IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. WICHANG GACH CHAWECH, Defendant-Appellant.	SUPREME CT. NO. 22-1974

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE JEANIE K. VAUDT, JUDGE

APPLICANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED DECEMBER 20, 2023

MARTHA J. LUCEY
State Appellate Defender

THERESA R. WILSON
Assistant Appellate Defender
twilson@spd.state.ia.us
appellatedefender@spd.state.ia.us

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

ATTORNEYS FOR DEFENDANT-APPELLANT

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in finding the evidence was sufficient to support Chawech's convictions? Chawech was justified in using reasonable force to defend himself against like force. Alternatively, even if he were not justified, the evidence did not establish that Chawech's bullet was the one that hit Nyamal Deng.

II. Did the Court of Appeals deviate from U.S. Supreme Court and Iowa Supreme Court precedent in finding error was not preserved on Chawech's challenge to an illegal mandatory minimum sentence that was never charged in the trial information?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Court Rules:

Other Authorities:

STATEMENT IN SUPPORT OF FURTHER REVIEW

COMES NOW Defendant-Appellant and pursuant to Iowa R. App. P. 6.1103 requests further review of the December 20, 2023, decision in State of Iowa v. Wichang Gach Chawech, Supreme Court No. 22-1974.

1. The Court of Appeals erred in affirming Chawech's convictions, judgment, and sentence for one count of Assault with Intent to Inflict Serious Injury, Willful Injury Causing Serious Injury, and Intimidation with a Dangerous Weapon with Intent.

2. The Court of Appeals entered a decision in conflict with the precedent of both the United States Supreme Court and the Iowa Supreme Court. Iowa R. App. P. 6.1103(1)(b)(1) (2023).

The Court held that the State's failure to charge the mandatory minimum of Iowa Code section 902.7 was not an illegal sentence but a defective procedure not preserved for appeal. Opinion pp. 9-10. A mandatory minimum sentence

enhancement is an "element" that must both be listed in the indictment and found by a jury. Alleyene v. United States, 570 U.S. 99, 103, 110-11 (2013); Jones v. United States, 526 U.S. 227, 232 (1999). Failure to allege Section 902.7 in the trial information results in an illegal sentence. State v. Luckett, 387 N.W.2d 298, 301 (Iowa 1986); State v. Dann, 591 N.W.2d 635, 639 (Iowa 1999).

Even if the error were characterized as a defective procedure rather than an illegal sentence, error preservation is unnecessary. State v. Richardson, 890 N.W.2d 609, 615 (Iowa 2017); State v. Gross, 935 N.W.2d 695, 698 (Iowa 2019).

3. The Court of Appeals erred in finding the evidence sufficient to affirm Chawech's convictions. While the Court of Appeals placed emphasis on evidence that one shot was fired, multiple witnesses told detectives they heard more than one shot. (9/15/22 Tr. p. 65 L.6-p. 66 L.16, p. 77 L.10-p. 78 L.9, p. 80 L.2-p. 81 L.7; 9/16/22 Tr. p. 53 L.18-p. 54 L.24). This

is consistent with Chawech's claims he was defending himself and that his bullet did not hit Nyamal Deng.

4. Chawech does not seek review of the Court of Appeals' opinion to the extent it ordered merger under Counts II and III.

WHEREFORE, Chawech respectfully requests this Court grant further review of the Court of Appeals' decision in his case.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant Wichang Chawech from his convictions, sentence, and judgment for two counts of Assault with Intent to Inflict Serious Injury, aggravated misdemeanors in violation of Iowa Code sections 708.1 and 708.2(1) (2021), Willful Injury Causing Serious Injury, a class C felony in violation of Iowa Code section 708.4(1) and 902.7 (2021), and Intimidation with a Dangerous Weapon with Intent, a class C felony in violation of Iowa Code sections 708.6 and 902.7 (2021). Judgment was entered following a jury trial in Polk County District Court.

