IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. JASON MICHAEL PIRIE, Defendant-Appellant.	)))))))))	S.CT. 23-0434

APPEAL FROM THE IOWA DISTRICT COURT
FOR GREENE COUNTY
HONORABLE JOSEPH MCCARVILLE

APPELLANT'S FINAL BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On the 23rd day of March, 2024, the undersigned certifies that a true copy of the foregoing instrument was served upon the Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Jason Pirie, No. 6221921, Fort Dodge Correctional Facility, 1550 L Street, Fort Dodge, IA 50501.

The foregoing instrument was served upon the Attorney General's Office via EDMS.

/s/ Leah Patton _____
Leah Patton

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE APPELLANT'S MOTION TO RECUSE WHEN THE TRIAL JUDGE REPRESENTED THE APPELLANT BEFORE AND MADE RECENT COMMENTS INDICATING HE COULD NOT BE FAIR AND IMPARTIAL.

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II. WHETHER THE TRIAL COURT ERRED WHEN IT ADMITTED HEARSAY TESTIMONY FROM THE OFFICER THAT TWO WITNESSES, WHO DID NOT TESTIFY AT TRIAL, TOLD HIM CONSISTENT VERSIONS OF EVENTS THAT WERE INCONSISTENT WITH WHAT THE APPELLANT TOLD THE OFFICER.

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Iowa R. Evid. 5.801(c)

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III. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE APPELLANT'S MOTION FOR A NEW TRIAL DUE TO THE UNAVAILABILITY OF A MATERIAL WITNESS.

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State v. LaDouceur, 366 N.W.2d 174 (Iowa 1985)

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RECORDED ORAL WAIVER OF THE APPELLANT'S RIGHT TO BE PERSONALLY PRESENT DURING SENTENCING.

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Iowa Supreme Ct. Supervisory Order, *In the Matter of Remote Judicial*

Proceedings (Nov. 4, 2022)

V. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING PRISON FOR THEFT OF A BOTTLE OF LIQUOR WORTH $55 AND ORDERING THAT THE SENTENCE BE SERVED CONSECUTIVE TO THE PROBATION VIOLATION.

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Iowa Code § 908.1

Iowa R. App. P. 6.907

ROUTING STATEMENT

This case should be transferred to the Court of Appeals because the issues raised involve applying existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

STATEMENT OF THE CASE

Statement of the Case:

Defendant-Appellant Jason Pirie appeals from the judgment, conviction, and sentence for the charge of Theft in the Third Degree in violation of Iowa Code section 714.2(3). The Honorable Joseph McCarville presided over the motion to recuse hearing, the jury trial, and the sentencing hearing.

Course of Proceedings and Disposition Below:

Initially, Jason was charged by complaint with Theft in the Fifth Degree in violation of section 714.2(5). (App. pp. 8-9). Subsequently, on October 6, 2022, Jason was charged by Trial Information with Theft in the Third Degree in violation of section 714.2(3). (App. pp. 10-12). The charge was enhanced due to at least two prior theft convictions. (App. pp. 10-12). Jason pled not guilty to the charge. (App. p. 13).

Shortly prior to trial, Jason's attorney filed a motion to recuse the trial judge. (App. p. 14). The motion was based on the trial judge's prior

representation of Jason in two criminal cases in Webster County with one as recently as 2016 that posed a conflict of interest for the trial judge. (App. p. 14). The motion was denied. (App. pp. 15-16).

A jury trial was held on January 24, 2023. (Trial Tr. 1). Prior to the jury verdict, Jason stipulated to the enhancements, specifically two prior theft convictions. (Trial Tr. 81:8-25 and 82:1-24). Jason was found guilty of theft by the jury. (App. p. 23). Sentencing was scheduled for March 1, 2023. (App. pp. 21-22).

On February 3, 2023, Jason's attorney filed a motion for a new trial, arguing the verdict was contrary to the facts of the case, a witness listed by the State and the defense was unable to be located before trial and had since been located, and the witness's testimony was material and "would change the facts in this case and would be essential for a jury to hear before rendering judgment." (App. p. 25). That same day, the State filed a resistance to the motion for a new trial. (App. p. 26). The motion for a new trial was set for hearing at the same time as the sentencing hearing. (App. pp. 27-28).

On March 1, 2023, the trial court held a remote hearing on Jason's motion for new trial and sentencing. (App. pp. 30-33). The trial court denied Jason's motion for new trial, finding there was no evidence to grant a new trial. (App. p. 30). The trial court ordered Jason to an indeterminate prison

sentence not to exceed two years on the Theft in the Third Degree charge consecutive to the probation violation sentence. (App. p. 31).

Jason filed a timely notice of appeal. (App. p. 34).

