

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

v.

S.CT. NO. 23-0598

EZEKIEL KIEFFER,

Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
HONORABLE PATRICE J. EICHMAN, JUDGE

APPELLANT'S BRIEF AND ARGUMENT

MARTHA J. LUCEY
State Appellate Defender

MICHELLE E. RABE
Assistant Appellate Defender
mrabe@spd.state.ia.us
appellatedefender@state.ia.us

STATE APPELLATE DEFENDER'S OFFICE
6200 Park Avenue
Des Moines, Iowa 50321
(515) 281-8841 / (515) 281-7281 FAX

ATTORNEYS FOR DEFENDANT-APPELLANT

FINAL

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The Evidence was Insufficient to Support the Finding of a Domestic Relationship Between Kieffer and Adams.

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Authorities

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III. The Firearms Prohibition Violates Kieffer's rights under both the Second Amendment to the United States Constitution and Article I, Section 1A of the Constitution of the State of Iowa.

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because at least one of the issues raised involves substantial constitutional issues of first impression in Iowa. Specifically, this case raises concerns of statutory interpretation involving an individual's rights to keep and bear arms under the Second Amendment of the U.S. Constitution and Article I, § 1A of the State of Iowa Constitution. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(a) & (d) (2021).

STATEMENT OF THE CASE

Nature of the Case: Defendant-Appellant Ezekiel Kieffer appeals from his convictions, sentence and judgment for Domestic Abuse Assault impeding flow of air/blood, an aggravated misdemeanor in violation of Iowa Code section 708.2A(2)(d), and first offense Domestic Abuse Assault causing bodily injury or mental illness, a serious misdemeanor in violation of Iowa Code section 708.2A(2)(b), entered on February 24, 2022, following a jury trial in Black Hawk County District Court. Kieffer contends error occurred in the following ways: 1) the evidence was insufficient to support the finding of a

domestic relationship between Kieffer and the alleged victim; 2) the trial court erred in the denial of Keiffer's motion for mistrial after the State violated the Motion in Limine; and 3) the prohibition on gun ownership entered after judgment violates both the U.S. Constitution and the Constitution of the State of Iowa.

Course of Proceedings: On August 1, 2022, the State filed a trial information charging Kieffer with Domestic Abuse Assault Impeding Flow of Air/Blood, an aggravated misdemeanor in violation of Iowa Code § 708.2A(2)(d), and Domestic Abuse Assault Causing Injury or Mental Illness Kieffer, a first offense serious misdemeanor in violation of Iowa Code § 708.2A(2)(b) (2021). (Trial Information) (App. pp. 4-6). Kieffer pleaded not guilty and waived his right to a speedy trial. (Written Arraignment and Plea of Not Guilty) (App. pp. 7-8).

The defense filed a motion in limine on October 3, 2022, seeking to exclude, among other things, any reference to Kieffer's prior arrests, convictions, bad acts and/or character references. (Defendant's Motion in Limine § 1) (App. pp. 9-12). It also sought to prohibit the State from seeking testimony from

any witness regarding matters outside the date/time of the incident in question, as well as referring to the complainant as a “victim” and any improper burden shifting or bolstering. (Defendant’s Motion in Limine §§ 1(c), 3, 5) (App. pp. 11-15). The District Court granted Kieffer’s motion in limine, largely without objection from the State, while indicating some of the more hypothetical issues might have to be ruled on as necessary during trial. (2/23/23 Trial Tr., Voir Dire, at 8:10 - 17:24).

Jury trial commenced February 23, 2023. On February 25, 2023, the jury convicted Kieffer of both counts of the indictment, as described above. (2/24/23 Trial Tr. at 181:12-22). Kieffer filed a combined Motion for a New Trial and Motion in Arrest of Judgment on March 1, 2023, which was denied on March 31, 2023. (Motion for New Trial and Motion in Arrest of Judgment) (App. pp. 24-34) (3/31/23 Sent. Tr. 8:18 – 9:7).

The District Court held a sentencing hearing on March 31, 2023. (3/31/23 Sent. Tr. 1:17-18). The State requested 365 days jail with all but 180 suspended, a suspended fine of \$855, and two years of self-probation. (3/31/23 Sent. Tr. 9:20 – 10:7). Kieffer requested a deferred judgment, a suspended civil

penalty, and either self-probation or no probation. (3/31/23 Sent. Tr. 10:23 – 11:8). As to each Count, after hearing arguments of counsel and the defendant, the District Court sentenced Kieffer to 180 days with 93 suspended, with credit for 87 days served, to run concurrent with each other, and two years' probation. (3/31/23 Order of Judgment and Sentence) (App. pp. 35-39). The Court suspended a fine of \$855 plus surcharge on Count I, imposed a fine of \$430 plus surcharge on Count II, and ordered Kieffer to complete the Iowa Domestic Assault Program. (3/31/23 Order of Judgment and Sentence) (App. pp. 35-39). The Court also extended the no-contact order for an additional 5 years and entered a separate Notice of Firearm Prohibition Pursuant to Iowa Code 724.31A. (3/31/23 Order of Judgment and Sentence) (App. pp. 35-39); 3/31/23 Sent. Tr. 18:1 – 19:12; 20:6-7; and 21:5-9). Kieffer filed a timely notice of appeal on April 11, 2023. (Notice of Appeal) (App. pp. 42-43).