Course of Proceedings: Chawech generally accepts the Courts of Appeals' recitation of the course of proceedings and facts. Additional and disputed facts will be discussed below as relevant to Chawech's challenge to the sufficiency of the evidence.

ARGUMENT

I. The evidence was insufficient to support Chawech's convictions. Chawech was justified in using reasonable force to defend himself against like force. Alternatively, even if he were not justified, the evidence did not establish that Chawech's bullet was the one that hit Nyamal Deng.

Preservation of Error: Error was preserved by the District Court's rulings on Chawech's motion for directed verdict and motion for judgment of acquittal. (9/19/22 Tr. p. 36 L.19-p. 41 L.23, p. 131 L.21-p. 133 L.3). Chawech specifically argued that there were multiple shots, he was defending himself, and his bullet could not have hit Nyamal Deng. (9/19/22 Tr. p. 36 L.22-p. 40 L.11). Nonetheless, a motion for judgment of acquittal is no longer required to preserve error from a jury trial. State v. Crawford, 972 N.W.2d 189, 196-98 (Iowa 2022).

Standard of Review: The Court considers the evidence in the light most favorable to the State, and it considers all the evidence presented at trial, not just the evidence which supports the verdict. State v. Adney, 639 N.W.2d 246, 250

(Iowa Ct. App. 2001). The verdict must be supported by substantial evidence, "such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt." Id. The evidence presented must do more than create speculation, suspicion, or conjecture. State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981).

Merits: "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). See also Patterson v. New York, 432 U.S. 197, 211 (1977) (recognizing requirement of proof beyond a reasonable doubt was the "universal rule" long before Winship). Review of a sufficiency claim requires not simply determining whether the jury was properly instructed, but "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318 (1979).

"[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319. In Travillion v. Superintendent Rockview SCI, the Third Circuit explained the Jackson standard as requiring "the finder of fact 'to reach a subjective state of *near certitude* of the guilt of the accused.'" Travillion v. Superintendent Rockview SCI, 982 F.3d 896, 902 (3rd Cir. 2020) (quoting Jackson v. Virginia, 443 U.S. 307, 315 (1979)).

Contrary to the Court of Appeals' opinion, the evidence in this case did not rise to the level of "near certitude of guilt" to support Defendant-Appellant Wichang Chawech's convictions on any of the four counts. Rather, the evidence supported a finding that Chawech was acting in self-defense and defense of others after he perceived Abdullahi Maiqudi raise a weapon during a bar fight. Even if this Court does not find his

actions justified, the evidence failed to establish the bullet he fired was the one that hit Nyamal Deng.

A. Chawech was justified in firing his weapon.

"Justification is a statutory defense that permits a defendant to use reasonable force to defend himself or herself." State v. Lorenzo Baltazar, 935 N.W.2d 862, 869 (Iowa 2019). The Iowa Code had traditionally provided that "a person is justified in the use of reasonable force when the person reasonably believes that such force is necessary to defend oneself or another from any actual or imminent use of unlawful force." Iowa Code § 704.3 (2015). Reasonable force was the amount of force a reasonable person would deem necessary to prevent injury or loss. Id. § 704.1. It could include deadly force to resist a similar force or to protect the life and safety of the person or another. Id. Reasonable force could be used to defend another or to resist a forcible felony. Id. §§ 704.3, 704.7. A person generally had a duty to retreat before resorting to force, unless retreating would pose a risk to

life or safety, or if a person was in their dwelling or place of business. Id. § 704.1.

In 2017, the Iowa General Assembly made significant changes to Iowa's self-defense statutes. State v. Wilson, 941 N.W.2d 579, 585 (Iowa 2020) (citing H.F. 517, 87th G.A., 1st Sess. (Iowa 2017); 2017 Iowa Acts ch. 69, §§ 37–44). Iowa's new justification statutes, which were in effect at the time of the shooting in this case, provided that a person had no duty to retreat so long as they were in *any place* where they were lawfully entitled to be and were not engaged in illegal activity. Iowa Code § 704.1(3) (2021).

