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IN THE SUPREME COURT OF IOWA

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

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

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED AUGUST 21, 2024

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CERTIFICATE OF SERVICE

On the 10th day of September, 2024, the undersigned certifies that a true copy of the foregoing instrument was served upon the Defendant-Appellant, Jason Pirie, by email at jasonpirie1@gmail.com.

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

/s/ Leah Patton ___________
Leah Patton

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE ADMISSION OF INDIRECT HEARSAY STATEMENTS WAS HARMLESS, CONSIDERING IDENTIFICATION WAS HOTLY CONTESTED AND THERE WAS NO IDENTIFICATION OF THE APPELLANT AS THE PERSON WHO STOLE THE LIQUOR BOTTLE.

II. WHETHER THE COURT OF APPEALS WAS WRONG IN FINDING THAT THE APPELLANT DID NOT PRESERVE ERROR ON HIS ARGUMENT THAT SENTENCING WAS HELD REMOTELY WITHOUT HIS CONSENT AND A WAIVER OF IN-PERSON SENTENCING, CONSIDERING THAT THE APPELLANT WAS NOT REQUIRED TO OBJECT UNDER CASELAW.

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STATEMENT SUPPORTING FURTHER REVIEW

COMES NOW, Defendant-Appellant, Jason Pirie, pursuant to Iowa R. App. P. 6.1103, makes an Application for Further Review of the August 21, 2024, decision of the Iowa Court of Appeals in *In re C.S.*, Supreme Court No. 23-0434.

1. The Court of Appeal's decision in this case, finding that the Defendant-Appellant did not preserve error on his argument that the trial court held a remote sentencing hearing without first obtaining his consent and a waiver of in-person sentencing, conflicts with this Court's decision in *State v. Cooley*, 587 N.W.2d 752, 754 (Iowa 1998) ("It strikes us as exceedingly unfair to urge that a defendant, on the threshold of being sentenced, must question the court's exercise of discretion or forever waive the right to assign error on appeal"). It also conflicts with other Iowa Court of Appeals' decisions, *State v. Allen*, 2023 WL 8069210, at *4 (Iowa Ct. App. Nov. 21, 2023) (reversing for resentencing but not requiring the defendant to preserve error where the record did not include a knowing and voluntary waiver of the use of a risk assessment), *State v. Roe*, 2022 WL 2824732, at *5-6 (Iowa Ct. App. July 20, 2022) (although error preservation was not raised, the appellate court held

the district court was required to engage in a colloquy with the defendant to determine whether the defendant consented to a remote proceeding under a prior version of a COVID-19 supervisory order), *State v. Emanuel*, 967 N.W.2d 63, 69 (Iowa Ct. App. 2021) (same), and *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994) (finding ordinary error preservation rules do not apply to a "procedurally defective sentence").

2. Further, the case presents issues of broad public importance that this Court should ultimately decide. First, during the COVID-19 pandemic, district courts were subject to this Court's supervisory orders that delineated when proceedings could be held remotely. The last order provided that a contested testimonial proceeding, including sentencing, must occur in person unless all parties consented to the proceeding being held remotely. Iowa Supreme Ct. Supervisory Order, *In the Matter of Remote Judicial Proceedings* ¶ 3 (Nov. 4, 2022). Even though the COVID-19 pandemic has ended, the Iowa Judicial Branch has recognized the benefits of using remote proceedings, including increased access to the courts. Therefore, the Court promulgated rules governing remote proceedings, including criminal cases. *See generally* Iowa R. Remote P. 15. The remote

proceedings rules track the last COVID-19 supervisory order. Sentencing must occur in accordance with Iowa Rules of Criminal Procedure 2.27. *Id.* r. 15.404(2). If testimony is not expected, then the proceeding is presumed to be remote. *Id.* r. 15.404(4). If a defendant has a right to an in-person proceeding, "the proceeding must occur in person unless the [defendant] has waived any such right." *Id*. r. 15.405(1). The trial court held the sentencing hearing remotely, even though the Defendant-Appellant did not consent to this and had a right to appear in person for sentencing and did not waive that right. Because of the remote proceeding rules, this issue will occur frequently, considering the benefits of using remote technology in conducting sentencing. It is important that this Court ultimately decide this issue.

3. Second, the Court of Appeals found that the admission of inadmissible indirect hearsay evidence was harmless. The admission was not harmless because identification was a hotly contested issue, and there was no identification of the Defendant-Appellant as the person who committed the crime. The State's use of the evidence was prejudicial. This is likewise an issue of public importance, considering that the State has before and is likely again

to use indirect hearsay evidence in criminal trials to obtain a criminal conviction in cases where the issues are hotly contested. It is important that this Court ultimately decide this issue.