Facts: On June 25, 2022, at approximately 2:35 a.m., law enforcement was dispatched to 1923 Ashland Avenue in Cedar Falls, Iowa, in reference to a possible domestic

disturbance. (Trial Tr., Portion of the Proceedings 2/23/23 and 2/24/23, 22:7-18). Adams testified that she met Kieffer in early to mid-May of 2022 when they worked together at Blain's in Cedar Falls. (2/23/23 Trial Tr., "Day 1 and Portion of Day 2," 43:17-24). Adams indicated she and Kieffer began dating on May 29, 2022, the day her ex passed away. (Id. at 44:12-18). While Adams testified she had moved some belongings into Kieffer's residence on the day of this incident, June 24, 2022, Kieffer later testified that it was just an overnight bag. (Id. at 46:2-3; Trial Tr. Portion of Proceedings Held 2/23/23 and 2/24/23, 71:11-14).

Adams testified that she, Kieffer, and Kieffer's roommate, Austin Fernau, returned from a local event called Sturgis Falls in the early morning hours of June 25, 2022, and she and Kieffer began to argue in the bathroom. (Trial Tr., "Day 1 and Portion of Day 2," 46:22 – 47:1). Adams said Kieffer became angry and accused her of cheating and pushed her into the washer and dryer. (Id. at 47:2-7). Adams testified that although she didn't remember the event very clearly, Kieffer began to hit her and called for his roommate Fernau to intervene and come

get her. (Id. at 47:13-18). Adams stated that there was more pushing and shoving as she tried to leave the bathroom and then at some point Kieffer had his legs wrapped around her neck and she couldn't move, while Fernau tried to separate them. (Id. at 48:16-25). After Fernau helped free her, Adams ran to the kitchen and subsequently broke Kieffer's television by throwing "three or four punches" into it. (Id. at 49:14-17; 50:4-13). Unable to locate her keys or her phone, Adams left the house and walked down the street and ended up "laying down or sitting on the ground" before Fernau picked her up and took her to a neighboring house. (Id. at 51:19 – 52:2). They eventually returned to Kieffer's home and law enforcement responded, despite Adams' reluctance to involve them. (Id. at 53:7-15). Despite this reluctance, Adams relayed her version of events to them and they documented her injuries. (Id. at 63:1-2; 64:1-3). Adams admitted to drinking the night of the incident and also to hitting or scratching Kieffer "in self-defense." (Id. at 63:3-8; 68:9-17).

Austin Fernau, Kieffer's childhood friend and roommate on Ashland at the time of this incident, testified for the State that

when he, Adams, and Kieffer returned home from Sturgis Falls, he was drawn into an argument between the two of them. (Id. at 90:6-11). Fernau testified that Kieffer was using the restroom when “she [Adams] just started throwing punches at him.” (Id. at 92:13-16). The argument continued from there into the bedroom, and Adams “started punching [Kieffer’s] TV” and Kieffer grabbed her in an attempt to prevent further escalation. (Id. at 92:24 – 93:2). However, the argument continued and she and Kieffer got into a “wrestling match” and “[s]he walked out of the house with a baseball bat. (Id. at 93:5-7). Fernau went after her and then the neighbors intervened. (Id. at 93:8-10).

Kieffer testified that he and Adams met in May of 2022 and were boyfriend/girlfriend at the time of this incident one month later. (Trial Tr., Portion of Proceedings Held 2/23/23 and 2/24/23, 70:22 – 71:1). They were not living together and she had not moved in. (Id. at 71:2-17). On the night of June 24, 2023, and early morning of June 25, 2023, he and Adams went to Sturgis Falls and several bars. (Id. at 75:12 – 76.2). Kieffer testified that he and Adams were intoxicated when they returned to the home he shared with Fernau around 1:30 or

2:00 a.m. (Id. at 76:9-11; 76:15-16; 77:3-6). They began to argue when Kieffer was in the bathroom and he called for Fernau as Adams became confrontational and aggressive. (Id. at 78:5-13) Kieffer testified that Adams was hitting herself in the forehead and he tried to call her down, but she bit him and then kicked the shower doors, causing them to break. (Id. at 78:15-21; 79:5-7). Adams punched him seven or eight times in the face before breaking his TV. (Id. at 79:22 – 80:2; 80:4-8). As she continued to throw punches, Kieffer subdued her by wrapping his legs around her to try to keep her away from him. (Id. at 81:2-25). Kieffer indicated he used his legs rather than his arms as he has only two fingers on each hand from an injury in 2016, resulting in nerve damage and as well as mobility issues. (Id. at 82:21 – 83:19).

Kieffer testified that Fernau was able to pull Adams off of him, at which time Adams grabbed her knife and began stabbing the walls in his bedroom as he moved away towards the kitchen. (Id. at 84:2-25; Defense Exhibits 1 and 2) (App. pp. 22-23). After this, Adams grabbed Kieffer's baseball bat and walked outside while Kieffer stayed behind and asked Fernau to

retrieve the bat before she hit his car with it. (Id. at 89:2-16). Fernau returned, indicating he was unable to find her, and he and Kieffer went out to see where she went. (Id. at 89:18-22). At this point, the neighbors had come outside and Kieffer saw Adams about two blocks away, face down on the ground. (Id. at 90:1-14). Kieffer returned home, believing Adams had fallen due to intoxication, as Fernau and the individual at the neighbor's house, Wyatt Ohm, went to check on Adams. (Id. at 90:22 – 91:3).