Statement of the Facts:

On August 3, 2023, a bottle of Patron tequila was stolen from the liquor aisle at the Hy-Vee in Jefferson. (Trial Tr. 7:13-18 and 15:16-18). Surveillance video from the liquor aisle shows that a white male in a white t-shirt and jeans is in the liquor department, walking from one aisle to another one with a green box in his hand. *See* State's Ex. 1. He does something with the box out of view of the camera. *See id.* He walks back to the other aisle and does not have anything in his hands. *See id.* He walks back to the aisle with the box, does something with the box out of view of the camera, and walks out with nothing in his hands. *See id.* A still photo shows that the same individual walked out the front door of the store with nothing in his hands. *See* App. p. 17. The surveillance video from the front door shows the same individual walking into the parking lot with an unidentified object in his hands and getting into a red car parked in the lot. *See* State's Ex. 6. The white male was with two other males that day—a white male with a blue shirt and sunglasses and another white male with a KISS t-shirt and jeans, who had a grocery bag in his hands. *See* App pp. 18-19. All three individuals arrived at

the store together in a red car but left the store separately. (Trial Tr. 19:12-25 and 20:1-6). Larry Blake, a service manager at Hy-Vee, reported the theft to the police that day and spoke with Officer Nick Johnson. (Trial Tr. 7:13-20). Officer Nick Johnson reviewed the surveillance video from inside and outside the store. (Trial Tr. 37:8-15).

The next day, Officer Nick Johnson encountered the same red vehicle that was parked in the Hy-Vee parking lot the prior day and depicted in State's exhibit 6. (State's Ex. 9; Trial Tr. 41:7-10). Officer Nick Johnson also encountered three individuals associated with the red vehicle, who were the same individuals who were at the Hy-Vee the prior day and depicted in State's exhibits 4, 5, and 6. (App. p. 20; State's Ex. 7; Trial Tr. 45:18-25, 46:1-25, and 47:1-12). This included Jason, who Officer Nick Johnson identified as the white male in a white t-shirt and jeans depicted in State's exhibit 6. (Trial Tr. 47:3-12).

Prior to trial, Jason filed a motion to recuse the trial judge and testified that the judge had previously represented him in other criminal cases in 2016, specifically assault while displaying a deadly weapon, and 2005, specifically forgery, when the judge was in private practice. (Motion Recuse Tr. 8:24-25, 9:1, 15:23-25, and 16:1-5). In 2022, when Jason's current attorney represented him for the underlying probation violation case in front of the

same judge, the trial judge made a comment to Jason's attorney when he entered his guilty plea and accepted the plea agreement. (Motion Recuse Tr. 9:2-8). In particular, the comment was "[g]ood thing I took the deal because Joe McCarville knows me and it wasn't going to be good." (Motion Recuse Tr. 9:9-12). Jason was left with the impression that the judge would be biased if he came before the judge again. (Motion Recuse Tr. 9:13-18). As a result, he did not believe the judge could be fair and impartial at his trial for the theft charge when it came to evidentiary and procedural rulings. (Motion Recuse Tr. 9:19-24 and 11:5-20). If the jury convicted him of theft, he also did not believe the judge could be fair and would impose a stricter sentence. (Motion Recuse Tr. 9:25 and 10:1-4).

The trial court denied the motion to recuse. (Motion Recuse Tr. 19:20-21). The trial court noted that the motion was made shortly before trial. (Motion Recuse Tr. 18:19-25 and 19:1-2). The trial judge did not deny making the comment but disagreed that the comment showed bias or prejudice against Jason. (Motion Recuse Tr. 19:3-21).

At trial, Officer Nick Johnson testified that the Defendant was with two other individuals on the date that a bottle of Patron was stolen from the Hy-Vee in Jefferson. (Trial Tr. 47:7-12). The two other individuals were Cody, who did not provide a last name, and Jason Vote. (Trial Tr. 48:18-25 and

49:1-5). He further testified that he interviewed both individuals. (Trial Tr. 49:6-7). When the State asked if the individuals provided different versions of events, Jason's attorney objected based on hearsay. (Trial Tr. 49:10-13). The trial court overruled the objection because it was not being offered for the truth of the matter asserted. (Trial Tr. 49:14-22). Jason's attorney continued to object based on hearsay. (Trial Tr. 49:23-25 and 50:1-3). The trial court continued to overrule the objection. (Trial Tr. 50:15-19).

The State elicited testimony from Officer Nick Johnson that the two individuals provided him with consistent versions of events that were inconsistent with Jason's version of events. (Trial Tr. 51:2-13). Specifically, Jason told Officer Nick Johnson that he was not at Hy-Vee on the date of the theft. (Trial Tr. 51:9-10). The implication is that the other two individuals told Officer Nick Johnson that Jason had been at Hy-Vee on the date of the theft. Again, Jason's attorney objected based on hearsay, arguing the testimony was offered for the truth of the matter asserted. (Sent. Tr. 51:14-25). And the trial court again overruled the objection. (Sent. Tr. 52:1-2).

