IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff–Appellee, v. TERENCE E. MANNING, JR., Defendant–Appellant.	Polk County Case No. SRCR365958 S. CT. NO. 23–1390

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE HEATHER LAUBER, JUDGE

APPELLANT'S BRIEF AND ARGUMENT

MARTHA J. LUCEY
State Appellate Defender

MARY K. CONROY
Assistant Appellate Defender
mconroy@spd.state.ia.us
appellatedefender@spd.state.ia.us

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

ATTORNEYS FOR DEFENDANT–APPELLANT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The district court erred by allowing the State to enter the QuikTrip surveillance video, as captured on the responding officer's body camera video, into evidence.

II. The State presented insufficient evidence that Manning specifically intended to commit a serious injury to Makuay.

ROUTING STATEMENT

The Court should transfer this case to the Court of Appeals because it raises issues that involve the application of existing legal principles. Iowa R. App. P. 6.903(2)(*a*)(4), 6.1101(3)(*a*) (2024).

NATURE OF THE CASE

Defendant–Appellant Terrence E. Manning, Jr. appeals his conviction, sentence, and judgment following a jury trial. A jury found Manning guilty of willful injury causing serious injury, a class "C" felony, in violation of Iowa Code section 708.4(1). (D0109, Sentencing Order, at 1 (08/25/2023)). The district court sentenced Manning to a term not to exceed ten years in prison. (D0109, Sentencing Order, at 1).

STATEMENT OF THE FACTS

On December 26, 2022, City of Des Moines Police Officers Jackson Bruckner and Joshua Leibold responded to a call from the gas station clerk at the QuikTrip on 63rd Street. (D0138, Trial Day 2, at 37:11–40:7, 83:1–86:2 (06/27/2023)). The clerk reported there was an assault in the parking lot. (D0138, at 40:4–7). Upon

arriving, the police identified Stenslaws Makuay, who was inside the store, as one of the participants. (D0138, at 40:5–41:9, 56:2–7).

The sweatshirt Makuay was wearing was blood splattered. (D0138, at 41:12; D0090, Ex. 5: Makuay Photograph (flash drive) (07/03/2023)). There were several injuries to Makuay's face, and his lips, cheeks, and eyes were very swollen. (D0138, at 40:12–14; D0090, Ex. 5). Makuay was also missing several teeth. (D0138, at 42:20–43:30, 54:9–14; 62:7–9; D0090, Ex. 8: Makuay Mouth Photograph (flash drive) (07/03/2023)).

Leibold spoke with Makuay and Mary Bol Mayen; the two were in a relationship. (D0138, at 42:25–44:9, 57:2–11, 86:9–11). Bol Mayen was present when the fight broke out, left the QuikTrip, and then returned to the gas station shortly after. (D0138, at 44:11–18; 104:15–22; D0090, Ex. 3: Aerial Map (flash drive) (07/03/2023)). Leibold testified he had trouble understanding Makuay and that Makuay became agitated and upset with him. (D0138, at 94:3–13). Leibold acknowledged Makuay was also upset with Bol Mayen and described Makuay as being "[a]gitated in general." (D0138, at 95:2–7). Leibold testified the fire department had trouble getting Makuay

to cooperate and go the hospital; Leibold noted it took "awhile to get him to kind of follow . . . direction[s] and cooperate." (D0138, at 95:8–17, 104:3–14).

Bruckner observed Makuay interact with Leibold and the fire department. (D0138, at 51:12–22). Bruckner stated he was "in the background" for most of the investigation, except for his review of the security video; the officer did not get close to Makuay. (D0138, at 53:8–11). Bruckner testified Makuay was "difficult." (D0138, at 52:9–12). Bruckner also characterized Makuay's behavior as "[n]ot too good with the fire department." (D0138, at 52:17–18). Bruckner testified the fire department official had to "raise his voice to get an answer" and that Makuay was not directly answering his questions. (D0138, at 52:19–24). Bruckner acknowledged Makuay's speech was slurred, but he attributed that to Makuay's missing teeth and swollen lips. (D0138, at 12–19).

Bruckner spoke with the gas station clerk. (D0138, at 44:10–18). The clerk could not directly access QuikTrip's security footage, which was controlled off-site. (D0138, at 49:3–5, 53:12–20). The clerked called that third party—QT security—which then linked the

store's computer to the video footage so Bruckner could watch it. (D0138, at 49:3–50:25). Bruckner testified he only observed the video on the screen; QT security controlled the views and zoomed in on its contents. (D0138, at 48:12–50:25).

Bruckner did not retrieve a full copy of the security video. (D0138, 50:11–16). He testified that was not part of his job. (D0138, at 50:11–18). Bruckner could not remember if he told either the gas station clerk or QT security to preserve the video evidence. (D0138, 51:1–3). There was not a video of the actual surveillance footage from QuikTrip admitted at trial, and Leibold testified as far as he knew law enforcement never retrieved a copy of that video. (D0138, at 91:24–92:2, 105:4–10).