The new statutes retained the ability to use deadly force "to avoid injury or risk to one's life or safety … or it is reasonable to believe that such force is necessary to resist a like force or threat." Id. § 704.1(1). The definition of deadly force continued to include force used for the purpose of causing serious injury, force the actor knows or reasonably should know will create a strong probability, that serious

injury will result, or discharge of a firearm "in the direction of some person with the knowledge of the person's presence there, even though no intent to inflict serious physical injury can be shown." Id. § 704.2(1)(c). The fact that a person might be wrong in estimating the danger or the force necessary to repel the danger does not undermine the defense as long as there is a reasonable basis for the belief of the person and the person acts reasonably in the response to that belief. Id. § 704.2(2).

The jury in Chawech's trial was instructed on his defense of justification. (Inst. 21)(App. p. 12). In accordance with Iowa's stand your ground law, the jury was instructed that Chawech had no duty to retreat from a location where he was legally allowed to be so long as he was not engaged in illegal activity. (Insts. 23, 26)(App. pp. 14, 17). The jury was instructed Chawech must have acted with an honest and sincere belief danger existed, and that his perception of danger was reasonable. (Insts. 27, 28)(App. pp. 18-19).

The evidence presented at trial established Chawech was justified in using reasonable force against Abdullahi Maiqudi. Chawech testified he observed men in Maiqudi's group with guns before they entered the bar, and Maiqudi was "cussing [him] out" while Gbeddeh tried to get Maiqudi to calm down. (9/19/22 Tr. p. 51 L.6-p. 55 L.25). Chawech was alerted to a fight inside the bar apparently involving Gbeddeh and others. (9/19/22 Tr. p. 82 L.16-p. 83 L.12). When Gbeddeh and Maiqudi exited the bar, Chawech saw them get into a confrontation with another group of men. (9/19/22 Tr. p. 86 L.5-p. 88 L.1). Chawech went to step in to stop the situation from escalating, which was his role at the bar. (9/19/22 Tr. p. 47 L.2-17, p. 88 L.2-10).

According to Chawech, Gbeddeh displayed a gun from his pocket, and Maiqudi had one at his waist. (9/19/22 Tr. p. 88 L.25-p. 89 L.19, p. 112 L.19-p. 113 L.3). Chawech did not draw his gun until Maiqudi raised his arm and aimed at him. (9/19/22 Tr. p. 89 L.15-p. 90 L.23, p. 113 L.4-16).

According to Chawech, he pushed Maiqudi, Maiqudi fired his gun, and then Chawech fired his gun but it jammed. (9/19/22 Tr. p. 90 L.1-10). Chawech heard more shots as he retreated between two vehicles and unjammed his gun. (9/19/22 Tr. p. 90 L.11-15, p. 106 L.10-21, p. 115 L.7-19, p. 129 L.5-15). Chawech testified he was in fear for his life. (9/19/22 Tr. p. 111 L.7-11).

Gbeddeh admitted having a gun when he was at the bar, but claimed he did not have it on him when the shooting occurred. (9/14/22 Tr. p. 52 L.6-8, p. 53 L.8-p. 55 L.4). Maiqudi denied ever having a gun. (9/13/22 Tr. p. 138 L.12-17). Even so, the surveillance video from the bar shows Maiqudi getting closer to the confrontation and raising his arm toward Chawech just before the shooting. (9/16/22 Tr. p. 16 L.24-p. 18 L.20, p. 91 L.7-p. 92 L.9; 9/19/22 Tr. p. 89 L.15-p. 90 L.25; Ex. 87 1:54:30-1:54:45; Ex. F-3)(Ex. App. p. 7). Maiqudi testified that a metallic object seen at the end of his hand was his bracelets and not a gun. (9/14/22 Tr. p. 24

L.9-p. 25 L.15). Dr. Joshua Akers, however, testified that a still shot from the surveillance video appeared to show Maiqudi holding a gun. (9/14/22 Tr. p. 148 L.9-17). Even assuming Maiqudi did not have a gun, given the presence of guns on "everyone" as both Gbeddeh and Chawech put it, the metallic appearance of Maiqudi's bracelets, and Chawech's earlier experience with the group, it would not be unreasonable for Chawech to assume Maiqudi was pulling a gun on him. (9/14/22 Tr. p. 24 L.9-p. 25 L.15, p. 53 L.19-22; 9/19/22 Tr. p. 51 L.6-p. 52 L.25).