About 30 minutes later, Adams walked through the door and went into the bathroom without saying anything. (Id. at 92:1-11). Kieffer asked her if she was okay, she responded she was fine, and, according to him, “it was a whole different mood change.” (Id. at 92:12-14). She and Kieffer had gone back to the bedroom when they noticed lights outside the window, indicating the police were present. (Id. at 92:14-19). Neither one of them wanted the police involved, with Kieffer testifying he thought they were coming to arrest Adams and he did not want things to go any farther. (Id. at 97:22 – 98:3).

ARGUMENT

I. The Evidence was Insufficient to Support the Finding of a Domestic Relationship Between Kieffer and Adams.

Preservation of Error: At trial, defense counsel made a motion for a directed verdict of acquittal arguing, inter alia, that the State failed to prove the existence of a domestic relationship as required under element 4 of the marshalling instructions, and as defined in Instruction 16. (Trial Tr., Portion of Proceedings 2/23/23 and 2/24/23, 63:19 – 64:7) (Jury Instructions 9, 10, and 16) (App. pp. 19-21). That motion was considered and denied by the trial court. (Id. at 67:16 – 68:1).

Additionally, in any event, “a defendant need not 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). “A defendant's trial and the imposition of sentence following a guilty verdict are sufficient to preserve error with respect to any challenge to the sufficiency of the evidence raised on direct appeal.” Id. at 202.

Standard of Review: Challenges to the sufficiency of the evidence are reviewed for correction of errors at law. State v. Petithory, 702 N.W.2d 854, 856 (Iowa 2005).

Discussion: Domestic abuse is defined under Iowa Code § 236.2(2) as any form of assault committed under any of the following circumstances:

- a. Family or household members who resided together at the time of the assault.
- b. Separated spouses or persons divorced from each other and not residing together at the time of the assault.
- c. Persons who are parents of the same minor child, regardless of whether they have been married or have lived together at any time.
- d. Persons who have been family or household members residing together within the past year and are not residing together at the time of the assault.
- e. (1) Persons who are in an intimate relationship or have been in an intimate relationship and have had contact within the past year of the assault.

Iowa Code § 236.2(2).

The Code goes on to enumerate the following nonexclusive factors under subsection “e” for determining whether the persons are or have been in an intimate relationship:

- (a) The duration of the relationship.
- (b) The frequency of the interaction.
- (c) Whether the relationship has been terminated.

(d) The nature of the relationship as characterized by either party's expectation of sexual or romantic involvement.

Iowa Code § 236.2(e)(1)(a)-(d).

Nearly all of the evidence elicited at trial indicated Kieffer and Adams' relationship did not meet this definition at the time of this incident. Adams testified she and Kieffer had only been dating for a short time and she did not receive any mail at the residence Kieffer shared with Fernau at 1923 Ashland. (Trial Tr., Day 1 and Portion of Day 2, 81:22 – 82:2). They were not married, nor did they own any property together or share any bank accounts. (Id. at 82:3-10). On direct, Adams was asked “[w]ho lived at 1923?” and she responded with “Ezekiel and A.J. I just moved in my stuff that day.” (Id. at 46:1-5). She went on to testify only that she had been staying there “pretty consistently” from time to time. (Id. at 46:6-8). In fact, the only evidence Adams provided in support of the existence of a domestic relationship between herself and Kieffer was her agreement with the prosecutor when asked “[b]ut at least as of the 24th you had moved in and were one of the roommates then?” (Id. at 46:9-11).

Kieffer testified that he had lived at 1923 Ashland since May of 2021 with his roommate Fernau. (Trial Tr. of 2/23/23 (partial) and 2/24/23 at 69:24 – 70:5). He testified that he and Adams had been boyfriend and girlfriend for approximately one month prior to this incident, and that Adams lived with her grandmother in Evansdale. (Id. at 70:24 – 71:1; 71:22-23). Kieffer repeatedly and unequivocally denied that he and Adams were living together, as evidenced by the following exchange:

Q. And was Ms. Adams living at the house with you on Ashland Avenue?

A. No. She stayed there pretty much like on weekends or days off though.

Q. There was some video played where you said something along the lines of, and I'm 100 percent paraphrasing, she just brought her stuff here that night or tonight or something along those lines. Do you recall that?

A. Yes. She had brought makeup and clothing. My mom was also in town that weekend because of Sturgis Falls, so she was planning on staying over for the weekend, meeting my mom.

Q. So when you said she had just moved her stuff there that night, did you mean she moved in?

A. No.

Id. at 71:2-17.

Kieffer also testified that Adams did not share any of the bills or expenses at his house, nor did she have a key or receive mail there. (Id. at 72:15-17; 73:10-13). As defense counsel correctly pointed out in her Motion for Judgment of Acquittal, the state did not provide “a sufficient quantum of evidence” to let the case go to the jury on the issue of the domestic relationship. (Id. at 63:22-24). They did not have children together, they were not married, and they did not share income or expenses. (Id. at 63:5-7).