After the trial, Jason's attorney filed a motion for new trial, and Jason testified that he wanted a witness to testify on his behalf at trial, specifically Jason Vote, who was a key witness. (Sent. Tr. 19:18-25). Mr. Vote had been

listed as a witness for the State. (Conf. App. pp. 5-11; Sent. Tr. 20:1-2). Per the minutes,

> This witness will testify that he was with the Defendant on or about the date set out in the State's Trial Information. He will testify that they were at the Hy-Vee store in Jefferson, Greene County, Iowa. He will testify there was one other individual with them and he will identify that individual. He will identify the Defendant and testify as to any statements or admissions made by the Defendant.

(Conf. App. p. 7). The State had attempted to subpoena Mr. Vote as a witness at trial on January 19, 2023, but was unable to serve him. (App. p. 29; Sent. Tr. 20:1-2). Prior to trial, the defense did not have an address for Mr. Vote. (Sent. Tr. 20:2-5). The night before trial, Jason was able to contact Mr. Vote and attempted to get him to attend trial. (Sent. Tr. 20-6-11). Mr. Vote's testimony would have been material to Jason's case. (Sent. Tr. 20:22-23). He was present at the time of the alleged theft and drove the vehicle to and from the scene. (Sent. Tr. 20:24-25 and 21:1-3). Jason informed his trial attorney of Mr. Vote's whereabouts on the morning of the trial, and his trial attorney did not have time to prepare and serve a subpoena on Mr. Vote to compel his attendance at trial. (Sent. Tr. 22:1-4). The trial court denied the motion for a new trial. (Sent. Tr. 22:5-16).

The trial court conducted Jason's motion for new trial and sentencing hearing by videoconference, specifically GotoMeeting, because the judge had

a positive COVID-19 test. (App. p. 30; Sent. Tr. 3:14-17). There is nothing in the docket entries or in the transcripts that show that the trial court informed Jason of his right to an in-person sentencing hearing or that the hearing need not proceed unless he agreed with holding the sentencing via videoconference. There is also nothing in the record to show that Jason orally or in writing waived his right to be personally present for the hearing and sentencing. And there is nothing in the record to show that Jason or his attorney consented to have the hearing and sentencing held via videoconference.

After the motion for new trial was denied, the case proceeded to sentencing. While the State argued for prison, Jason argued for probation or in the alternative placement at a residential treatment facility and obtaining a substance abuse evaluation and complying with treatment recommendations. (Sent. Tr. 27:12-14 and 19-23 and 28:22-25). The State's request for prison was based on Jason's criminal history, including theft convictions, prior stints in prison, jail, and the halfway house, pending probation violation, and not taking responsibility for his actions. (Sent. Tr. 26:13-25 and 27:1-21). The State requested the prison sentence run consecutively to the probation violation. (Sent. Tr. 27:19-25). On the other hand, Jason's request for probation or in the alternative placement at a residential treatment facility was based on the amount involved in the offense, specifically, a bottle of liquor

worth about $55, his need for substance abuse treatment, ability to find employment, caretaker for his grandmother, and some of the criminal history is older. (Sent. Tr. 28:18-25 and 29:1-6). The Defendant requested the sentence run concurrently with the probation violation. (Sent. Tr. 29:6-14).

Further, two witnesses, Jason and his mother, Shelley Larson, testified at sentencing. (Sent. Tr. 23:1-13 and 24-25, 24:1-25, 25:1-25, and 26:1-6). Ms. Larson testified that Jason has caretaking responsibilities for his grandmother who is physically disabled. (Sent. Tr. 12:9-25 and 13:1-9). Further, Jason has medical issues, specifically with his liver and hypertension. (Sent. Tr. 15:25 and 16:1-19). Jason also testified that the bottle of liquor that was taken was worth about $55. (Sent. Tr. 24:8-11). He further testified that if he were placed at a residential treatment facility, he would have a better chance of getting employment so he could pay his court obligations. (Sent. Tr. 24:18-25 and 25:1-2). He took responsibility for the charge. (Sent. Tr. 25:12-14). The theft charge was a nonviolent, misdemeanor offense. (Sen. Tr. 25:19-21). Although Jason's criminal history reveals prior theft convictions, the last one occurred in 2018. (Conf. App. pp. 12-22).

In the sentencing order, the trial court found that a prison sentence was appropriate for the theft charge because "it provides for Defendant's rehabilitation and protection of the community" and considered the

Defendant's age and criminal history. (App. p. 31). On the record, the trial court mainly relied upon Jason's criminal history in sentencing him to prison:

> The Court: Okay. Well, I will state I did not wake up this morning thinking I would send you to prison but then I read your criminal history and that changed my mind.
> Mr. Pirie: I know I got a bad history but, I mean –
> The Court: Yes. And it doesn't seem to be changing and it's consistent and it's long and you've been to prison I think four or five times.
> Mr. Pirie: Right and I don't think prison is a fair punishment. I mean, and I know I didn't –
> The Court: Mr. Pirie, I get to talk now, okay?
> Mr. Pirie: Okay. Sorry about that.