Notably, the surveillance video contradicts the testimony of various witnesses who claimed Chawech was the aggressor. Nyador Bilim admitted that -- before seeing the video -- she believed Chawech immediately grabbed Gbeddeh as he walked out, put him against the wall, pulled out a gun, and let out a shot. (9/13/22 Tr. p. 89 L.4-8, p. 94 L.23-p. 97 L.15). Likewise, Nyalat Dak testified that Chawech put Gbeddeh against the wall, put a gun to his head, and pulled the trigger

before the gun jammed. (9/15/22 Tr. p. 56 L.16-p. 57 L.21, p. 59 L.4-8). She had to admit the video did not show Gbeddeh against the wall with a gun to his head. (9/15/22 Tr. p. 87 L.7-p. 89 L.11). When confronted with the inconsistency, Nyador Bilim simply agreed "the video is what it is." (9/13/22 Tr. p. 114 L.13-16).

For his part, Gbeddeh did not recall Chawech throwing him against the wall. (9/14/22 Tr. p. 72 L.6-8). In fact, the video showed Chawech initially against the wall while Gbeddeh and Maiqudi argued with others. (Ex. 87 1:52-47-1:54:43). Maiqudi testified that Chawech put a gun to his head and shot at him as he tried to walk by. (9/13/22 Tr. p. 131 L.5-9, p. 134 L.25-p. 135 L.18). Both Maiqudi and Gbeddeh admitted they could not see a gun pointed at Maiqudi's head on the video as it was played. (9/14/22 Tr. p. 20 L.14-p. 23 L.16, p. 85 L.10-p. 87 L.22). Simply put, the video contradicts the State's key witnesses on the critical question of who fired first.

The record also supports more than one shot being fired outside of the High Dive bar. Chawech testified he fired one shot after Maiqudi fired his gun, but heard another shot as he retreated. (9/19/22 Tr. p. 90 L.1-15, p. 113 L.4-20). Detective Jeffrey Shannon testified that the High Dive's three security guards and two other people he interviewed also mentioned hearing multiple shots. (9/16/22 Tr. p. 53 L.18-p. 54 L.24). Nyalat Deng testified she heard one shot, but did not remember if she told Shannon she heard shots. (9/13/22 Tr. p. 77 L.17-p. 78 L.2). Nyalat Dak testified she was positive she heard only shot, but admitted that she told Shannon she heard two or three shots. (9/15/22 Tr. p. 65 L.6-p. 66 L.16, p. 77 L.10-p. 78 L.9, p. 80 L.2-p. 81 L.7). And while the video is less than clear, it appears there may be two muzzle flashes at the time of the shooting. (Ex. 87 1:54:35-1:54:43).

Chawech does not dispute that he fired his gun toward Maiqudi, but contends he only did so after Maiqudi fired at

him first. (9/19/22 Tr. p. 90 L.1-15). He was in fear for his life. (9/19/22 Tr. p. 111 L.4-8). He was in front of the business that employed him to deescalate potentially dangerous situations. (9/19/22 Tr. p. 47 L.2-p. 48 L.17). While he did not have any legal obligation to leave a location where he had a right to be, he also had no opportunity to do so. Iowa Code § 704.1(3) (2021). The confrontation escalated quickly, giving Chawech reason to believe he would be shot if he either tried to leave or call 911 and wait for police. Chawech used reasonable force to protect himself and others from what he perceived to be a real and reasonable danger of deadly force. Iowa Code § 704.3 (2021).

Chawech's actions were justified as a matter of law, and his convictions, judgment, and sentence should be vacated.