Bruckner testified that when he was watching the video through the screen that QT security controlled, he did not see anything that happened inside of the vehicle prior to the fight. (D0138, at 51:4–8). He only saw the portion of the surveillance video that his body camera captured. (D0138, at 51:9–11). The State entered the video from Bruckner's body camera into evidence

as Exhibit 2. (D0138, at 44:19–45:12; D0090, Ex 2: Body Camera Video (flash drive) (07/03/2023)).

Bol Mayen told the officers that she drove Defendant–Appellant Terence E. Manning, the other person involved in the fight, to the Conoco gas station across the street. (D0138, at 44:11–18; 104:15–22; D0090, Ex. 3: Aerial Map (flash drive) (07/03/2023)). Another Des Moines police officer located Manning at the Conoco gas station and arrested him. (D0138, at 45:18–49:4). The State submitted a video from inside the arresting officer's squad vehicle into evidence. (D0090, Ex. 1: Patrol Vehicle Video (flash drive), at 0:50–1:00 (07/03/2023)).

Manning told the arresting officer that he did not know what was going on and asked what the officer had been told. (D0090, Ex. 1: Patrol Vehicle Video (flash drive), at 0:50–1:00 (07/03/2023)). The officer explained they were called to an assault at the QuikTrip, and there was a man there with facial injuries. (D0090, Ex. 1, at 0:50–1:20). Manning admitted he had been involved in the fight; he told the officer he felt like he had "been set up" and they wanted

him to go to jail. (D0090, Ex. 1, at 0:50–1:50, 4:00–4:30). Manning stated he was defending himself. (D0090, Ex. 1, at 0:50–1:10).

Manning told the officer he had been arguing with his girlfriend and then Makuay. (D0090, Ex. 1, at 02:35–2:55). Manning identified Makuay as the aggressor; he stated he told Bol Mayen that he did not want any issues with Makuay. (D0090, Ex. 1, at 02:35–2:55). Manning told the officer that Bol Mayen told Makuay to leave Manning alone and she tried getting Makuay back into the vehicle. (D0090, Ex. 1, at 5:40–5:50).

Manning stated Makuay got into the vehicle's front seat and tried "smacking" him. (D0090, Ex. 1, at 3:00–3:15). Manning also reported Makuay had been repeatedly trying to open the car door and forcefully throw Manning out of the car. (D0090, Ex. 1, at 0:55–1:55, 2:49–3:20). Manning told the officer that Makuay "kept attacking him," trying to him out of the car, and repeatedly telling Manning to come outside and fight him. (D0090, Ex. 1, at 03:00–4:55). Manning said he stayed in the car and he did not want to fight Makuay. (D0090, Ex. 1, at 03:30–03:40). Manning reported that, only after Makuay continued to try to drag him from the

vehicle, did he exit it. (D0090, Ex. 1, at 03:30–03:45, 04:30–4:55). Manning told the officer he got out of the car and defended himself by knocking Makuay to the ground. (D0090, Ex. 1, at 03:40–03:50, 4:30–5:00). Manning said Makuay kept coming back at him. (D0090, Ex. 1, at 03:45–04:05).

Manning told the officer that Makuay went inside the QuikTrip and Bol Mayen drove him to the Conoco gas station. (D0090, Ex. 1, at 03:50–4:05, 5:00–5:10). Manning said Bol Mayen told him she was going to drive Makuay to the hospital then return to give Manning a ride home. (D0090, Ex. 1, at 1:50–2:05, 4:00–4:10). Manning was adamant he was defending himself from Makuay's attacks and that the surveillance video would corroborate his statements. (D0090, Ex. 1, at 1:30–2:00, 2:50–3:00, 5:30–5:50).

At trial, both Makuay and Manning testified about what occurred on December 26, 2022. Makuay testified he and Bol Mayen were at the house of a family member when Bol Mayen's

daughter[1] called her. (D0138, at 57:8–58:19, 74:25–75:5). Makuay testified Bol Mayen's daughter reported having a problem with her boyfriend—Manning. (D0138, at 57:16–59:14). Bol Mayen's daughter and Manning met Makuay and Bol Mayen at their apartment. (D0138, at 58:18–59:20, 71:18–20).

Makuay testified Manning and Bol Mayen's daughter were arguing. (D0138, at 59:15–20). Makuay and Bol Mayen decided to drive Manning to his mother's house, where Manning was living at the time. (D0138, at 59:17–24, 114:23–23). Bol Mayen drove while Makuay was in the front passenger seat; Manning sat in the car's backseat behind the driver. (D0138, at 60:20–61:5). Makuay stated Manning was angry because he did not "want to leave his girlfriend." (D0138, at 60:1–4). Makuay testified Manning was "being disrespectful" and "cussing" him and Bol Mayen. (D0138, at 60:5–9).