(Sent. Tr. 29:21-25 and 30:1-6).

The sentences for the theft charge and the probation violation were ordered to run consecutively because "they are separate and distinct crimes" and the "Defendant is a habitual felon he has a long criminal history and simply refuses to live a law abiding life." (App. p. 31; Sent. Tr. 31:12-19).

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE APPELLANT'S MOTION TO RECUSE WHEN THE TRIAL JUDGE REPRESENTED THE APPELLANT BEFORE AND MADE RECENT COMMENTS INDICATING HE COULD NOT BE FAIR AND IMPARTIAL.

A. Preservation of Error: Jason preserved error by filing a motion to recuse the trial judge, and the trial judge denied the motion. (App. p. 14-16).

B. Standard of Review: Appellate review of a trial court's decision on a motion to recuse is for abuse of discretion. *Carter v. Carter*, 957 N.W.2d 623, 631 (Iowa 2021).

C. Discussion: Jason argues that the trial court abused its discretion in denying his motion to recuse when the trial judge represented him before and made recent comments indicating he could not be fair and impartial.

The trial court abuses its discretion when the decision is "based on untenable grounds or it has acted unreasonably." *State v. Milsap*, 704 N.W.2d 426, 432 (Iowa 2005). "There is as much obligation for a judge not to recuse when there is no occasion for [the judge] to do so as there is for [the judge] to do so when there is." *State v. Mann*, 512 N.W.2d 528, 532 (Iowa 1994) (quotation omitted).

When the "judge's impartiality might reasonably be questioned," then the judge "shall" disqualify himself or herself from hearing the proceeding. Iowa Code of Judicial Conduct, Rule 51:2.11(A). The test is an objective one. *State v. Trane*, 984 N.W.2d 429, 434 (Iowa 2022). The party requesting recusal must show actual prejudice before recusal is necessary; speculation is not enough. *Carter*, 957 N.W.2d at 644.

A judge's impartiality may be reasonably be questioned when the judge "has a personal bias or prejudice concerning a party or a party's lawyer. . . ." Iowa Code of Judicial Conduct, Rule 51:2.11(A)(1). Only a personal bias or prejudice that stems from an extrajudicial source is a disqualifying factor. *Milsap*, 704 N.W.2d at 432. "Judicial predilection or an attitude of mind resulting from the facts learned by the judge from the judge's participation in the case is not a disqualifying factor." *Id.*

Jason affirmatively showed that the trial judge's impartiality might reasonably be questioned because the trial judge had a personal bias or prejudice against him that stemmed from an extrajudicial source. As a result, the trial judge should have disqualified or recused himself. At the motion to recuse hearing, Jason testified that the trial judge had previously represented him in two other criminal cases, including as recently as 2016 and in 2005, when the judge was in private practice. (Motion Recuse Tr. 8:24-25, 9:1,

15:23-25, and 16:1-5). In 2022, when Jason's current attorney represented him for the underlying probation violation case in front of the same judge, the trial judge made a comment to Jason's attorney when he entered his guilty plea and accepted the plea agreement. (Motion Recuse Tr. 9:2-8). In particular, the comment was "[g]ood thing I took the deal because Joe McCarville knows me and it wasn't going to be good." (Motion Recuse Tr. 9:9-12). Jason was left with the impression that the judge would be biased if he came before the judge again. (Motion Recuse Tr. 9:13-18). And his beliefs were reasonable when viewed objectively.

This reasonable and objective belief leads one to question whether the trial judge could be fair and impartial in terms of evidentiary and procedural rulings during and after the jury trial. (Motion Recuse Tr. 9:19-24 and 11:5-20). And the ruling on objections during trial as well as a post-trial ruling are discussed below in more detail. Further, this reasonable and objective belief also leads one to question whether the trial judge could be fair and impartial in terms of sentencing once Jason was convicted of the theft charge. And that concern was borne out in this case when Jason was sentenced to prison for the theft of a bottle of liquor worth $55 and that prison sentence was ordered to be served consecutively with the probation violation, which is discussed below in more detail.

II. THE TRIAL COURT ERRED WHEN IT ADMITTED HEARSAY TESTIMONY FROM THE OFFICER THAT TWO WITNESSES, WHO DID NOT TESTIFY AT TRIAL, TOLD HIM CONSISTENT VERSIONS OF EVENTS THAT WERE INCONSISTENT WITH WHAT THE APPELLANT TOLD THE OFFICER.

A. Preservation of Error: Jason preserved error by objecting to the hearsay statements, and the trial court overruled the objection. (Sent. Tr. 49:10-25, 50:1-3 and 9-20, 51:14-25, and 52:1-2).