B. The evidence did not establish that Chawech's bullet is the one that struck Nyamal Deng.

Even if this Court does not find Chawech's actions were justified, the record fails to support a finding that the bullet he fired was the one that hit Nyamal Deng. There is ample

evidence that a bullet fired by Abdullahi Maiqudi was the bullet that struck and fatally injured Nyamal Deng.

Polk County Medical Examiner Dr. Joshua Akers testified that cause of Nyamal Deng's death was a gunshot wound to the neck and the manner of her death was homicide. (9/14/22 Tr. p. 100 L.22-p. 101 L.11). He opined, but did not definitively conclude, that the same bullet that grazed Abdullahi Maiqudi's chin could have suffered yaw and created the irregular entrance wound in Nyamal Deng's neck. (9/14/22 Tr. p. 106 L.17-p. 108 L.7, p. 111 L.22-p. 112 L.7, p. 133 L.3-11).

Akers testified that the trajectory of the bullet path through Maiqudi was downward while the trajectory of the bullet path through Nyamal Deng was upward. (9/14/22 Tr. p. 119 L.18-p. 120 L.13). He explained that a bullet would not be able to reverse course, but that the trajectory of a bullet's path was dependent on the position of the gun and the position of the body. (9/14/22 Tr. p. 120 L.14-p. 121 L.19, p.

130 L.22-p. 132 L.24). Even though he testified it was possible the same bullet could have caused both injuries, he acknowledged that it could not have done so based on the positioning of the parties at the time of the shooting. (9/14/22 Tr. p. 133 L.4-10, p. 136 L.3-20).

Akers testified he could not say whether a gun held by Chawech or a gun held by Maiqudi caused Nyamal Deng's death. (9/14/22 Tr. p. 150 L.10-16). He acknowledged that if Maiqudi had a gun pointed down, started to raise it as he went by Nyamal Deng, and then clenched the trigger, he could have created the upward trajectory seen in Nyamal Deng's wound. (9/14/22 Tr. p. 150 L.10-p. 151 L.8).

According to Chawech, Maiqudi had a gun at his waist. (9/19/22 Tr. p. 89 L.15-19, p. 112 L.16-p. 113 L.5). Chawech did not draw his gun until Maiqudi raised his arm and aimed at him. (9/19/22 Tr. p. 89 L.15-p. 90 L.10, p. 113 L.4-18). According to Chawech, he pushed Maiqudi, Maiqudi fired his gun, and then Chawech fired his gun but it jammed.

(9/19/22 Tr. p. 90 L.1-15). Chawech heard more shots as he retreated between two vehicles and unjammed his gun. (9/19/22 Tr. p. 90 L.1-15, p. 106 L.10-21, 115 L.7-19, p. 129 L.1-18).

Maiqudi denied ever having a gun. (9/13/22 Tr. p. 138 L.12-17). Even so, the surveillance video from the bar shows Maiqudi getting closer to the confrontation and raising his arm toward Chawech just before the shooting. (9/16/22 Tr. p. 16 L.24-p. 18 L.20, p. 91 L.7-p. 92 L.9; 9/19/22 Tr. p. 89 L.15-p. 90 L.10; Ex. 87 1:54:30-1:54:45; Ex. F-3)(Ex. App. p. 7). Maiqudi testified that a metallic object seen at the end of his hand was his bracelets and not a gun. (9/14/22 Tr. p. 24 L.9-p. 25 L.15). Akers, however, testified that a still shot from the surveillance video appeared to show Maiqudi holding a gun. (9/14/22 Tr. p. 148 L.9-17).

The medical examiner in this case could say that Nyamal Deng was killed by a bullet that entered the back of her neck, but he could not say definitively that Chawech was the one

who fired the bullet. Rather, he acknowledged that the position of the parties made it unlikely Chawech was the one who fired the fatal shot. (9/14/22 Tr. p. 136 L.6-20).