[1] Makuay and Bol Mayen were engaged. (D0138, at 57:2–7). Bol Mayen's daughter is also referred to as Makuay's stepdaughter throughout the trial. *See, e.g.*, (D0138, 58:23–59:2, 117:1–17).

Makuay testified he directed Bol Mayen to stop at the QuikTrip. (D0138, at 79:16–80:7). Makuay stated they pulled into the gas station parking lot because Manning was being disrespectful to him and Bol Mayen. (D0138, at 60:10–19). The gas station was only a mile or so from the apartment. (D0138, at 71:23–72:6). Makuay testified the vehicle was parked for only a couple of minutes before things escalated. (D0138, at 72:16–20).

Makuay stated he told Manning to get out of the car and that they were no longer driving him home because he was being disrespectful. (D0138, at 61:12–16). Makuay testified Manning refused to get out of the car, prompting Makuay to exit the vehicle and open the vehicle's backdoor. (D0138, at 61:12–21). According to Makuay, Manning kept pulling the door shut and continued to refuse to exit the car. (D0138, at 61:19–62:3).

Makuay testified he tried two or three times to open the door and force Manning out. (D0138, at 61:19–62:3). But Makuay also testified he did not physically try to make Manning get out of the car. (D0138, at 81:5–10). Makuay denied touching Manning.

(D0138, at 81:5–10). He also testified that he never threatened Manning. (D0138, at 81:9–10).

At trial, Makuay acknowledged he had previously seen the body camera video, which captured the QuikTrip video. (D0138, at 62:20–23). Initially, Makuay denied the vehicle on the video was Bol Mayen's, testifying that they were driving a black Toyota Camry. (D0138, at 61:6–11, 63:4–16). He also initially denied being the person on the video, who was shown getting hit and falling to the ground. (D0138, at 63:4–16). S (D0138, at 61:6–11).

Makuay testified Manning hit him, and he did not remember what occurred after Manning hit him for the second time. (D0138, at 65:3–10). He stated he believed he was knocked unconscious after the second hit. (D0138, at 65:1–10). Even after being presented with the video, which showed Makuay standing up right after being hit, Makuay still maintained he was "out for a while." (D0138, at 76:3–15). Makuay testified "I got up but my memory, I wasn't myself. I don't know what's going on. I get up as a dead body. I don't see nothing around me." (D0138, at 76:14–18).

Makuay testified he was "trying to protect [him]self because [he] knew he was coming to hurt me." (D0138, at 65:15–66:1). Makuay testified Manning was saying a lot of "bad word[s]" as he was walking towards him. He testified Manning told him, "I will put you to sleep. I'll kill you. I will knock you out." (D0138, at 66:3–10).

Makuay's teeth were knocked out. (D0138, at 63:22–25). He also testified he fractured his nose. (D0138, at 64:1–6). Makuay also had injuries to his eyes, which he testified impacted his vision; he was still experiencing blurry vision in his right eye at the time of trial. (D0138, at 64:1–18). Makuay testified he was hospitalized for two or three weeks after. (D0138, at 69:10–13).

Makuay denied that he had been drinking alcohol that night. (D0138, at 75:6–11). However, Bol Mayen told the police that Makuay had been drinking. (D0138, at 92:19–21, 93:18–20). Makuay testified that his face, . . . brain, everything shook up" and that he did not remember talking to the fire department. (D0138, at 77:1–6).

Manning recalled the night's events different. Manning testified he and his girlfriend, Bol Mayen's daughter, were at a

Christmas party with friends. (D0138, at 115:1–5). Bol Mayen's daughter drove to her apartment, where they met Bol Mayen, who had agreed to give Manning a ride to his mother's house in Indianola. (D0138, at 114:23–21). Bol Mayen was sitting in her vehicle, a silver suburban, and Makuay was inside the vehicle, sitting in the front passenger seat. (D0138, at 115:11–116:3).

Manning stated Bol Mayen began to drive, but she stopped at the QuikTrip gas station, which was about five minutes from her apartment; Manning testified Bol Mayen stopped so she could enter his address into her GPS. (D0138, at 116:4–19). Manning testified he and Bol Mayen were talking about what had happened at the party; he stated the subject was "[j]ust too much to drink and her daughter going home." (D0138, at 116:7–24).

Manning believed both Bol Mayen and Makuay had been drinking at the separate party they had attended earlier that night. (D0138, at 116:25–117:5, 126:8–13). Manning also thought Makuay smelled like alcohol and was intoxicated based on his behavior. (D0138, at 12221–123:7). Manning testified Makuay became offended by something Manning stated about Bol Mayen's daughter.

(D0138, at 117:1–12). Manning testified he was not trying to be disrespectful to Makuay or Bol Mayen, and Manning did not expect anyone to take offense to his statements. (D0138, at 117:1–5, 123:3–7).