In its ruling on Kieffer’s Motion for Judgment of Acquittal on the issue of domestic relation, the trial court held as follows:

Speaking first to the domestic relation element. The court finds that while the evidence may be fairly slim as to the domestic relation, there is still enough evidence looking at it in the light most favorable to the state to let that go through to a jury question. At this point there was - - there were a couple of witnesses at least that testified that she moved her belongings or her clothing in that day, and that would be a question for the jury if, in fact, they thought that would constitute a domestic relation along with some of the other evidence that was presented.

Id. at 67:16 – 68:1.

Despite acknowledging that the evidence was “fairly slim,” the trial court erred in denying Kieffer’s motion and allowing the

question of a domestic relationship to go to the jury. The nonexclusive indicia of cohabitation discussed in and required by State v. Kellogg, 542 N.W.2d 514, 518 (Iowa 1996), were not met under the facts of this case as elicited at trial. (See also Jury Instruction 16) (App. p. 21). Under these circumstances, the trial evidence was insufficient to establish that Kieffer and Adams' situation met the legal definition of "domestic relationship," and the matter should be remanded for entry of a judgment of acquittal. Thus, Kieffer respectfully requests that this Court reverse his conviction and remand for entry of a judgment of acquittal.

II. The Trial Court Erred in Denying Kieffer's Motion For Mistrial After The State Presented Evidence That Violated The Motion In Limine.

Preservation of Error: Error was preserved by the District Court's rulings on Kieffer's motion in limine, objections, and mistrial motion. (Defendant's Motion in Limine) (App. pp. 9-18); (Trial Tr., Voir Dire, 8:10 – 17:22).

Scope of Review: A district court's ruling on a motion for mistrial is reviewed for abuse of discretion. State v. Jirak, 491

N.W.2d 794, 796 (Iowa 1992). Trial courts have considerable discretion in ruling upon motions for mistrial, since they are present throughout the trial and in the best position to gauge the effect of the challenged evidence upon the jury. Id. (citing State v. Cage, 218 N.W.2d 582, 586 (Iowa 1974)). However, although broad, the trial court's discretion is not unlimited; rather, it must be exercised toward the "end that justice be more nearly effectuated." State v. Ware, 205 N.W.2d 700, 702 (Iowa 1973) (citations omitted). In addition, the trial court is deemed to have abused its discretion in denying a mistrial only when the defendant establishes prejudice which prevented the defendant from receiving a fair trial. State v. Callender, 444 N.W.2d 768, 770 (Iowa Ct. App. 1989) (citation omitted).

Discussion. "The primary purpose of a motion in limine is to preclude reference to potentially prejudiced evidence" State v. Jensen, 741 N.W.2d 823, 2007 WL 2963955, at *3 (Iowa Ct. App. 2007) (unpublished table decision) (citing Davis, 240 N.W.2d 662, 663 (Iowa 1976)). Kieffer filed a motion in limine on October 3, 2022, seeking to exclude, among other things, "[a]ny reference to prior arrests, convictions, bad acts, character

evidence or all matters considered 404(b)/other acts of evidence.” (Motion in Limine, § 1) (App. pp. 9-12). In addition, Kieffer noted that “[t]here are no allegations in this case that there have been prior acts of violence between the individuals involved in this case.” (Motion in Limine § 1(c)) (App. pp. 11-12). Kieffer also specifically asked the court to exclude “evidence or testimony concerning alleged prior instances of contact or interactions the police have had with the Defendant” on the basis that “[t]he only purpose for such evidence would be to show bad character and a propensity for criminality – to inflame passions and prejudices of the jury because Defendant is ‘mean’ or ‘bad’ or ‘violent’.” (Motion in Limine § 1(b)) (App. p. 11); Iowa Rules of Evidence 5.401-404.

The trial court addressed Kieffer’s motion in limine on the morning of trial, with trial counsel clarifying that her concerns went beyond any videos that might be admitted and asking specifically that “the State be ordered not to say those things” regarding any witness’ prior familiarity with or situations involving Kieffer. (Trial Tr., Voir Dire, 9:20-25). In addressing the court’s concerns regarding point 1, the State specifically

offered its assurances that such testimony would not come to light, answering “[a]bsolutely” in response to the court’s question “[a]nd is that something that you’re all right with letting officers know and also the lay witnesses I guess too?” (Id. at 10:1-4). The trial court granting limine point 1, above, “until we know differently.” (Trial Tr., Voir Dire, at 10:1-4).

However, shortly thereafter, when discussing the circumstances of the altercation, Adams testified on direct as follows:

Q. Here’s where I am interested. Law enforcement came; right?

A. Yes.

Q. Did you have some reluctance to involve law enforcement or to tell them who had caused those injuries?

A. Yes.

Q. Why?

A. I just didn’t want it to come to this because I’ve been in this situation before and it’s a long process.

(Id. at 53:10-18).

Defense counsel immediately objected and a bench conference was held. (Id. at 53:19-21). Defense counsel argued

that “[b]ased on the motion in limine the witnesses are supposed to be admonished not to speak of those instances,” and requested a mistrial. (Id. at 54:10-19). The court brought Adams back for counsel to voir dire outside the presence of the jury in order to explore her testimony in more detail, after which defense counsel reasserted her request for a mistrial. (Id. at 56:5-8; 58:11-22).