Other evidence in the record suggested that Maiqudi had a gun and likely fired the shot that struck Nyamal Deng. This evidence included Chawech's account of Maiqudi with a firearm, reports from numerous witnesses that more than one shot was fired, and evidence showing Maiqudi with his arm raised and a metallic object in his hand. (9/13/22 Tr. p. 77 L.17-p. 78 L.2; 9/14/22 Tr. p. 148 L.9-15; 9/15/22 Tr. p. 65 L.6-p. 66 L.16, p. 77 L.10-p. 78 L.9, p. 80 L.2-p. 81 L.7; 9/16/22 Tr. p. 53 L.18-p. 54 L.24; 9/19/22 Tr. p. 89 L.15-19, p. 112 L.16-p. 113 L.5; Ex. F-3)(Ex. App. p. 7).

The evidence presented at trial was not sufficient to establish that Chawech fired the bullet that struck Nyamal Deng. His conviction, sentence, and judgment for Assault with Intent to Inflict Serious Injury under Count I should be vacated.

II. The Court of Appeals erred in holding Chawech's challenge to the uncharged mandatory minimum sentence under Iowa Code section 902.7 was not preserved for appeal. The sentence was both illegal and procedurally defective, which are exceptions to the general rules of error preservation.

Preservation of Error: A challenge to an illegal sentence, including a challenge to the constitutionality of a sentence, is not subject to the requirement of error preservation. State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010). See also State v. Dann, 591 N.W.2d 635, 637 (Iowa 1999) (finding error preserved on similar claim as presented here). Procedurally defective sentences are also exempt from the rules of error preservation. State v. Richardson, 890 N.W.2d 609, 615 (Iowa 2017); State v. Gross, 935 N.W.2d 695, 698 (Iowa 2019).

Standard of Review: Although illegal sentences are usually reviewed for correction of errors at law, an unconstitutional sentence is reviewed de novo. Jefferson v. Iowa Dist. Ct., 926 N.W.2d 519, 522 (Iowa 2019).

Merits: The District Court erred in imposing mandatory minimum five-year sentences on Defendant-Appellant Wichang Chawech's convictions for Willful Injury Causing Serious Injury and Intimidation with a Dangerous Weapon. (Sent. Tr. p. 19 L.22-p. 20 L.2; 11/18/22 Sent. Order p. 2) (App. p. 34). Iowa Code § 902.7 (2021). While jurors answered special interrogatories as to whether Chawech possessed a dangerous weapon for these counts, the enhancements were never formally alleged in the trial information. As a result, the imposition of the mandatory minimums is illegal.

"Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." Alleyene v. United States, 570 U.S. 99, 103 (2013). Because mandatory minimums are penalties for a crime, any fact that increases a mandatory minimum must be submitted to a jury to comply with the Sixth Amendment and Due Process. Id. at 103-04, 111-12.

While Alleyene emphasized the importance of obtaining a jury finding on any element that increases the range of punishment, it also noted the common law requirement that a criminal defendant be placed on notice of the increased punishment by way of indictment. Id. at 109-111. This notice allowed a criminal defendant to prepare his defense accordingly. Id. at 111. More specifically, "[d]efining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment." Id. at 113-14.

The Iowa Rules of Criminal Procedure likewise acknowledge the importance of the notice requirement in Rule 2.6(6):

> 2.6(6) Allegations of use of a dangerous weapon. If the offense charged is one for which the defendant, if convicted, will be subject by reason of the Code to a minimum sentence because of use of a dangerous weapon, the allegation of such use, if any, shall be contained in the indictment. If use of a dangerous weapon is alleged as provided by this rule, and if the allegation is supported by the evidence, the

> court shall submit to the jury a special interrogatory concerning this matter, as provided in rule 2.22(2).

Iowa R. Crim. P. 2.6(6) (2022) (footnotes omitted).