B. Standard of Review: Appellate courts generally review challenges to a trial court's decision to exclude or admit evidence for abuse of discretion. *State v. Jordan*, 663 N.W.2d 877, 879 (Iowa 2003). However, appellate review of a trial court's ruling on a hearsay objection is for errors of law. Iowa R. App. P. 6.907; *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006).

C. Discussion: Jason argues that the trial court erred by admitting hearsay testimony, specifically Officer Nick Johnson's testimony that two witnesses, who did not testify at trial, told him consistent versions of events that were inconsistent with what Jason had told the officer.

"Hearsay" means a statement that "[t]he declarant does not make while testifying at the current trial or hearing" and "[a] party offers into evidence to prove the truth of the matter asserted in the statement." Iowa R. Evid. 5.801(c). The appellate court must analyze the purpose in which the party

offers the hearsay to determine if it is admissible. *State v. Horn*, 282 N.W.2d 717, 724 (Iowa 1979). The appellate court does "not rely on the purpose urged by the party offering the alleged hearsay; rather, [it] look[s] at the true purpose for which the party offered the testimony." *Hawkins v. Grinnell Reg'l Med. Ctr.*, 929 N.W.2d 261, 265-66 (Iowa 2019). A determination is made based on "an objective finding based on the facts and circumstances developed by the record." *State v. Sowder*, 394 N.W.2d 394 N.W.2d 386, 371 (Iowa 1986).

When one thinks of hearsay, one generally thinks that it "consists of repetition of an out-of-court statement made by another." *State v. Judkins*, 242 N.W.2d 266, 267 (Iowa 1976). However, hearsay can also be "indirect" or "obscured" hearsay. *Id.* "'If the apparent purpose of offered testimony is to use an out-of-court statement to evidence the truth of the facts stated therein, the hearsay objection cannot be obviated by eliciting the purport of the statements in indirect form.'" *Id*. at 267-68 (quoting McCormick on Evidence, (Second Ed.), section 249, pages 593, 594). Thus, the State's handwriting expert may not testify that the defendant's expert confirmed his opinion as this constitutes indirect or obscured hearsay. *Id.*

Similarly, in this case, although the State did not elicit from Officer Nick Johnson what the other two individuals said in a direct manner, it did so through indirect means such that it was impermissible hearsay evidence.

Officer Nick Johnson testified that Jason was with two other individuals on the date that a bottle of Patron was stolen from the Hy-Vee in Jefferson. (Trial Tr. 47:7-12). The two other individuals were Cody, who did not provide a last name, and Jason Vote. (Trial Tr. 48:18-25 and 49:1-5). He further testified that he interviewed both individuals. (Trial Tr. 49:6-7). When the State asked if the individuals provided different versions of events, Jason's attorney objected based on hearsay. (Trial Tr. 49:10-13). The trial court overruled the objection. (Trial Tr. 49:14-22).

Then, the State elicited testimony from Officer Nick Johnson that the two individuals provided him with consistent versions of events that were inconsistent with Jason's version of events. (Trial Tr. 51:2-13). Specifically, Jason told Officer Nick Johnson that he was not at Hy-Vee on the date of the theft. (Trial Tr. 51:9-10). The implication is that the other two individuals told Officer Nick Johnson that Jason had been at Hy-Vee on the date of the theft. Again, Jason's attorney objected based on hearsay. (Sent. Tr. 51:14-25). And the trial court again overruled the objection. (Sent. Tr. 52:1-2). The hearsay evidence was in fact offered for the truth of the matter asserted—that the two individuals made statements consistent with each other that Jason had been at the Hy-Vee on the date of the theft, which was inconsistent with what

Jason had stated. Therefore, it was indirect or obscured hearsay that should not have been admitted into evidence.

In determining whether inadmissible hearsay requires reversal, appellate courts start with the proposition that "admission of hearsay evidence over a proper objection is presumed to be prejudicial error unless the contrary is affirmatively established." *State v. Nims*, 357 N.W.2d 608, 609 (Iowa 1984). The contrary is shown if upon a review of the record the hearsay evidence did not affect the jury's verdict. *State v. Elliott*, 806 N.W.2d 660, 669 (Iowa 2011). One way to establish this is if there is overwhelming evidence of the defendant's guilt such that its admission is harmless error. *State v. Skahill*, 966 N.W.2d 1, 15 (Iowa 2021). However, if the hearsay introduction goes to the main issue in the case or a hotly contested central dispute of the parties, then it is harder for the court on appeal to find the evidence nonprejudicial. *Hawkins*, 929 N.W.2d at 261; *Judkins*, 242 N.W.2d at 268-69.