STATEMENT OF THE CASE

Nature 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).

Course of Proceedings and Disposition Below:

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).

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. (App. pp. 21-22).

On March 1, 2023, the trial court held a remote sentencing hearing. (App. pp. 30-33). The trial court ordered Jason to an indeterminate prison sentence not to exceed two years for the theft charge consecutive to his probation violation sentence. (App. p. 31).

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

On August 21, 2024, the Iowa Court of Appeals in a per curium opinion affirmed. *State v. Pirie*, No. 23-0434, *19 (Iowa Ct. App. Aug. 21, 2024). Assuming the trial court admitted inadmissible indirect hearsay evidence, the majority found the error was harmless because the evidence was overwhelming. *Id.* at *10-11. The majority also found that Jason failed to preserve error on his argument that the remote sentencing proceeding violated the COVID-19 supervisory order and violated his constitutional and statutory rights to in-person sentencing by failing to object. *Id.* at *12-16. The dissent disagreed, finding that the inadmissible indirect hearsay evidence was prejudicial because it went to the hotly contested issue of identity and there was no identification of Jason as the person who stole the liquor bottle. *Id.* at *20-24 (Gamble, S.J., dissenting). Further, the dissent found that Jason was not required to object to the trial court's holding the sentencing hearing remotely and concluded that it violated the COVID-19 order by holding a remote sentencing hearing without his consent. *Id.* at 24-27.

<u>Statement of the Facts:</u>

On August 3, 2023, a Patron tequila bottle 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, and one carried a grocery bag. *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, August 4th, Officer Nick Johnson encountered the same red vehicle that was parked in the Hy-Vee parking lot the prior day. (State's Ex. 9; Trial Tr. 41:7-10). Officer Nick Johnson also encountered three individuals associated with the red vehicle. (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 on August 4th. (Trial Tr. 47:3-12).

At trial, Officer Johnson testified that Jason was with two other individuals on August 4th. (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 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 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 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).

The trial court conducted Jason's sentencing hearing by videoconference. (App. p. 30; Sent. Tr. 3:14-17). The judge simply stated, "So this hearing is being held by Go To meeting because I tested positive for [COVID-]19." (App. p. 30; Sent. Tr. 3:14-17). The court then launched into the sentencing hearing. And there was no room for discussion. There was no colloquy between the court and Jason. 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.

ARGUMENT

I. THE COURT OF APPEALS WAS WRONG IN FINDING THAT THE ADMISSION OF INDIRECT HEARSAY STATEMENTS WAS HARMLESS, CONSIDERING IDENTIFICATION WAS HOTLY CONTESTED AND THERE WAS NO IDENTIFICATION OF THE APPELLANT AS THE PERSON WHO STOLE THE LIQUOR BOTTLE.

The Iowa Court of Appeals assumed that the trial court erroneously admitted into evidence indirect hearsay, specifically the officer testified that two witnesses, who did not testify at trial, told him consistent statements that were inconsistent with what Jason told the officer. However, the Court found no prejudice and that the error was harmless because the evidence was overwhelming. The inadmissible indirect hearsay testimony went to a hotly contested issue, and there was no identification of Jason as the person who stole the liquor bottle. Therefore, the evidence was not overwhelming, and error was not harmless. Instead, Jason was prejudiced by the admission of this evidence.

Under the rules of evidence, "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 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 Johnson testified that Jason was with two other individuals on August

4th. (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 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 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 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—identification. And there was no identification of Jason as the person who stole the bottle of liquor.

> [T]he district court only allowed the officer to identify [Jason] as one of the individuals on the body camera footage from August 4, when the officer came upon the three men while investigating the grocery store's report of the theft. The court refused to allow the officer to testify that [Jason] was the individual in the grocery store's surveillance video from August 3. And there was no other testimony identifying [Jason] as the individual in the surveillance video at the grocery store on August 3.

Pirie, No. 23-0434, at *22 (Gamble, S.J., dissenting).

