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IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff–Appellee, v. CURTIS JAMES COTTON, Defendant–Appellant.	Woodbury County Case No. FECR118538 S. CT. NO. 25–0959

APPEAL FROM THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY
THE HONORABLE JEFFREY A. NEARY, JUDGE

APPELLANT'S REPLY BRIEF AND ARGUMENT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Cotton preserved error.

II. The State engaged in prosecutorial error in its rebuttal argument, necessitating a new trial.

NATURE OF THE CASE

COMES NOW Defendant–Appellant Curtis James Cotton, pursuant to Iowa Rule of Appellate Procedure 6.903(4), and hereby submits the following argument in reply to the State's brief filed on or about August 12, 2026. While the Defendant–Appellant's brief adequately addresses the issues presented for review, a short reply is necessary to address certain contentions raised by the State.

ARGUMENT

I. Cotton preserved error.

The State argues the appellate "court should not entertain Cotton's new arguments for the first time on appeal." State Br., at 15. This is incorrect for two reasons. First, Cotton does not raise new arguments, but rather builds on and clarifies the arguments he made in the trial court. Second, the State confuses claim preservation, which is required, with argument preservation, which is not. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *Feld v. Borkowski*, 790 N.W.2d 72, 84 (Iowa 2010) (Appel, J., concurring in part and dissenting in part) ("[T]he Supreme Court has made it clear that once a claim is properly presented, a party is

not limited to arguments presented below."); *State v. Harbach*, 3 N.W.3d 209, 228 (Iowa 2024) (Waterman, J., dissenting).

All that is required for error preservation is the district court's consideration of the issue and rejection of it. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012) (citations omitted) ("If the court's ruling indicates the court *considered* the issue and necessarily ruled on it, even if the court's reasoning is 'incomplete or sparse,' the issue has been preserved."). The record indicates the trial judge considered Cotton's causation arguments and denied them because, as the district court concluded, it was bound to apply the current state of the law.

During trial, the defense noted,

> it was the State that offered evidence of Ashley Bond getting ejected from the vehicle.
>
> . . . it was the State that offered the evidence of the seatbelt not being worn through their technical investigator.
>
> And it was the State that offered evidence through the medical examiner, Dr. Klein, that . . . gave the opinion that it was the blunt force trauma from the ejection, from the . . . vehicle that caused her death.
>
> And it was the State that offered evidence that it was the defendant who, you know, was not ejected and survived.

> . . . So the State offers all this evidence of that and then the defendant can't argue to the jury that her ejectment for failure to wear the seatbelt caused her own death?

D0241, at 7:25–8:19. The district court responded, "I don't disagree with you that the facts are out there the way you've described them, but I think the case law says that not wearing a seatbelt can't be a sole proximate cause, which is the status of the law that we have now." D0241, at 9:19–23. The court then ruled the defense could not argue Bond's failure to use a seatbelt caused her death. D0241, at 9:25–10:15.

Defense counsel, clarifying the ruling, asked:

> So I'm not going to the superseding instruction saying, ladies and gentlemen, she failed to wear her seatbelt and that's what caused her death and that's the superseding cause here in this case. I understand you're saying I can't do that.
>
> But am I able to argue that it's -- that the State has not . . . proven that the defendant's intoxicated driving is a substantial factor because of these other factors?

D0241, at 11:8–17. The State objected stating allowing that argument would "essentially [allow] an end runaround the Court's ruling." D0241, at 121:20–12:16. The district court agreed and stated its intent to instruct the jury accordingly. D0241, at 12:17–

13:22. Shortly following this discussion, when determining the jury instructions, the district court stated: "I think there's lot of clarity that could be provided with regard to cause, causation, proximate cause, foreseeability; those kinds of things, the difference between the civil and criminal causation instructions and case law . . . ." D0241, at 26:5–10. The court was referring to the state of the case law and the possibility of the appellate courts addressing these issues.

The district court's comments at sentencing also explained the posttrial motions as raising "several questions with regard to causation and the nexus and those kinds of things." D0236, Sentencing Tr., at 5:9–11 (06/06/2025). The court stated,

> And while I think those are reasonable discussions that the Court can understand why they were raised, most of those matters were -- the rulings the Court made were primarily based upon the status of the existing law.
>
> And to the extent that those requests made at the time of trial and renewed now would require the Court to change the law, it's really not the prerogative of a district court judge to change supreme court decisions. So those issues are better addressed by the Iowa Supreme Court because if I were to rule in favor of the defendant on most of the bases for the motions, I would essentially be acknowledging that I think law should be changed. It's not my prerogative to do so. . . .

> There is no issue out there -- and I've seen this in both criminal cases and civil cases -- between the difference of causation in the criminal setting and causation in the civil setting. And [defense counsel] aptly points out those distinctions, and I think it's a good issue for the Supreme Court to take a look at and decide what they really want to do.
>
> If you were here for trial, you would have . . . heard us talk about some of these things in a similar fashion, but nevertheless I won't go against current precedent in terms of the causation matters.

D0236, at 5:1–6:15.

The trial court's statements illustrate it understood the differences in causation in criminal versus civil law and how that affected what Cotton was allowed to argue to the jury in his criminal trial. Thus, the issues as raised on appeal are the same as considered by the trial court. *Summy v. City of Des Moines*, 708 N.W.2d 333, 338 (Iowa 2006), *overruled on other grounds by Alcala v. Marriott Intern., Inc.*, 880 N.W.2d 699, 708 n.3 (Iowa 2016) (finding all that is necessary is that the "objection [be] sufficient to alert the court to the error that the defendant now raises on appeal"). Moreover, the trial court recognized that it was not at liberty to change the law and that it was bound by precedent and the current state of the law.