The admission of indirect or obscured hearsay in this case was not harmless. The evidence of Jason's guilt was not overwhelming. And the introduction of the hearsay evidence went to the main issue of the case. It went to a hotly contested central dispute of the parties. Specifically, it went to whether Jason was at the Hy-Vee on the date of the theft. And more

specifically, whether Jason stole the bottle of Patron. Therefore, the appellate court must find that the admission of this hearsay evidence was in fact prejudicial and not harmless.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE APPELLANT'S MOTION FOR A NEW TRIAL DUE TO THE UNAVAILABILITY OF A MATERIAL WITNESS.

A. Preservation of Error: Jason preserved error by filing a motion for a new trial, and the trial court denied the motion. (App. p. 25; Sent. Tr. 22:5-16).

B. Standard of Review: Appellate review of a trial court's decision on a motion for a new trial is for abuse of discretion. *State v. Pletka*, 310 N.W.2d 525, 529 (Iowa 1981).

C. Discussion: Jason argues that the trial court abused its discretion in denying his motion for a new trial when a witness, who would have given material testimony, was not able to be located and be subpoenaed as a witness at trial.

The trial court "may" grant a new trial "[w]hen from any other cause the defendant has not received a fair and impartial trial." Iowa R. Crim. P. 2.24(2)(b)(9). "Trial courts, which are closer to the actual trial than the appellate courts are, have discretion in granting or denying trials based on fair trial consideration." *State v. LaDouceur*, 366 N.W.2d 174, 178 (Iowa 1985).

The trial court abused its discretion in denying Jason's motion for new trial. At the motion for new trial hearing, Jason testified that he wanted a witness to testify on his behalf at trial, specifically Jason Vote, who was a key witness. (Sent. Tr. 19:18-25). Mr. Vote had been listed as a witness for the State, and the State had attempted to subpoena him as a witness at trial. (Conf. App. pp. 5-11; App. p. 29; Sent. Tr. 20:1-2). Prior to trial, the defense did not have an address for Mr. Vote. (Sent. Tr. 20:2-5). The night before trial, Jason was able to contact Mr. Vote and attempted to get him to attend trial. (Sent. Tr. 20-6-11). Mr. Vote's testimony would have been material to Jason's case. (Sent. Tr. 20:22-23). He was present at the time of the alleged theft and drove the vehicle to and from the scene. (Sent. Tr. 20:24-25 and 21:1-3). Jason informed his trial attorney of Mr. Vote's whereabouts on the morning of the trial, and his trial attorney did not have time to prepare and serve a subpoena on Mr. Vote to compel his attendance at trial. (Sent. Tr. 22:1-4).

Under the facts and circumstances of this case, Jason did not receive a fair and impartial trial. He was unable to find a material witness to the theft until just before the trial started. And his attorney was unable to prepare and serve a subpoena on the witness prior to trial to compel the witness' attendance at trial. This same witness was listed as a witness for the State, and the State was similarly unable to serve a subpoena on the witness to

compel his attendance. The trial court abused its discretion in denying the motion for a new trial.

IV. THE TRIAL COURT ERRED BY CONDUCTING SENTENCING VIA VIDEOCONFERENCE WITHOUT OBTAINING 1) THE CONSENT OF ALL PARTIES TO THE CONTESTED TESTIMONIAL PROCEEDING AND 2) A WAIVER OF THE APPELLANT'S RIGHT TO BE PERSONALLY PRESENT DURING SENTENCING.

A. Preservation of Error: The error preservation rule does not apply to void, illegal, or procedurally defective sentences. *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). Therefore, Jason is not required to raise an alleged sentencing defect in the trial court to preserve the right of direct appeal on that ground. *State v. Wilson*, 294 N.W.2d 824, 825-26 (Iowa 1980).

B. Standard of Review: Appellate review of a sentence imposed by the trial court is correction of errors at law. Iowa R. App. P. 6.907; *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). A trial court's sentencing decision is upheld unless there was an abuse of discretion or a defect in the sentencing procedure. *State v. Formaro,* 638 N.W.2d 720, 724 (Iowa 2002). However, to the extent that a challenge implicates constitutional rights, appellate review is de novo. *State v. Bower*, 725 N.W.2d 435, 440 (Iowa 2006).

C. Discussion: Jason argues the trial court erred when it conducted sentencing via videoconference without obtaining 1) the consent of all parties to the contested testimonial proceeding and 2) a written or recorded oral waiver of his right to be personally present for sentencing.

In response to the COVID-19 pandemic, the Iowa Supreme Court issued several supervisory orders regarding the pandemic's impact on court services. *State v. Emmanuel*, 2021 WL 1906366, at *1 (Iowa Ct. App. May 12, 2021). On November 4, 2022, the Iowa Supreme Court entered a supervisory order that provided that "[a]ll contested court proceedings are presumed to occur in person. A contested testimonial proceeding may occur by videoconference or telephone *only with the consent of all parties* and in the court's discretion." Iowa Supreme Ct. Supervisory Order, *In the Matter of Remote Judicial Proceedings* ¶ 3 (Nov. 4, 2022) (emphasis added). This supervisory order was in effect at the time of Jason's sentencing.