The trial information in this case did not alert Chawech to the possibility he would be facing five-year mandatory minimums pursuant for possessing a dangerous weapon. (12/2/21 Trial Information)(App. pp. 5-6). Neither the trial information nor the written arraignment makes any mention of Iowa Code section 902.7, which allows for a five-year mandatory minimum for a person convicted of forcible felony who also possessed, displayed, or was armed with a dangerous weapon. (12/2/21 Trial Information; 12/3/22 Written Arraignment)(App. pp. 5-8). Iowa Code § 902.7 (2021). It does not appear that the trial information was ever amended to include a reference to Section 902.7.

By the time the instructions were submitted to the jury, however, special interrogatories were included that allowed the jury to make the required findings for imposition of the mandatory minimums under Section 902.7. (9/29/22 Form

of Verdict – Interrogatory)(App. pp. 31-32). The parties stipulated to the instructions, though the record is unclear if the stipulation included the interrogatories. (9/20/22 Tr. p. 2 L.14-p. 3 L.13). Regardless, including the interrogatories in the instruction resolved only one of the Alleyene requirements – a finding by the jury; it failed to address the other requirement – notice ahead of trial. Alleyene v. United States, 570 U.S. 99, 103 (2013). See also Hamling v. United States, 418 U.S. 87, 117 (1974) ("Our prior cases indicate that an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense."). Nor is the error waived by a defendant's failure to object at the instruction stage or at sentencing. State v. Luckett, 387 N.W.2d 298, 301 (Iowa 1986).

Even assuming that the argument is one of a defective sentencing procedure as opposed to an illegal sentence, it is a distinction without any practical difference when it comes to error preservation. "[T]he rule of error preservation 'is not ordinarily applicable to void, illegal or *procedurally defective* sentences.'" State v. Richardson, 890 N.W.2d 609, 615 (Iowa 2017) (quoting State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)) (emphasis added); State v. Gross, 935 N.W.2d 695, 698 (Iowa 2019) (same). However one characterizes the error, it was preserved for appeal.

The case law does not support any contention that Chawech would have been adequately aware from the minutes of testimony that the State was accusing him of using a dangerous weapon. The Iowa Supreme Court has previously rejected such arguments, holding that Iowa Rule of Criminal Procedure 6.2(4) requires the allegation be contained in the indictment or information. State v. Luckett, 387 N.W.2d 298,

301 (Iowa 1986) (referring to predecessor Criminal Procedure Rule 6.6); State v. Dann, 591 N.W.2d 635, 639 (Iowa 1999).

Finally, Chawech does not agree that a trial information's passing reference to a dangerous weapon is adequate to fulfill the State's responsibilities to notify a defendant of its desire to pursue a mandatory minimum sentence under Iowa Code section 902.7. Again, any fact other than a prior conviction that increased the statutory maximum penalty for an offense should be charged in the indictment or information and submitted to the jury. Jones v. United States, 526 U.S. 227, 243 n.6 (1999); See also Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (acknowledging Due Process requirement of Fourteenth Amendment requires same process in state proceedings).

The State failed to sufficiently plead the mandatory minimums under Iowa Code section 902.7. Because Chawech was not given proper notice of the enhancement before trial, his mandatory five-year minimum sentences

under Counts III and IV were illegal and should be vacated. State v. Dann, 591 N.W.2d 635, 639 (Iowa 1999).

CONCLUSION

The evidence was insufficient to support Defendant-Appellant Wichang Chawech's convictions for Assault with Intent to Inflict Serious Injury, Willful Injury Causing Serious Injury, and Intimidation with a Dangerous Weapon with Intent. His convictions, judgment and sentence should be vacated in their entirety. Alternatively, Chawech's mandatory minimum sentences under Iowa Code section 902.7 should be vacated as illegal.

Chawech respectfully requests this Court vacate his convictions, sentence and judgment and remand his case to the District Court for the relief requested.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $2.08, 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 FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

> [X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 4,683 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Theresa R. Wilson Date: *1/2/24*

THERESA R. WILSON
Assistant Appellate Defender
Appellate Defender Office
6200 Park Ave.
Des Moines, IA 50321
(515) 281-8841
twilson@spd.state.ia.us
appellatedefender@spd.state.ia.us

TRW/lr/1/24 Filed: *1/5/24*