Manning testified Makuay started to threaten him and wanted to force him out of the vehicle. (D0138, at 117:18–21). Manning testified Makuay started yelling at both him and Bol Mayen. (D0138, at 119:5–14). Manning said Makuay called him names and "the B word." (D0138, at 119:8–11). Manning described Makuay as "being very aggressive" towards Bol Mayen, who was attempting to calm Makuay down and diffuse the situation. (D0138, at 119:8–14, 123:3–4). Manning testified Bol Mayen did not seem to understand Makuay's actions. (D0138, at 137:2–4). Manning stated Bol Mayen never told him to get out the vehicle, which belonged to her. (D0138, at 136:6–137:9).

Manning testified Makuay began "reaching over the front seat and slapping at" him. (D0138, at 123:12–23). Manning described Makuay as trying to grab him and testified that Makuay struck him "[o]nce or twice" with a closed fist. (D0138, at 123:24–124:2).

Manning testified the vehicle was parked while this happened. (D0138, at 135:5–18).

Manning testified Bol Mayen was reversing out of the parking spot when Makuay abruptly exited the vehicle. (D0138, at 119:7–14). Makuay tried to open the vehicle's rear doors several times; Manning testified it was at least four. (D0138, at 119:15–19, 121:16–20). Manning testified Makuay "wanted to fight" him and repeatedly stated that he "was going to beat [Manning's] ass." (D0138, at 122:1–9). Manning locked the door to stop Makuay from opening it. (D0138, at 120:19–24). Manning testified Makuay ordered Bol Mayen out of the vehicle in order to try to unlock the door and force Manning out of the car. (D0138, at 120:15–121:6). Makuay opened the front driver's side door, got into the driver's seat, and started hitting Manning. (D0138, at 120:4–121:12).

Manning testified he believed Makuay was going to attack him and would not stop, so Manning exited the vehicle and defended himself. (D0138, at 124:8–13, 125:11–20). Manning agreed he pushed Makuay down and hit him. (D0138, at 124:14–17). Manning acknowledged he hit and kicked Makuay while he was on the

ground, stating Makuay was trying to get up. (D0138, at 129:7–12, 129:7–130:13). Manning testified he expected Makuay to attack him again when Makuay got back on his feet. (D0138, at 126:23–127:1).

Makuay did get to his feet. (D0138, at 130:14–21). Manning testified that when he saw this, he believed Makuay was in a fighting stance. (D0138, at 131:4–11). Manning testified that he was not sure "how far [Makuay] would go and [he] just wanted [Makuay] to stop." (D0138, at 124:19–22). Manning testified he thought Makuay rush him so he was hesitant to turn his back on Makuay in order to reenter the vehicle. (D0138, at 138:2–10). Manning testified Makuay was still yelling at him, causing Manning to believe Makuay would attack him again; Manning punched Makuay again, knocking him to the ground. (D0138, at 131:4–132:8).

Manning testified after Makuay got up from the ground the second time, he realized Makuay was done fighting; Manning stated Makuay put his hands down and changed his demeanor. (D0138, at 124:23–125:3). Manning testified he asked if Makuay was done and could they get in the car and leave now, and Makuay said yes. (D0138, at 125:21–25). Manning was not injured in the fight.

(D0138, at 132:9–15). Manning testified he did not feel as if he could predict Makuay's behavior that night, as Makuay was not acting rationally. (D0138, at 137:13–25).

ARGUMENT

I. The district court erred by allowing the State to enter the QuikTrip surveillance video, as captured on the responding officer's body camera video, into evidence.

***Preservation of Error*:** During trial, Manning objected to the admission of the portion of State's Exhibit 2, which was video from Bruckner's body camera and showed the QuikTrip surveillance video being played on a monitor inside the store for the officer to watch. (D0138, at 3:10–14). Manning specifically objected that the State did not lay the proper foundation and authentication and it was not the best evidence as it was "inadequate and incomplete" copy. (D0138, at 9:24–12:24, 22:18–19, 24:1–16). The court's adverse ruling on the timely objections preserved error. (D0138, at 30:5–34:17, 45:3–7). *See State v. Alberts*, 722 N.W.2d 402, 406–07 (Iowa 2006) (citations omitted).

***Standard of Review*:** This Court reviews evidentiary rulings for an abuse of discretion. *State v. Paredes*, 775 N.W.2d 554, 560

(Iowa 2009). "An abuse of discretion occurs when the trial court exercises its discretion 'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v. Rodriguez*, 636 N.W.2d 234, 239 (Iowa 2001) (quoting *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997)). "'A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law.'" *Id.* (quoting *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000)).