The court declined to either grant the mistrial or issue a curative instruction, instead directing the State to have Adams testify that her prior involvement with domestic violence was with a different perpetrator. (Id. at 59:7-15). Nonetheless, the evidence in this case relied heavily on Adams’ testimony and her initial statement was in direct violation of the court’s ruling on the motion in limine and caused the jury to hear otherwise inadmissible evidence, the only purpose of which was to taint the jury against Keiffer and/or garner sympathy for Adams rather than allowing them to reach a decision on the basis of the merits.

The motion in limine was violated again when Officer Fey testified shortly thereafter that he had been to Kieffer’s home

before. As the State was taking Officer Fey through the body cam video, the following exchange occurred:

Q: Okay. Starting over playback. I've paused here at ten seconds. Now, officer, that's you obviously driving the squad car?

A. Correct.

Q. Was there anybody else with you?

A. No.

Q. And so when you arrived at the scene were you directed towards where the interested parties might be?

A. Yes, and I had been to that residence.

(Id. at 153:11-19) (emphasis added).

At this point defense counsel immediately objected, a bench conference was held, and the jury was excused in order for counsel to make a record. (Id. at 153:20 – 154:4). Defense counsel then stated as follows:

Your Honor, the State just elicited testimony from the officer that is in direct violation of motion in limine that was entered in this case. The State was ordered to tell their witnesses to comply with the motion in limine. That officer was not supposed to be talking about any prior contact at this residence or with the individuals that lived there. Now again we're in a situation where we can't unring the bell. Any curative instruction given to the jury about how this officer may or may not know why he was at the residence before - - I mean, we can ask the officer

but I'm pretty sure it's going to be about either Mr. Kieffer or Mr. Fernau, which are not things that should be before this jury as they are prior bad acts that are inadmissible. So for those reasons I would be asking for a mistrial as it is in direct violation of the motion in limine.

(Id. at 154:5-20).

The State resisted the motion for mistrial and argued that there was no violation because 1) the officer did not use the word "before," and 2) the State did not elicit the offending testimony. (Id. at 155:4-10). In response, defense counsel correctly noted that all the videos had been specifically redacted prior to trial to remove that information, so the State certainly knew it was a potential problem. (Id. at 156:6-10); (See also Trial Tr., Voir Dire, 8:17 – 10:4; 16:24 – 17:6).

The trial court began by finding that the testimony was "in direct violation of the motion in limine." (Id. at 156:18-19). Officer Fey was brought back in for voir dire outside the presence of the jury to further explore his testimony about having previously been to Kieffer's residence, which apparently involved a psychiatric incident with defense witness Fernau. (Id. at 158:8-11). After the voir dire of Officer Fey, the court said "I am still of the opinion that it is in violation of the motion in

limine,” and then took a short recess to consider the mistrial request (Id. at 157:4 – 158:11; 159:9-11).

The court ultimately denied Kieffer’s motion for mistrial, but not before admonishing the State as follows:

The Court: We are back on the record. We’re still outside the presence of the jury. The Court took a moment to think about the request for a mistrial. At this point, I am gonna deny the request for a mistrial. I am going to tell the State that the cumulative effect of the prior violation, of the having the domestic abuse before that the victim testified to, plus this is - - is getting very close to me to being a cumulative effect that might be a mistrial. So I would ask the State to be very careful with its witnesses and perhaps go overboard in directing them on certain issues.

(Id. at 160:1-11).

Again, as with the first violation, the court declined to either issue a curative instruction or grant Kieffer’s renewed request for a mistrial. Rather, the court directed the State to have Officer Fey clarify that the reason for the prior visit(s) to the residence was unrelated to Kieffer. (Id. at 160:12-17).

In denying Keiffer’s requests for a mistrial, the court did not adequately address these violations of the motion in limine. The State clearly violated the court’s pretrial ruling by presenting this evidence and the prosecutor did not even make

a meaningful attempt to argue otherwise, particularly as to the second violation. (Trial Tr., Day 1 and a Portion of Day 2, 155:4-19). This testimony was in direct violation of the court's ruling on section 1(b) of the motion, which specifically prohibited police testimony such as "they have been to this house before" or "this is not the first time they have been out here." (Motion in Limine § 1(b)) (App. p. 11); (Trial Tr., Voir Dire, 9:22 – 10:4). Therefore, the question becomes whether reversal is required.

To constitute reversible error on the violation of a limine order, the defendant has the burden of establishing the prejudice deprived him of a fair trial. State v. Frei, 831 N.W.2d 70, 80 (Iowa 2013) (citations omitted), overruled on other grounds by Alcala v. Marriott Int'l, Inc., 880 N.W.2d 699, 708 n.3 (Iowa 2016). "When the error is not of constitutional magnitude, the test of prejudice is whether it sufficiently appears the rights of the complaining party have been injuriously affected or that the party has suffered a miscarriage of justice." Id. at 73. The Court considers the whole trial, including any admonition to the jury. State v. Greene, 592

N.W.2d 24, 32 (Iowa 1999) (quoting State v. Anderson, 448 N.W.2d 32, 33 (Iowa 1989)).