Further, a defendant has a constitutional right to be present at every stage of the trial. *Illinois v. Allen*, 397 U.S. 337, 338 (1970); *State v. Webb*, 516 N.W.2d 824, 830 (Iowa 1994). This includes the right to be present at sentencing. *State v. Johnson*, 222 N.W.2d 453, 458 (Iowa 1974). Iowa Rules of Criminal Procedure 2.23(3)(d) codify the right of a criminal defendant to be personally present for the imposition of sentence. *See* Iowa R. Crim. P. 2.23(3)(d) (2022) ("Prior to such rendition, counsel for the defendant, and the defendant personally, shall be allowed to address the court where either wishes to make a statement in mitigation of punishment."). A defendant has a right to personally appear for sentencing because no "modern innovation[ ]

lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation." *State v. Craig*, 562 N.W.2d 633, 636 (Iowa 1997) (quotations omitted).

A defendant may waive the right to personally appear for sentencing. *State v. Lumadue*, 622 N.W.2d 302, 304 (Iowa 2011). The waiver must be knowing, intentional, and unambiguous. *Id.* The standard definition of waiver is "the intentional relinquishment of a known right." *State v. Seager*, 571 N.W.2d 204, 209 (Iowa 1997).

In *State v. Emmanuel*, a case involving a COVID-19 supervisory order that allowed the trial court to conduct sentencing remotely if the defendant consented and signed a written waiver, the trial court did not advise the defendant of his right to personally appear for sentencing or that the hearing did not need to proceed unless he agreed with that procedure. *State v. Emmanuel*, 967 N.W.2d 63, 69 (Iowa Ct. App. 2021). The record before the appellate court did not indicate that the defendant knew of his right to in-person sentencing such that his waiver was invalid. *Id.* The appellate court also "rejected the State's harmless-error argument, as there is no way to tell what the outcome would have been had the sentencing judge and [the defendant] been face to face." *Id.* Therefore, the appellate court reversed and remanded for a new sentencing hearing. *Id.*

The trial court conducted Jason's sentencing hearing by videoconference, specifically GotoMeeting, because the judge had a positive COVID-19 test. (App. p. 30; Sent. Tr. 3:14-17). There is nothing in the docket entries or in the transcripts that show that the trial court informed Jason of his right to an in-person sentencing hearing or that the hearing need not proceed unless he agreed with holding the sentencing via videoconference. Further, there is nothing in the docket entries or in the transcripts that show that Jason orally or in writing waived his right to be personally present for the hearing and sentencing. The sentencing hearing was contested. While the State argued for prison, the Defendant argued for probation with placement at a residential treatment facility as well as obtaining a substance abuse evaluation and complying with treatment recommendations as conditions of probation. (Sent. Tr. 27:12-14 and 19-23 and 28:22-25). Further, two witnesses, Jason and his mother, Shelley Larson, testified at sentencing. (Sent. Tr. 23:1-13 and 24-25, 24:1-25, 25:1-25, and 26:1-6). There is nothing in the record to show that Jason or his attorney consented to have the sentencing held via videoconference.

This case is like *State v. Roe*, where there was no written waiver of the defendant's right to an in-person sentencing and there was no colloquy between the trial court and the defendant on the record addressing the

defendant's waiver of his right to an in-person sentencing. *State v. Roe*, 2022 WL 2824732, *5 (Iowa Ct. App. July 20, 2022). According to the appellate court in *Roe*,

> [t]he COVID-19 pandemic imposed a tremendous burden on our district courts, and [the defendant] may well have attempted to waive his right to in-person sentencing outside the record. But the absence of a written or on-the-record waiver violates the supreme court's supervisory order. Our supreme court has advised that trial judges leave no room for doubt that a defendant has been given the opportunity to speak regarding punishment. Thus, the record does not contain a required waiver of in-person sentencing, and we cannot find a lack of prejudice from this omission. Therefore, we vacate [his] sentences and remand for resentencing.

Id. (citations and quotations omitted).

Because the trial court did not inform Jason of his right to an in-person sentencing hearing, Jason did not orally or in writing waive his right to be personally present for sentencing, and there was a contested, testimonial sentencing whereby neither Jason nor his attorney consented to the hearing being held by videoconference, the trial court erred by holding the sentencing hearing via videoconference. By doing so, the trial court not only violated the Iowa Supreme Court's supervisory order, but it also ran afoul of Jason's constitutional and statutory right to an in-person sentencing. And the error was not harmless. Therefore, the appellate court must reverse and remand for resentencing.

V. THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING PRISON FOR THEFT OF A BOTTLE OF LIQUOR WORTH $55 AND ORDERING THAT THE SENTENCE BE SERVED CONSECUTIVELY TO THE PROBATION VIOLATION.

