor did not make the same argument at trial that the State now makes on appeal. During the instructions conference, Johnson objected to Instructions 55 and 58, noting there was "zero facts in evidence that suggest that at the time she used deadly force that she was engaging in the crime of an assault. I haven't heard anybody say anything about that." (09/22/21 p.146 L.6–11). Despite this objection, the State did not identify any assault that would constitute Johnson "engaging in illegal activity" nor did it point to any testimony or evidence in the record that supported the inclusion of this language in the instructions. (09/22/21 p.145 L.23–p.146 L.25, p.148 L.24–p.152 L.8). Reasonably, this is because the State recognized there was no evidence in the record that supported the proposition that Johnson was "engaging in illegal activity" at the time she fired her gun. It is revealing that in its closing, the State summarized its witnesses' testimony:

> And the bottom line of it is, ladies and gentlemen, no matter who was the primary aggressor in the fight, *by the time the gun went off, the fight was over. They had duked it out already and everybody was walking away*. Mama Sherry had already moved back up into the house, Gloria had turned to go to her car. *Everybody assumed this fight was over*. Jada was backing up towards the sidewalk. *It was done. At that point, it should have been over with.* Everything should have been left alone. There was absolutely no reason to kill somebody.
>
> But she was still mad because she'd had her hair pulled, and she decided to take revenge at Jada by shooting her.

(09/23/21 p.21 L.16–p.22 L.1).

The record does not contain substantial evidence that Johnson was engaged in a continuous assault when she fired her gun. See State v. Bentley, 757 N.W.2d 257, 262 (Iowa 2008) (citation omitted) ("'Substantial evidence' is that upon which a rational trier of fact could find the defendant guilty beyond a reasonable doubt."). Accordingly, the district court erred by giving Instructions 55 and 58 when there was no evidence supporting that Johnson was engaged in a continuous assault. See State v. Ellison, 985 N.W.2d 473, 478 (Iowa 2023) (citing State v. Liggins, 557 N.W.2d 263, 267 (Iowa

1996)); Comment, Iowa State Bar Ass'n, Iowa Criminal Jury Instruction Nos. 400.3, 400.6 (June 2020) (warning to only use the language that is supported by the evidence). None of the evidence presented, including M.H.'s statements to the CPC interviewer and at trial, support the theory that Johnson was continuing to assault Mills when she shot the gun; rather, each of the State's witnesses testified the prior "tussle" was over when Johnson shot the gun.

The language regarding that Johnson being engaged in the illegal activity of assault was "not related to the factual issues to be decided by the jury". Ellison, 985 N.W.2d at 479 (citation omitted). The facts did not present an open question of whether Johnson was engaged in illegal activity at the time she shot her gun. Thus, Instructions 55 and 58 did not "'fairly state the law as applied to the facts of the case.'" Id. (citation omitted).

Additionally, as discussed in the original brief and argument, the instructions regarding Johnson's justification defense did not "'convey[] the applicable law in such a way

that the jury ha[d] a clear understanding of the issues' before it." State v. Benson, 919 N.W.2d 237, 245 (Iowa 2018) (citation omitted). Rather, the instructions were misleading and confusing; because there was no evidence that Johnson was engaged in a separate assault at the time she fired the gun, they provided the jury a circular path. The only assault in play at the time of the shooting was the act of shooting the gun itself. The instructions suggested that if Johnson was engaged in the illegal act of assault when shooting her gun then she was not entitled to the presumption that she reasonably believed deadly force was necessary and/or her use of force was not justified because she made no effort to retreat. (Jury Instruction 55, 58) (App. pp. 19, 20). Such a suggestion is confusing, as the main question at issue for the jury to determine was whether Johnson's act of shooting the gun was justified.

This is not a case where overwhelming evidence of Johnson's guilt exists. The jury obviously credited at least part of the defense's version of what occurred, as shown in the

verdict it rendered. The evidence of Johnson's guilt was not overwhelming, and Johnson presented convincing testimony and evidence in her defense. However, the instructional errors diluted her stand-your-ground defense by taking away Johnson's statutorily entitled presumption that she reasonably believed deadly force was necessary and by allowing the State to incorrectly argue that she had a duty to retreat if retreat was a reasonable alternative. See (Def.'s Br. pp. 60–62). The guilty verdict in this trial was not surely unattributable to the error. See State v. Shorter, 945 N.W.2d 1, 6 (Iowa 2020) (citation omitted). Accordingly, Johnson was prejudiced by the erroneous jury instructions and is entitled to a new trial. See id. (citing Benson, 919 N.W.2d at 241–42).