As a general rule, the prompt action of the trial court in striking the offending evidence from the record and instructing the jury to disregard will ordinarily prevent prejudice. State v. Wade, 467 N.W.2d 283, 285 (Iowa 1991) (quoting State v. Brown, 397 N.W.2d 689, 699 (Iowa 1986)). However, in the instant case, the district court did not promptly strike the offending evidence. Nor did it ever admonish the jury not to consider the challenged evidence in an instruction or otherwise.

Unfairly prejudicial evidence is that which “appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action” that causes the jury to make its decision on something other than the proof presented. State v. White, 668 N.W.2d 850, 854 (Iowa 2003) (citation omitted). Such a rule is necessary not because character is irrelevant but rather based “on a fear that juries will tend to give it excessive weight” and “on a fundamental sense that no one should be convicted of a crime based on his or her [other] misdeeds.” State v. Sullivan, 679

N.W.2d 19, 24 (Iowa 2004). The jury was likely to give an excessive weight to evidence that Kieffer was some type of serial offender. See Id. (“Empirical studies have confirmed the courts’ fear that juries treat bad-acts evidence as highly probative.”). See also State v. Liggins, 524 N.W.2d 181, 188–89 (Iowa 1994) (finding admission of evidence showing cocaine delivery was inherently prejudicial).

The evidence presented as to both Adams’ reluctance to report this matter to the police based on prior experience and law enforcement’s familiarity with Kieffer’s residence was unfairly prejudicial. This testimony cannot be characterized as vague since the implication of the reference was specific and clear, i.e. that not only had Adams “been in this situation before,” but that it was with Kieffer, and the process was difficult. (Id. at 53:17-18). The inadmissible evidence appealed to the jury’s instincts to punish Kieffer and the remainder of the State’s evidence was not so overwhelming as to not prejudice him.

In addition, the court did not endeavor to take any curative actions to blunt the impact of the evidence. The court discussed and dismissed the idea of a cautionary instruction, without giving Kieffer that option, after the denial of the Motion for Mistrial. (Id. at 59:7-12); (See also State v. Plain, 898 N.W.2d 801, 815 (Iowa 2017) (adequacy of cautionary instructions depends on whether the defense can “combat the evidence without compounding the prejudice,” the extensiveness of the evidence and the promptness with which it was addressed, and the prejudice in light of the strength of the State’s case)).

While the defense may choose to decline cautionary instructions so as not to draw attention to the improper evidence, no such option was provided here. (See State v. Turner, No. 15-2130, 2017 WL 108304 at *2 (Iowa Ct. App. Jan. 11, 2017) (State recognizing strategic reasons for not requesting limiting instruction)). Because there were no curative measures taken, there was a great risk the jury would consider this evidence improperly and convict Kieffer based upon an inference other misdeeds or prior involvement with law

enforcement rather than the facts, and the court erred in denying Kieffer's requests for a mistrial.

The evidence in this case rested heavily on Adams' testimony. The District Court erred in overruling Kieffer's objections and denying his motion for mistrial as they related to the introduction of testimony inferring prior acts of violence between the individuals involved in this case and/or at Kieffer's residence. Therefore, for all the reasons discussed above, the district court abused its discretion in failing to grant a mistrial, and Kieffer is entitled to a new trial.

III. The Firearms Prohibition Violates Kieffer's rights under both the Second Amendment to the United States Constitution and Article I, Section 1A of the Constitution of the State of Iowa.

Error Preservation. The district court's sentencing order included a notice that pursuant to Iowa Code § 724.31A, Kieffer would be prohibited from possessing firearms and that a separate order would be issued to that effect. (Sent. Order, p. 4) (App. p. 38). A separate notice was filed at the same time as the sentencing order stating that pursuant to Iowa Code § 724.31A, Kieffer "lost firearm rights" because the court found he was

guilty of a “misdemeanor crime of domestic violence” pursuant to Iowa Code § 724.26(2) and 18 U.S.C. 922(g)(9). (Notice of Firearm Prohibition) (App. pp. 40-41). Because the firearms prohibition was contained in the sentencing order, it became part of Kieffer’s sentence. Iowa Code § 724.26 provides that a person who is subject to a protective order under 18 U.S.C. §922(g)(8) or who has been convicted of a misdemeanor crime of domestic violence under 18 U.S.C. § 922(g)(9) and who knowingly possesses, ships, transports, or receives a firearm, offensive weapon, or ammunition is guilty of a class “D” felony. Iowa Code § 724.31A recognizes a court may issue an “order or judgment” prohibiting a defendant from acquiring a pistol or revolver.