Based on a review of the whole record, the real reason why the prosecutor desired to use the contents of the other person's statements to the officer was for the truth of the matter asserted—"to establish that they were at the grocery store on August 3 with [Jason.]" *Id.* The prosecutor emphasized these statements in closing arguments:

> You saw the officer's body camera footage. You see the same three individuals that are all still together the very next day on August 4th and they're at a different store here in Jefferson, Iowa.
>
> Cody and Jason . . . tell[] a story to law enforcement and their version of events, it matches. The Defendant's story does not. The three individuals are in that same vehicle, that red vehicle, that red Sedan. The Defendant denies his presence there at [the grocery store], why?

(Sent. Tr. 69:7-15). The prosecutor did not argue that these statements showed Jason's consciousness of guilt. *Pirie*, No. 23-0434, at *23 (Gamble, S.J., dissenting). Rather, the prosecutor argued that the three individuals were in the same red car at the grocery store on August 3rd. *Id.* Therefore, the trial

court erroneously admitted the indirect hearsay statements because the out-of-court statements of the two individuals were offered to show Jason was at the store and were offered to prove the truth of the matter asserted. *Pirie*, No. 23-0434, at *22 (Gamble, S.J., dissenting).

Therefore, the Court of Appeals erred in finding that the admission of this indirect hearsay testimony was harmless and not prejudicial.

II. THE COURT OF APPEALS ERRED IN FINDING THAT THE APPELLANT DID NOT PRESERVE ERROR ON HIS ARGUMENT THAT SENTENCING WAS HELD REMOTELY WITHOUT HIS CONSENT AND A WAIVER OF IN-PERSON SENTENCING, CONSIDERING THAT THE APPELLANT WAS NOT REQUIRED TO OBJECT UNDER CASELAW.

The Court of Appeals also found that Jason was required to object when the trial court held the sentencing hearing remotely. Because he did not object, error was not preserved. Jason disagrees. The trial court held the sentencing hearing remotely without obtaining his consent in violation of the last COVID-19 supervisory order that was in effect. And he had a statutory and constitutional right to be personally present at sentencing, and he did not waive that right. He was not required to object under these circumstances to preserve error. Therefore, error was preserved, and this case must be reversed and remanded for a new sentencing hearing in front of a different judge.

The Attorney General's position is inconsistent with prior cases involving this exact issue where it has conceded error was preserved.[1] In *Emmanuel,* 967 N.W.2d 63, the State acknowledged that "[t]he normal rules of error preservation do not apply to a direct appeal of a sentence." Appellee's Final Brief p. 23 (citing *Cooley*, 587 N.W.2d 2d at 754). Further, in *Roe*, 2022 WL 2824732, the State conceded that "'errors in sentencing may be challenged on direct appeal even in the absence of an objection in the district court.'" Appellee's Final Brief p. 23 (quoting *State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010)). Because the State conceded error was preserved, the Iowa Court of Appeals in the *Emmanuel* and *Roe* cases did not address error preservation. *See Roe*, 2022 WL 2824732, at *5; *Emmanuel*, 967 N.W.2d at 68-69.

In this case, the State has switched course and argues that error preservation is required concerning the manner that the sentencing hearing was held. It argues that the exception to error preservation in sentencing applies to the sentencing decision itself, "not to procedural errors in how the

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[1] The dissent in this case notes that the State may not have contested error preservation in *State v. Roe* and *State v. Emmanual* because "under the COVID-19 supervisory orders effective at the time, a colloquy was required to obtain the defendant's waiver of personal appearance." *Pirie*, No. 23-0434, at *22 (Gamble, S.J., dissenting).

court convenes and conducts the sentencing hearing," citing *State v. Gordon*, 921 N.W.2d 19, 22-24 (Iowa 2018), in support. Appellee's Final Brief p. 21.

In the *Gordon* case, the Iowa Supreme Court acknowledged a long-standing rule that "a defendant need not first challenge a district court's abuse of discretion at the time of sentencing to have the matter directly reviewed on appeal." *Gordon*, 921 N.W.2d at 22. The Court believed it would be "exceedingly unfair to urge that a defendant, on the threshold of being sentenced, must question the court's exercise of discretion or forever waive the right to assign the error on appeal.'" *Id.* at 22-23 (quoting *Cooley*, 587 N.W.2d at 754). In that situation, "'it would be 'incongruous' to apply ordinary preservation-of-error principles. . . .'" *Id.* (quoting *Cooley*, 587 N.W.2d at 754). In addition, the Court also acknowledged that "a defendant need not challenge the illegality of a sentence in the district court at the time of sentencing because a defendant can raise a claim of an illegal sentence at any time." *Id.* at 23.