***Discussion*:** In this case, the State admitted a portion of video surveillance from QuikTrip's parking lot, as captured and shown through Bruckner's body camera footage, through Bruckner's testimony at trial. (D0138, at 45:3–7). The district court improperly admitted the evidence under the "silent witness" doctrine. (D0138, at 29:10–31:5). Additionally, the district court overruled the defense's objection regarding the video being the best evidence. (D0138, at 31:6–25). Because the State failed to properly authenticate and lay the foundation for the admission of the security footage, via Bruckner's body camera, and the video is not

the best evidence, the district court abused its discretion in admitting Exhibit 2 over Manning's objections.

A. Foundation & Authentication

Iowa Rule of Evidence 5.901 provides the requirement for authenticating or identifying evidence. Iowa R. Evid. 5.901 (2023). Specifically, the rule requires that "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Iowa R. Evid. 5.901(*a*). The rule itself gives several, nonexhaustive examples of evidence that satisfies the requirement of authentication. *See id.*

First, it does not appear that Iowa courts have formally adopted the "silent witness" doctrine of authentication of video evidence. Though several Iowa court opinions contain the phrase, none are used in the context of authenticating evidence. *See, e.g.*, *State v. Bevins*, 230 N.W. 865, 876 (Iowa 1930); *State v. Parker*, 151 N.W.2d 505, 514 (Iowa 1967) (Rawlings, J., dissenting). Even assuming Iowa does recognize the "silent witness" doctrine, an examination of the caselaw from jurisdictions that have clearly

adopted the doctrine illustrates it would not authorize the admission of Exhibit 2 under these circumstances.

Acknowledging that sometimes there may be no qualified or competent eyewitness to testify that the evidence accurately and reliably shows what occurred, some courts have allowed the evidence's proponent to lay a "silent witness" foundation for its admission. *See* Hon. Richard B. Klein, Trial Communications Skills, *Silent Witness Foundation* § 33A:8 (Dec. 2023). It appears at least a few other jurisdictions have adopted this general doctrine under a similar rule to Rule 5.901. For example, Indiana allows evidence to be authenticated under the "silent-witness theory" so long as there is evidence "describing the process or system that produced the videos and showing the video is an accurate representation of the events in general." *See Toney v. State*, 206 N.E.3d 1153, 1155–56 (Ind. Ct. App. 2023) (citing Ind. R. Evid. 901(b)(9)).

In this case, the State did not present evidence that described "a process or system and show[ed] that it produce[d] an accurate result," as would possibly allow it to authenticate the QuikTrip surveillance video pursuant to Iowa Rule of Evidence 901(*a*), (*b*)(9).

Bruckner testified that he watched the surveillance video, as captured on his body camera, while on the phone with QT security. (D0138, at 6:7–20). Bruckner did not know who was controlling the security camera while he observed the footage. (D0138, at 6:18–23). Bruckner testified he was not zooming in on different parts of the video or controlling which screen he was observing. (D0138, at 7:25–8:3). Bruckner did not know how many cameras were in the parking lot and store. (D0138, at 7:2–4). He testified he was unfamiliar with the security camera system, and he did not know how it recorded. (D0138, at 8:6–10). Brucker could not say whether the cameras recorded "in real time or what the frame rate" was. (D0138, at 8:9–13). Nor did Bruckner know how the system stored information. (D0138, at 8:14–16).

As such, the State cannot authenticate the video using the silent witness doctrine. Bruckner admitted he did not know how the video surveillance system worked, was maintained, and accurate. *See Spradley v. State*, 128 So.3d 774, 781 (Ala. Crim. App. 2011) ("[A] witness must explain how the process or mechanism that created the item works and how the process or mechanism ensures

reliability."). Nor did he testify about the reliability or quality of the surveillance system itself. *See Washington v. State*, 961 A.2d 1110, 1116 (Md. 2008) (citations omitted) ("Courts have admitted surveillance tapes and photographs made by surveillance equipment that operates automatically when 'a witness testifies to the type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system.'"). Additionally, Bruckner did not testify that the video was not altered or doctored; rather, his statements acknowledge that he had no control over the footage as it was played. *See Toney v. State*, 206 N.E.3d 1153, 1155–56 (Ind. Ct. App. 2023) (citation omitted) ("The proponent must show that the video was not altered in any significant respect, and the date the video was taken must be established when relevant."). Thus, for these reasons, the State failed to properly authenticate the surveillance footage through Bruckner under the silent-witness doctrine. *See State v. Burgdorf*, 861 N.W.2d 273, 277–78 (Iowa Ct. App. 2014) (citing *Deering*, 291 N.W.2d at 39) (finding the district court improperly admitted video

surveillance from Wal-Mart "without foundational testimony form a Wal-Mart representative"). Therefore, the district court erred in finding Bruckner's testimony authenticated Exhibit 2 and subsequently admitting the exhibit over Manning's objections. *See State v. Lain*, 246 N.W.2d 238, 242 (Iowa 1976) ("A judge cannot make [foundational] findings without proof; evidence must be introduced warranting the findings.").