The district court imposed the prohibition pursuant to Iowa Code sections 724.31A and 18 U.S.C. 922(g)(9). (Sent. Order p. 4; Notice of Firearm Prohibition) (App. pp. 38, 40-41). See Iowa Code § 724.8(6) (2021) (no permit to carry may be issued to person “prohibited by federal law from shipping, transporting, possessing, or receiving a firearm”); 18 U.S.C. 922(g)(9) (2021) (making it a crime for any person convicted of

a “misdemeanor crime of domestic violence” to possess a firearm). These provisions create an immediate and mandatory penalty of firearm prohibition for certain convicted defendants. Cf. State v. Fisher, 877 N.W.2d 676, 684 (Iowa 2016) (finding defendant must be advised of driver’s license revocation consequence during plea to drug possession because it is “mandatory, immediate, and part of the punishment for that offense”). The prohibition is penal in nature because it effectively deprives Kieffer of what would otherwise be his constitutionally-protected rights to acquire, carry and possess weapons. New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2122 (2022); District of Columbia v. Heller, 554 U.S. 570, 595 (2008). U.S. Const. amend. II, Iowa Const. art. I, § 1A. Accordingly, the prohibition constitutes part of Kieffer’s sentence and is therefore directly appealable. See State v. Lillibridge, No. 21-1628, 2023 WL 2152645 at *1 (Iowa Ct. App. Feb. 22, 2023) (concluding defendant may challenge whether district court made appropriate findings to support gun rights prohibition on appeal).

A defendant may challenge an illegal sentence at any time. State v. Bruegger, 773 N.W.2d 862, 872 (Iowa 2009). The requirement of error preservation is generally not applied to “void, illegal or procedurally defective sentences.” State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994); accord State v. Cooley, 587 N.W.2d 752, 754 (Iowa 1998).

Scope of Review. Constitutional issues are reviewed de novo. State v. Nail, 743 N.W.2d 535, 538 (Iowa 2007).

A. Second Amendment of the United States Constitution

Discussion. The firearms prohibition applied to Kieffer violates his right to bear arms under the Second Amendment to the United States Constitution. Because the State cannot “affirmatively prove that its firearm regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms,” it must be vacated. See New York Rifle & Pistol Assoc., Inc. v. Bruen, 142 U.S. 2111, 2127 (2022).

In 2008, the United States Supreme Court held that “the Second Amendment conferred an individual right to keep and bear arms.” District of Columbia v. Heller, 554 U.S. 570, 595 (2008). The Court recognized limitations on the right –

including prohibitions on the possession of firearms by felons or the mentally ill, limitations on carrying firearms into “sensitive places” such as schools and government buildings, qualifications for commercial arms sales, and limitation to weapons of common use. Id. at 626-27. Two years later, the U.S. Supreme Court considered whether the Second Amendment right to bear arms as announced in Heller should be applied to the States. McDonald v. City of Chicago, 561 U.S. 742 (2010). A majority of the Court found Heller should be incorporated to the States via the Fourteenth Amendment, though four of the justices elected to do so through the due process clause while Justice Thomas elected to do so through the privileges and immunities clause. Id. at 791 (Alito, J., writing for plurality); Id. at 806 (Thomas, J., concurring in part).

In Heller, *supra*, the Court explained that presumptively lawful, longstanding prohibitions on the right to bear arms were not to be cast in doubt. Id., 554 U.S. at 626-627. Based on such language, in the context of a broader reading of both Heller and McDonald, then-Judge Kavanaugh advocated for evaluating challenges to restrictions on gun ownership based

solely on the Second Amendment's "text, history, and tradition." Heller v. District of Columbia (Heller II), 670 F.3d 1244, 1271-75 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."). Under this historical-traditional approach, "analysis of whether ... gun regulations are permissible must be based on their historical justifications." Id. at 1272 (internal quotations omitted). While Judge Kavanaugh cautioned that his approach does not require a precise weapon or restriction to have existed in 1787, 1791, or even 1868, there must, at least, be an analogous corollary. Id. at 1275. ("[T]he proper interpretive approach is to reason by analogy from history and tradition.").

Although McDonald referred to the right to bear arms for self-defense in particular as "fundamental," the Court has been less clear on what level of scrutiny to give to laws impacting the right to bear arms. Id. at 791 (describing the right as "fundamental from an American perspective"). This question

was resolved last year in New York Rifle & Pistol Assoc., Inc. v. Bruen, 142 U.S. 2111, 2127 (2022).

In Bruen, the Supreme Court held that intermediate scrutiny is not appropriate. Rather,

the standard for applying the Second Amendment is as follows: When the Second Amendment’s plain text cover an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”

Bruen, 142 S. Ct. at 2129–30 (quoting Konigsberg v. State Bar of Calif., 366 U.S. 36, 50 n.10 (1961)).

To carry its burden, the Government must point to “historical precedent from before, during, and even after the founding [that] evinces a comparable tradition of regulation.” Bruen, 142 S.Ct. at 2131–32 (internal quotation marks omitted). “[W]e are not obliged to sift the historical materials for evidence to sustain [the statute]. That is [the Government’s] burden.” Id. at 2150.

United States v. Rahimi, 61 F.4th 443, 454 (5th Cir. 2023) (cert. granted, 143 S.Ct. 2688 (6/30/2023)), (finding unconstitutional federal statute prohibiting possession of firearms by a person subject to a domestic abuse restraining order). Rahimi closely

parallels the facts of the case at hand and suggests that under the historical-traditional framework, 18 U.S.C. 922(g)(9) and the ban placed on Kieffer is unconstitutional because there is, at best, thin or conflicting historical framework for disarming domestic violence offenders. See U.S. v. Skoien, 614 F.3d 638 (7th Cir. 2010); David B. Kopel & Joseph G. S. Greenlee, The Federal Circuits' Second Amendment Doctrines, 61 St. Louis L.J. 193, 244 (Winter 2017) (“[T]here is simply no tradition - from 1791 or 1866 - of prohibiting gun possession (or voting, jury service, or government service) for people convicted of misdemeanors or subject to civil protective orders.”).