II. The district court violated Johnson's constitutional rights by imposing $150,000 restitution award when the jury did not find she caused the death of Mills.

This issue is properly before the Court and squarely controlled by the Iowa Supreme Court's decision in State v. Davison, 972 N.W.2d 276 (Iowa 2022). As noted in the

original brief, the district court was without the benefit Supreme Court's decision in Davison when it imposed the restitution. The Supreme Court issued the Davison opinion approximately five months after this case's disposition.

In Davison, the Court found the district court's award of $150,000 restitution "violated the Sixth Amendment to the United States Constitution." Id. at 288. The $150,000 restitution award is punitive and is part of the district court's sentence in this case. Id. at 283–288; State v. Izzolena, 609 N.W.2d 541, 551 (Iowa 2000) (citation omitted) ("Restitution under section 910.3B is a part of the sentencing process."); see also (Sentencing p.20 L.13–p.21 L.5) (Sentencing Order) (App. p. 26). But see State v. Richardson, 890 N.W.2d 609, 619 (Iowa 2017) (finding the word "sentence" in Iowa Code sections 901.5(1), 901.5(3), and 901.5(5) excluded restitution, including the $150,000 restitution award). "An unconstitutional sentence is an illegal sentence. Consequently, an unconstitutional sentence may be corrected at any time." State v. Lyle, 854 N.W.2d 378, 382 (Iowa 2014)

(citing State v. Bruegger, 773 N.W.2d 862, 872 (Iowa 2009)); see also Iowa R. Crim. P. 2.24(5) (2020). Thus, this Court may correct the district court's improper award of the $150,000 restitution, even if Johnson's objections to the restitution in the trial court were insufficient to preserve error because as an unconstitutional, and therefore, illegal sentence it may be corrected at any time.

The Iowa Supreme Court's decision in State v. Richardson is illustrative here. In that case, the Court wrote:

> When Richardson was sentenced below, the district court ordered her to make restitution of $150,000 to Kunkle's estate in accordance with Iowa Code section 910.3B(1). Richardson did not raise the potential applicability of the 2013 legislation at that time, nor did she object on constitutional grounds to mandatory restitution under section 910.3B(1).

Richardson, 890 N.W.2d at 615. However, the Supreme Court still addressed each of Richardson's claims. Id. at 615–27. In doing so, it noted, "[t]he rule of error preservation is not ordinarily applicable to void, illegal or procedurally defective sentences.'" Id. at 615 (quoting State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)). As in Richardson, the Court is

able to consider Johnson's constitutional challenge to the $150,000 restitution award because the rules of error preservation are not applicable to such a challenge. See id.

Alternatively, as the Supreme Court explained in Davison, "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and *the judge exceeds his proper authority*." Davidson, 973 N.W.2d at 287 (quoting Blakely v. Washington, 542 U.S. 296, 304 (2004)) (emphasis added) (internal quotation marks omitted). Thus, this Court could also treat the issue as a petition for a writ of certiorari if it believed that to be more appropriate under the circumstances. See Iowa R. App. 6.107(1) (2020) (noting a party claiming a district court judge exceeded its jurisdiction or otherwise acted illegally could file a petition for writ of certiorari); Iowa R. App. P. 6.108 (2020) (noting the court shall "proceed as though the proper form of review had been requested"); see also State v. Iowa District Ct. for Warren Cny., 828 N.W.2d 2013, 611 (Iowa 2008) (citations omitted)

("Certiorari is appropriate when a lower court or tribunal has exceeded its authority . . . ."); State v. Propps, 897 N.W.2d 91, 97 (Iowa 2017) ("Accordingly, we will treat Propp's notice of appeal and accompanying briefs as a petition for writ of certiorari . . . .").

Lastly, it is notable that the district court considered whether the $150,000 restitution award should apply to Johnson for her conviction of assault causing serious injury. Error preservation is based on two principles: 1) ensuring that there is a district court ruling for the appellate court to review and 2) providing the district court with an opportunity to correct its error. State v. Ambrose, 861 N.W.2d 550, 555 (Iowa 2015) (citations omitted).