The State also suggested it could offer the evidence through Makuay. (D0138, at 19:12–25). However, it did not, instead offering the exhibit through Bruckner's testimony. (D0138, at 3:10–14). Additionally, the record shows that Makuay would not have been able to lay an adequate foundation for the video's admission.

In Iowa, a "proper foundation for the admission into evidence of a motion picture film demands only that the fidelity of the film's portrayal be established. When, as here, a witness to the event reportedly depictured by the file testifies that the film accurately portrays that event, a foundation has been established . . . ." *State v. Deering*, 291 N.W.2d 38, 40 (Iowa 1980) (citations omitted). Thus,

a witness could testify that the "item is what it is claimed to be," thereby authenticating the evidence. *See* Iowa R. Evid. 5.901(*b*)(1).

However, Makuay's testimony shows he could not provide the testimony required to authenticate the surveillance video. Makuay testified Bol Mayen was driving a black, Toyota Camry, which he identified as a small car. (D0138, at 60:20–61:11). Makuay admitted that he had previously seen the footage from the parking lot. (D0138, at 62:18–23). Yet, when shown the footage by the prosecutor, Makuay could not authenticate the video.

Makuay specifically denied that it was Bol Mayen's car in the footage and that he was in the video. Makuay stated: "It's not really clear. I see the silver car. That's not the car we were driving. We were driving the black car." (D0138, at 63:4–10). The prosecutor then played Makuay a little over a minute of the video, starting at two minutes and sixteen seconds and stopping at two minutes and twenty-one seconds. (D0138, at 63:4–10). The prosecutor then asked, "We just watched someone fall to the ground here with their arms in the air. Is that you?" (D0138, at 63:14–16). Makuay responded, "No." (D0138, at 63:14–16). Though he later responded

to leading questions from the prosecutor as if he was on the video, he never affirmed it was him, as would be required to authenticate the evidence.

Moreover, Makuay did not testify that the video accurately portrayed the fight or what had occurred that night between him and Manning. Rather, Makuay's own testimony shows he could not. When he was asked if what he had watched on the video was accurate and what he "roughly" remembered as happening, Makuay responded that he did not remember anything that occurred after the second time he was hit. (D0138, at 65:13–14). Makuay testified he was "knocked out" and "out for a while" and denied remembering several things that occurred after, including how long he was at QuikTrip, that Bol Mayen had left and drove Manning to a different gas station, and what he had told the police and fire department. (D0138, at 75:16–77:5).

Accordingly, as the testimony above shows, Makuay could not authenticate the surveillance video. He initially denied it was even the car he was driving in, and he denied being the person in the video that fell down when first shown the footage. (D0138, at 63:4–

16). Nor did Makuay remember what occurred during a large portion of what the video showed. Makuay never testified that the video accurately portrayed the incident. As such the State could not and did not establish a proper foundation for Exhibit 2 through Makuay's testimony. *See Deering*, 291 N.W.2d at 40.

B. Best Evidence

The district court also disagreed that the best-evidence rule prohibited the admission of Exhibit 2. As defense counsel explained, the video "has been edited" and the State "cannot possibly go back and give [the defense] the rest of the video at this point because the detective didn't follow up." (D0138, at 17:9–14). The district court denied this objection to the exhibit, finding the "video of the output from the security camera . . . satisfies the original requirement." (D0138, at 31:6–20).

The best evidence rule is contained in Iowa Rules of Evidence 5.1000 through 5.1008. *State v. Khalsa*, 542 N.W.2d 263, 268 (Iowa Ct. App. 1995) (citation omitted). Generally, the rule provides that "[w]hen a party is attempting to prove the contents of a writing, recording, or photograph, the courts require the original to be

produced." *Id.*; *see also* Iowa R. Evid. 5.1002. "The purpose of the best evidence rule is to secure the most reliable information as to the contents of [the evidence], when those terms are disputed." Id. (citation omitted).

Here, the State used the video in an attempt to prove its contents—what occurred during the incident. *See* Laurie Dore, 7 Iowa Practice Series Evidence, Proof of contents—When applicable § 5.1002:2 (Oct. 2023). "If the recording itself is introduced to prove the content of the conversation, . . . the best evidence rule will require the use of the original recording." *See id.* Thus, the best evidence rule applied to the exhibit's admission.

The State did not produce the original video in this case. Rather, it was a video within a video. *Cf.* Iowa R. Evid. 5.1002. That the State produced a copy is not in itself problematic. The Iowa Rules of Evidence provide a "duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate." *See* Iowa R. Evid. 5.1003.

Here, as defense counsel noted, it was not clear what had occurred during the surveillance footage, as captured on the body camera video. Someone at QT security manipulated the cameras, zooming in and out, and switching screens. ((D0138, at 7:25–8:3). Defense counsel questioned if the video had been edited. (D0138, at 17:9–14). Moreover, it was also not apparent if the video was in real time or the frame rate. (D0138, at 8:14–16). As discussed above, there was no evidence about the reliability or accuracy of the cameras in the record, and the State failed to authenticate the exhibit.