The sentencing court’s order prohibiting Kieffer from possessing firearms pursuant to Iowa Code § 724.8(6) and 18 U.S.C. 922(g)(3), for a misdemeanor conviction is covered by the plain text of the Second Amendment which protects “the right of the people to keep and bear Arms.” U.S. Const. amend II; Heller, 554 U.S. at 628. It is presumptively constitutionally protected. Bruen, 142 S. Ct. at 2129–30. Accordingly, the State now has the burden of justifying this regulation “with ‘historical precedent’ that demonstrates a comparable tradition of

regulation from before, during, and even after the founding [that] evinces a comparable tradition of regulation” to rebut the presumption of unconstitutionality. Bruen, 142 S.Ct. at 2131–32. If it cannot, the firearms prohibition and the related portion of the sentencing order must be vacated.

Because the district court’s sentencing order and notice of firearms prohibition implicates Kieffer’s Second Amendment rights, under either the scrutiny analysis or the historical analysis, it cannot survive the demands of Heller, McDonald, and Rahimi, *supra*, and must be vacated.

B. Article I, Section 1A of the Constitution of the State of Iowa

Discussion. Article I, section 1A of the Iowa Constitution provides: “[t]he right of the people to keep and bear arms shall not be infringed. The sovereign state of Iowa affirms and recognizes this right to be a fundamental individual right. Any and all restrictions of this right shall be subject to strict scrutiny.” Iowa Const. art. I, § 1A. This amendment to the Iowa Constitution was adopted and ratified on November 8, 2022, and was in effect at the time of Kieffer’s sentencing. It mandates

a strict scrutiny analysis of any firearm restriction imposed by statute, including but not limited to Iowa Code § 724.31A. Under this analysis, the firearm prohibition entered against Kieffer in this case violates his right to keep and bear arms under the Iowa Constitution.

Article I, § 1A provides that the right to bear arms is a fundamental right and any restrictions on the right are subject to strict scrutiny. Iowa Const. art. I, § 1A. Thus, the court “will determine if the government action . . . is narrowly tailored to serve a compelling government interest.” Hensler v. City of Davenport, 790 N.W.2d 569, 580 (Iowa 2010). The prohibition in this case, as applied to Kieffer for a misdemeanor domestic violence conviction, does not survive strict scrutiny.

Federal courts, applying an intermediate standard of scrutiny, have considered statutes limiting one’s right to bear arms after a misdemeanor domestic violence conviction. The professed government interest is in keeping firearms out of the hands of people deemed particularly risky or dangerous. United States v. Carter, 669 F.3d 411, 417 (4th Cir. 2012); United States v. Yancey, 621 F.3d 681, 683 (7th Cir. 2010).

Iowa is one of only 4 states to have amended their constitution to adopt the NRA-approved language mandating that “any and all restrictions of this right [to bear arms] shall be subject to strict scrutiny.”¹ This action places the inquiry of defining the scope of Iowa’s gun restriction laws, such as that found in Iowa Code § 724.31A, squarely within the realm of the appellate courts.

Kieffer is a first-time domestic violence offender. His convictions are misdemeanors, not felonies, and he does not have any prior felony convictions. (3/31/23 Sent. Tr., 12:10-11; 13:15-18, 17:20-22). Kieffer’s state constitutional right to bear arms has been implicated; thus, under the newly ratified amendment, the State must show that the gun restriction imposed upon him is narrowly tailored to serve a compelling state interest.

The firearms prohibition applied to Kieffer does not survive strict scrutiny. The state statutes supporting the court’s order are not narrowly tailored to serve a compelling government

¹ The other 3 are Alabama, Louisiana, and Missouri.

interest. Rather, they are overbroad and impose a blanket prohibition on all citizens convicted even of first-time misdemeanor offenses from possessing for self-defense, even in one's home. Thus, the notice of firearms prohibition and the related portion of the sentencing order violate Kieffer's state constitutional rights and should be vacated.

CONCLUSION

As discussed in detail above, there are three main assignments of error in this case. First, the evidence as adduced at trial was insufficient to establish the existence of the requisite domestic relationship between the parties. Next, the State repeatedly violated the motion in limine and the district court failed to adequately address these violations. Finally, the firearms prohibition entered in this case violates both the Second Amendment of the U.S. Constitution and Art 1, Sec. 1A of the Constitution of the State of Iowa. For all of the foregoing reasons and authority, Defendant-Appellant Ezekiel Kieffer respectfully requests relief from this Court as detailed herein.

REQUEST FOR ORAL ARGUMENT

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 \$2.82, 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 7,353 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Michelle E. Rabe

Dated: 5/16/24

MICHELLE E. RABE

Assistant Appellate Defender

Appellate Defender Office

6200 Park Avenue

Des Moines, IA 50321

(515) 281-8841

mrabe@spd.state.ia.us

appellatedefender@spd.state.ia.us