A. Preservation of Error: Jason need not object to the trial court's imposition of prison for the theft charge and ordering the prison sentence to be consecutive to the probation violation because a challenge to the legality of a sentence can be addressed for the first time on appeal. *State v. Dann*, 591 N.W.2d 635, 637 (Iowa 1999).

B. Standard of Review: Appellate review of a sentence imposed by the trial court is correction of errors at law. Iowa R. App. P. 6.907; *Thomas*, 547 N.W.2d at 225. A trial court's sentencing decision is upheld unless there was an abuse of discretion or a defect in the sentencing procedure. *Formaro*, 638 N.W.2d at 724.

C. Discussion: Jason argues that the trial court abused its discretion in sentencing him to prison for theft of a bottle of liquor worth about $55 and ordering that the prison sentence for the theft charge be served consecutively to the probation violation.

A sentence is generally not disturbed on appeal unless the trial court has abused its discretion or there was a defect in the sentencing procedure. *State v. Granberry*, 619 N.W.2d 399, 401 (Iowa 2000). An abuse of discretion

occurs when the district court exercises its discretion on grounds or for reasons that are clearly untenable or to an extent that is clearly unreasonable. *Thomas*, 547 N.W.2d at 225. In fashioning the appropriate sentence, the trial court must decide which option would provide the maximum opportunity for rehabilitation and protect the community. Iowa Code § 907.5. In exercising its discretion, the trial court must weigh all pertinent factors, including the nature of the offense, the defendant's age, the defendant's character, the chances for reform, prior record of convictions, the defendant's employment, the defendant's family, and other appropriate factors. *Id.* § 907.5; *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995).

Under Iowa Code section 901.8, when a defendant is sentenced for two or more separate offenses, "the sentencing court may order the second or further sentence to begin at the expiration of the first or succeeding sentence" with some exceptions that are not applicable here. Iowa Code § 908.1. Therefore, a sentencing court "has discretion to impose concurrent or consecutive sentences for convictions on separate counts." *State v. Delaney*, 526 N.W.2d 170, 178 (Iowa Ct. App. 1994).

The trial court's decision imposing a prison sentence for the theft charge and ordering that sentence to be served consecutively to the probation violation was clearly untenable and unreasonable under the facts and

circumstances of this case. The trial court did not appropriately weigh and consider all the appropriate sentencing factors, particularly ones in mitigation of punishment. Instead, it placed too much emphasis on one aggravating factor, namely criminal history. If the trial court had properly weighed and considered all factors, including those in mitigation, it would have concluded that a prison sentence was not appropriate in this case and another sentence was more appropriate. Further, it would have concluded that a consecutive sentence was not appropriate, and a concurrent sentence was more appropriate.

Specifically, the trial court did not properly weigh and consider several mitigating factors that should have led to another sentence to be served concurrently with the probation violation. The trial court did not properly weigh and consider these mitigating factors:

1) the nature of the offense, namely the non-violent theft of a bottle of liquor worth about $55 that would have been a simple misdemeanor but for Jason's having at least two prior convictions for theft, which enhanced the charge to an aggravated misdemeanor (Sent. Tr. 24-8-11, 25:19-21, and 28:18-21);
2) Jason's caretaking responsibilities for his grandmother who is physically disabled (Sent. Tr. 12:9-25 and 13:1-9 and 29:2-4);

3) his medical issues, specifically his liver and hypertension (Sent. Tr. 15:25 and 16:1-19);
4) his substance abuse and need for substance abuse treatment (Sent. Tr. 28:22-25);
5) placement at a residential treatment facility would increase his chance of getting employment so he could pay his court obligations (Sent. Tr. 24:18-25, 25:1-2, and 28:21-25);
6) his taking responsibility for the charge (Sent. Tr. 25:12-14); and
7) the last theft conviction occurred in 2018 (Criminal History pp. 1-11).

Instead, the trial court focused almost solely on one aggravating factor, namely his criminal history. (App. p. 30; Sent. Tr. 29:21-25, 30:1-2, and 31:14-19). The trial court's failure to properly weigh and consider the mitigating factors and focusing almost exclusively on the aggravating factor was an abuse of discretion in ordering a prison sentence as opposed to another sentence, particularly considering the amount of what was stolen. It was also not justified and abused its discretion in ordering that the probation violation be served consecutively to the theft charge.

CONCLUSION

For the reasons stated above, Jason requests that the appellate court reverse and remand for recusal of the trial judge and a new trial, and in the alternative, vacate his sentence and remand for resentencing in front of a different judge.

NONORAL SUBMISSION

Counsel requests that the appellate court set the case for nonoral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Final Brief and Argument was $4.10.

/s/ Leah Patton_____
Leah Patton

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because: this brief contains 6,478 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or (2).

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/s/ Leah Patton_____ Dated: _March 23, 2024__
Leah Patton