Additionally, the circumstances made it unfair to admit the duplicate. As the defense indicated, it was unable to utilize tools to find out how if the video had been edited or manipulated because it never received a copy of the actual QT surveillance video. Nor could it view any other angles or views that were not captured on Bruckner's body camera. Nor can the inability of the defense to examine the accuracy of the video and its contents be attributed to the defense. Rather, the record shows that the failure to obtain a complete duplicate of the original surveillance video was due to

errors made by both law enforcement and QuikTrip. (D0138, at 11:23–12:6, 14:11–18).

In this case, the body camera video, which captured the footage from the QuikTrip's surveillance cameras was not the best evidence. Moreover, it was unfair to admit any duplicate under these circumstances. Accordingly, the district court erred in overruling Manning's objection to the exhibit pursuant to the best evidence rule.

C. Remedy

When a district court improperly admits evidence, the appellate court presumes "prejudicial error unless the contrary is affirmatively established." *In re Detention of Stenzel*, 827 N.W.2d 690, 708 (Iowa 2013) (citations omitted) (internal quotation marks omitted). "[T]he State bears the burden of showing lack of prejudice." *State v. Huston*, 825 N.W.2d 531, 539 (Iowa 2013) (citation omitted). In this case, Makuay, the only State witness that testified about the incident, struggled to articulate what actually occurred. Accordingly, the State relied heavily on the video in presenting its evidence and proving its case against Manning. Thus,

the record does not affirmatively establish that Manning was not prejudiced by the erroneous admission of the evidence. *See id.*; *State v. Nims*, 357 N.W.2d 608, 609 (Iowa 1984) (noting the record must establish "that the challenged evidence did not impact on the jury's finding of guilt"). This Court should vacate Manning's conviction and remand for a new trial.

II. The State presented insufficient evidence that Manning specifically intended to commit a serious injury to Makuay.

***Preservation of Error*:** During trial, Manning preserved error by moving for judgment of acquittal. Manning specifically argued the State failed to present substantial evidence that he intended to commit a serious injury, and the district court denied the motion for judgment of acquittal. *See* (D0138, at 107:1–10, 110:18–24); *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004). He also renewed the motion after the presentation of the defense's case, which the court overruled again. (D0137, Trial Day 3, at 2:11–3:5 (06/28/2023)). Moreover, "[a] defendant's trial and the imposition of sentencing following a guilty verdict are sufficient to preserve error with respect to any challenge to the sufficiency of evidence raised

on direct appeal." *State v. Crawford*, 972 N.W.2d 189, 201 (Iowa 2022).

***Standard of Review*:** The Court reviews claims of insufficiency of the evidence for correction of errors at law. *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012).

***Discussion*:** "In reviewing challenges to the sufficiency of evidence supporting a guilty verdict, appellate courts consider all of the record evidence viewed 'in the light most favorable to the State, including all reasonable inferences that may be fairly drawn from the evidence.'" *Id.* (quoting *State v. Keopasaeuth*, 645 N.W.2d 637, 639–40 (Iowa 2002)). The Court should uphold the verdict only if it is supported by substantial evidence in the record as a whole. *Id.* "Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *State v. Kemp*, 688 N.W.2d 785, 789 (Iowa 2004) (citing *State v. Webb*, 648 N.W.2d 72, 75 (Iowa 2002)). However, consideration must be given to all of the evidence, not just the evidence supporting the verdict. *State v. Petithory*, 702 N.W.2d 854, 856–57 (Iowa 2005) (citation omitted). "The evidence must raise a fair inference of guilt and do

more than create speculation, suspicion, or conjecture." *Webb*, 648 N.W.2d at 76 (citing *State v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981)).

The State has the burden of proving "every fact necessary to constitute the crime with which the defendant is charged." *Webb*, 648 N.W.2d at 76 (citing *State v. Gibbs*, 239 N.W.2d 866, 867 (Iowa 1976)); *see also State v. Limbrecht*, 600 N.W.2d 316, 317 (Iowa 1999) (citing *State v. Harrison*, 325 N.W.2d 770, 772–73 (Iowa Ct. App. 1982)) ("That record must show that the State produced substantial evidence on each of the essential elements of the crime."). In order to establish the crime of willful injury causing bodily injury, the offense that of which Manning was convicted, the State must prove: 1) the defendant committed an assault; 2) with the intent to cause serious injury to Makuay; and 3) the assault caused serious injury. *See* Iowa Code § 708.4(1) (2022); *see also* Iowa State Bar Ass'n, *Iowa Uniform Jury Instruction* No. 800.11 (June 2022); (D0084, Jury Instructions, at 18 (06/28/2023)). As applicable to this case, Iowa law defines "serious injury" as bodily injury which creates a "substantial risk of death", causes "serious

permanent disfigurement", or causes "protracted loss or impairment of the function of any bodily member or organ." *See* Iowa Code § 702.18(1) (2022); *see also* Iowa State Bar Ass'n, *Iowa Uniform Jury Instructions* No. 200.22 (June 2022); (D0084, Jury Instructions, at 19).