Prior to sentencing, the State requested the $150,000 restitution, arguing that Johnson did not have to be convicted of a homicide for the section 910.3B restitution. (Request 910.3B Restitution) (App. pp. 22–23). Rather, it asserted because Johnson had been convicted of a felony offense and Johnson's actions were the proximate cause of Mills's death,

the district court had to order the $150,000 restitution, pursuant to section 910.3B. (Request 910.3B Restitution) (App. pp. 22–23). Johnson resisted. (Resis.) (App p. 24). At sentencing, Johnson explained her objection, noting that the jury's verdict did not reflect that the State had proven Johnson had even recklessly caused Mills's death. (Sentencing p.14 L.19–p.17 L.13). Counsel stated the legislature did not contemplate that the restitution would apply to this offense. (Sentencing p.17 L.5–6). She went on, "In our case this was a jury trial and *this jury did not find in any clear way that the restitution amount should apply to Ms. Johnson in this case*." (Sentencing p.17 L.7–13) (emphasis added). The district court ordered the $150,000 restitution award, stating:

> A review of Iowa case law suggests that if it's the offender's felonious actions that result in the loss of human life, the Court shall order this consistent with the Code. The actions of this defendant . . . resulted in this if the felony conviction was the proximate cause of the death. The Court finds that to be appropriate and present in this circumstance . . . .

(Sentencing p.20 L.17–p.21 L.5).

Thus, this case is illustrative of why the appellate court may review errors in sentencing, even absent an objection in district court. See State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010). The district court had a chance to rule on the challenge, and it concluded that it was required to impose the $150,000 restitution. It determined the award applied because it found Johnson's felony conviction was the proximate cause of Mills's death. (Sentencing p.20 L.17–p.21 L.5). Additionally, there is no further record, that is necessary for the appellate court to review the challenge; as discussed below, the only record necessary is the jury's verdict. Lastly, Johnson actually objected to the restitution award, arguing that the jury did not find it should apply to her. (Sentencing p.17 L.7–13). But even if she had not objected to the restitution award, this is not the type of claim where there is any danger of "sandbagging". See State v. Crawford, 972 N.W.2d 189, 199 (Iowa 2022) (citation omitted). Thus, the principles behind error preservation are not served by requiring an objection to the constitutionality of restitution

award; thus, this Court's jurisprudence that allows it to directly address such claims is both logical and appropriate.

Additionally, the Iowa Supreme Court's decision in Davison dictates this Court reverse the district court's $150,000 restitution award. In Davison, the Court stated that "having 'caused the death of another person' (and no other circumstance) triggers a punitive award of $150,000." Davison, 973 N.W.2d at 288. It held that "Apprendi *requires the jury to find that the defendant caused the death* of another person." Id. In this case, the jury did not convict Johnson of a homicide felony—a felony where the jury had to find Johnson caused the death of another person. See id. Rather, as was the case in Davison, the jury acquitted Johnson of each of the offenses that contained the element that she caused Mills's death, including murder in the first degree, murder in the second degree, voluntary manslaughter, and both alternatives of involuntary manslaughter. See (Verdict) (App. p. 21). Because the jury's verdict does not contain a determination that Johnson caused Mills's death, the district

court's award of $150,000 restitution violated Johnson's constitutional rights. See Davison, 973 N.W.2d at 288.

CONCLUSION

For the reasons stated above and in the original brief and argument, Defendant–Appellant Lasondra A. Johnson requests this Court remand for a new trial on the charge of assault causing serious injury. In the alternatives, she asks the Court vacate the portion of her sentencing order that imposes the section 910.3B surcharge and remand to the district court for entry of a corrected sentencing order, as well as order a new sentencing hearing in front of a different judge.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $3.25, 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

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:

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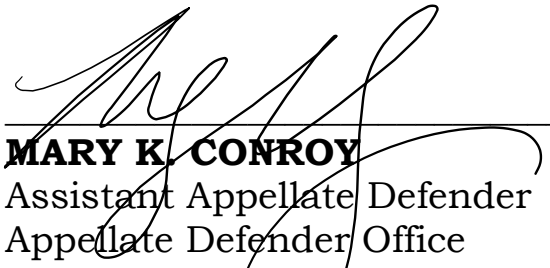

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