On the other hand, the Court in *Gordon* held that these error preservation rules did not apply under the unique facts of the case, where the error claimed is more complex and the defendant argued that the use of risk assessment tools in the Presentence Investigation Report ("PSI") violated his due process rights. *Id.* Both the defendant and his attorney had access to the

PSI before sentencing and did not object at sentencing to the use of the risk assessment tools contained in the PSI. *Id.* The defendant did not claim his sentence was intrinsically unconstitutional. *Id.* Therefore, the Court found that the normal error preservation rules applied. *Id.* A proper objection and a record on the issue was necessary to preserve error on appeal:

> How are we to determine the due process implications on the district court's use of risk assessment tools, when we do not know anything about the tools and [the defendant] failed to object to their use? If, as [the defendant] argues, we need further evidence to determine whether the court violated his due process rights by using this risk assessment tools, the defendant must bring that matter to the court's attention at the time of sentencing. It is unfair to the State for us to reverse the district court's sentence for allegedly considering an improper factor when the court needed more information to determine if the factor it considered was improper and the defendant failed to bring that issue to the attention of the court at the time of sentencing.

Id. at 24-25. Moreover, the sentencing court has the right to rely on information contained in a PSI when the defendant does not object to the information contained in it. *Id.* at 25. Therefore, under the unique facts of the case, the Court held that the defendant failed to preserve error on his due process claim. *Id.*

This case is distinguishable from the unique facts of the *Gordon* case. Jason does not argue on appeal that information contained in a PSI is inaccurate or incorrect and that trial court could not rely upon that information

in making its decision in terms of the proper sentence to impose. Rather, Jason's claim involves the manner in which the sentencing hearing was held and whether the remote sentencing proceeding complied with the constitution and the COVID-19 supervisory order. His claim involves a "procedurally defective sentence," in which ordinary error preservation rules do not apply. *Thomas*, 520 N.W.2d at 313. There is no "further evidence" that needed to be presented below for the trial court to make a proper determination of the propriety of a sentencing factor. The trial court had "already determined that it was conducting this contested sentencing proceeding remotely without any input from [Jason] because the judge had COVID-19." *Pirie*, No. 23-0434, at *24 (Gamble, S.J., dissenting). Thus, either the trial court followed the proper procedures, or it did not. And Jason argues that the trial court did not follow proper procedures in holding his sentencing hearing remotely.

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. *Emmanuel*, 967 N.W.2d at 69. 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 contested sentencing hearing by videoconference. (App. p. 30; Sent. Tr. 3:14-17). 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 testified at sentencing. (Sent. Tr. 23:1-13 and 24-25, 24:1-25,

25:1-25, and 26:1-6). Therefore, the trial court had a duty to obtain Jason's consent before conducting the sentencing hearing remotely. *Pirie*, No. 23-0434, at *25 (Gamble, S.J., dissenting). To obtain that consent, the trial court was obligated to engage in a colloquy with Jason to determine if he knowingly, voluntarily, and intelligently consented to a remote sentencing hearing. *Roe*, 2022 WL 2824732, at *5-6; *Emanuel*, 967 N.W.2d at 69.

The judge simply stated, "So this hearing is being held by Go To meeting because I tested positive for [COVID-]19." (App. p. 30; Sent. Tr. 3:14-17). The court then launched into the sentencing hearing. And there was no room for discussion. This "put [Jason] in the awkward position of having to object at sentencing to a decision the district court had already made." *Pirie*, No. 23-0434, at *26 (Gamble, S.J., dissenting). According to the Iowa Supreme Court, "[i]t strikes us as exceedingly unfair to urge that a defendant, on the threshold of being sentenced, must question the court's exercise of discretion or forever waive the right to assign error on appeal." *Cooley*, 587 N.W.2d at 754; *see also Allen*, 2023 WL 8069210, at *4 (reversing for resentencing but not requiring the defendant to preserve error where the record did not include a knowing and voluntary waiver of the use of a risk assessment).

There was no colloquy between the court and Jason. 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. 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. *Roe*, 2022 WL 2824732, *5. 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).

Therefore, Jason was not required to object to preserve error on this issue. As such, the Court of Appeals was wrong in finding otherwise and in failing to reverse and remand for a new sentencing hearing in front of a different judge.

CONCLUSION

For the reasons stated above, Jason respectfully requests that this Court grant his request for further review, vacate the Iowa Court of Appeal's decision, reverse the trial court's decision, and remand for further proceedings.

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 $0, and that amount has been paid in full by the undersigned.

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/s/ Leah Patton___________ Dated: _September 10, 2024__

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