In this case there was insufficient evidence that Manning specifically intended to cause serious injury to Makuay, as distinct from only bodily injury. It failed to do so. Specific intent is present when from the circumstances the offender must have subjectively desired the prohibited result. *State v. Redmon*, 244 N.W.2d 792, 797 (Iowa 1976) (citation omitted). "Specific intent is seldom capable of direct proof." *State v. Walker*, 574 N.W.2d 280, 289 (Iowa 1998) (citing *State v. Rademacher*, 433 N.W.2d 754, 758 (Iowa 1988)). Therefore, when determining a defendant's intent, the court examines "all the circumstances attending the assault, together with all relevant facts and circumstances disclosed by the evidence." *Bell*, 223 N.W.2d at 184 (citations omitted). In particular, "[t]he willful injury offense requires proof the defendant acted with

the specific intent to cause an injury of great severity." *State v. Vandermark*, 965 N.W.2d 888, 892 (Iowa 2021).

Based on the existing trial record, the conclusion that Manning specifically intended to cause serious injury, as distinct from only bodily injury, amounts to speculation and conjecture; as such, the guilty verdict is not supported by sufficient evidence. *See State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992). The record established there was no prior negative relationship between Makuay and Manning. There was no testimony that there was a previous altercation or history of bad blood between the two that one could infer that Manning had the specific intent to cause Makuay serious injury. *Cf. State v. Evans*, 671 N.W.2d 720, 725 (Iowa 2003) (considering the prior history between the two parties when examining whether the defendant possessed the specific intent to alarm or intimidate the victim). Nor did Manning use a weapon in the assault, which also supports the lack of specific intent to cause serious injury. *Cf. State v. Schumann*, 175 N.W. 75, 77 (Iowa 1919) (weighing the fact that the defendant used a brick as

a weapon in determining whether the defendant had the requisite intent).

The only evidence the State presented does not support a conviction that requires the specific intent to cause a serious injury. Rather, the evidence shows this was a fight that broke out quickly, not a planned attack by anyone. The evidence also indicated Makuay was the instigator of the altercation; by his own testimony, Makuay tried to remove Manning from the vehicle. (D0138, at 74:7–21). Notably, Manning repeatedly told the arresting officer that he was defending himself, and he insisted the surveillance video would corroborate his assertion. *See* (D0090, Ex. 1, at 0:50–1:10, 1:30–2:00, 2:50–3:00, 5:30–5:50). There was no evidence he intended to seriously injure Makuay. The evidence the State presented did not give a fair inference of guilt; rather, it only created "speculation, suspicion, or conjecture" as to Manning's specific intent. *Webb*, 648 N.W.2d at 76 (citation omitted). Accordingly, there was insufficient evidence that Manning specifically intended to seriously injury Makuay. *See id.*

Where evidence is insufficient to support a conviction, appellate courts will remand for entry of an amended judgment of conviction on the next-lesser included offense that was both submitted to the jury and itself supported by sufficient evidence. *State v. Morris*, 677 N.W.2d 787, 788-89 (Iowa 2004). In the present case, the evidence was sufficient to establish that Manning assaulted Makuay and caused serious injury. Accordingly, this Court should remand for entry of an amended judgment of conviction and resentencing[2] on the lesser-included offense of assault causing serious injury, a class "D" felony. *See* Iowa Code § 708.2(5) (2022); (D0084, Jury Instructions, at 4, 20); *see also State v. Mikesell*, 479 N.W.2d 591, 591 (Iowa 1991) (per curiam) (finding that under the posture of the case, assault causing bodily injury was a lesser-included offense of willful injury); *State v. Brown*, 996 N.W.2d 691, 700 (Iowa 2023) ("Based on the language of the statute, assault is a necessary component of willful injury.").

[2] Assault causing serious injury is not a forcible felony. Iowa Code § 702.11(2)(*f*) (2022). Because the district court has discretion in determining the sentence, resentencing is also required. *See State v. Ortiz*, 905 N.W.2d 174, 185 (Iowa 2017).

CONCLUSION

For the reasons outlined above, Defendant–Appellant Terence E. Manning, Jr. requests this Court reverse his conviction and remand to district court for further proceedings.

REQUEST FOR NONORAL SUBMISSION

Counsel requests this case be submitted without oral argument.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

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MARY K. CONROY
Assistant Appellate Defender
Appellate Defender Office
6200 Park Avenue
321 E. 12th Street
Des Moines, IA 50321
(515) 281-8841
mconroy@spd.state.ia.us
appellatedefender@spd.state.ia.us

MKC/sm/5/24

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