Furthermore, Cotton's claim on appeal is the same as it was in district court: the district court erred by restricting him from arguing that Bond's failure to use a seatbelt was the cause of her death and instructing the jury on causation. Cotton is not restricted to identical "'theories,' 'arguments,' 'frameworks,' or 'legal reasons'" on appeal which were raised in district court. *See* Sarah M. R. Cravens, *Involved Appellate Judging*, 88 Marq. L. Rev. 251, 256–57 (2004); *see also Summy*, 708 N.W.2d at 338 (concluding all that is necessary for error preservation is that the "objection [be] sufficient to alert the court to the error that the defendant now raises on appeal"). The ample discussions the parties had with the trial court regarding causation and the district court's rulings, as well as the instructions the court gave to the jury, establish that Cotton raised the same issue in trial court as he does on appeal. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Notably, the principles of error preservation illustrate why it is appropriate for the appellate court to consider Cotton's claims. In *State v. Crawford*, the Iowa Supreme Court identified error preservation as important for three reasons:

> (1) it affords the district court an opportunity to avoid or correct error that may affect the future course of the trial; (2) it provides the appellate court with an adequate record for review; and (3) it disallows sandbagging—that is, it does not "allow a party to choose to remain silent in the trial court in the face of the error, tak[e] a chance on a favorable outcome, and subsequently assert error on appeal if the outcome in the trial court is unfavorable."

State v. Crawford, 972 N.W.2d 189, 199 (Iowa 2022). As discussed above, the district court had the opportunity to avoid the error and did not do so. *See id.* There is an adequate record for the appellate court to decide the challenge on appeal. *See id.* Additionally, it is clear from the record that counsel was not engaging in sandbagging; he clarified the court's rulings, objected to the court's jury instructions regarding causation, and proposed the court adopt a related civil instruction. *See id.*; *see also McCoy v. People*, 442 P.3d 379, 388 (Colo. 2019) ("'The assumption that any competent attorney would withhold a meritorious argument at trial in the hope of having something to argue on appeal if the trial goes badly belies reality.'"). Moreover, the district court made it clear that it would only follow the current law, making it futile for the defense to specifically ask for the adoption of the scope of liability analysis

contained in the Restatement (Third) of Torts. *See* D0241, at 13:21–22; D0236, at 5:1–6:15. Thus, this Court may review all of Cotton's arguments raised in the appeal, as all the issues were properly preserved in district court.

II. The State engaged in prosecutorial error in its rebuttal argument, necessitating a new trial.

The prosecutor did not employ an "embellishment of oratory;" rather, he violated the golden rule by encouraging the jurors to place themselves in the position of Bond and act as her voice. *See* State's Br., at 29. In a case where the prosecutor made similar comments, the Kentucky Supreme Court found the prosecutor employed a golden-rule argument by "evocative[ly] refer[ing] to the victim's death . . . to arouse the sympathy of the jury." *See Price v. Commonwealth*, No. 14–CR-00997, 2016 WL 7665874, at *8 (Ky. Dec. 15, 2016) (mem. opinion). The Court explained:

> Asking the jurors "to be [the departed victim's] voice" did just that. We expect jurors to be detached and dispassionate arbiters of the facts, based upon the evidence, dispensing justice without favor or sympathy. Encouraging the jury to act in unison as the victim's "voice" is rhetoric that invites the jury to step outside its proper role. The function of the jury in reaching a verdict is to find the truth. The jury's purpose is not to act as "the

> voice" of the victim and it is prosecutorial misconduct for a prosecutor to urge them to do so

Id. It is improper for the prosecutor to tell the jury act as the victim's "voice." *See State v. Mahony*, NO. 70–CR–06–16295, 2009 WL 233878, at *4 (Minn. Ct. App. Feb. 3, 2009) (noting such an argument was misconduct because "it tended to ask the jurors to put themselves in the shoes of the victim and was an appeal to passion"). Yet, that is exactly what the prosecutor did in this case. The State engaged in misconduct by making this inappropriate argument in rebuttal; the district court should have sustained the defense's objection, struck the comments, and immediately should have given a specific curative instruction to the jury on how it should disregard such argument.

Moreover, Cotton was prejudiced by the prosecutor's improper argument to the jury. This Court should heavily weigh the timing of the prosecutor's inappropriate comments when considering prejudice. *See State v. Chitwood*, 518 P.3d 903, 912 (Ore. 2022) (noting the "timing of the prosecutor's remark . . . exacerbated the

risk that it would be prejudicial"). As the Oregon Supreme Court concluded:

> The comment came at the end of the prosecutor's rebuttal closing argument. Thus, it was the last thing that the jury heard before beginning deliberations. And, because it was the last thing the jury heard, its impact was likely to have been significant, insofar as a defendant had no opportunity to make a counter argument to the jury.

Id. In addition, research shows that the cognitive tendency of recency bias also comes into play for inappropriate statements during rebuttal. "Arguments made in rebuttal have the power of recency in the minds of the jury. Research shows that people tend to remember best, and be influenced most, by the latest event in a sequence, making rebuttal the most persuasive aspect of closing arguments." *Id.*

In this case, the prosecutor's inappropriate statements urging the jurors to be Bond's "voice for what happened when the accident happened" and to hold Cotton accountable were essentially the last thing the jurors heard prior to deliberation. D0241, at 64:1–65:11. Thus, the timing of the statements exacerbates the prejudice of such statements. *See United States v. Alcantara-Castillo*, 788 F.3d

1186, 1198 (9th Cir. 2015) ("Because the government's rebuttal was the last thing the jury heard before beginning its deliberations, 'the impact' of the misconduct was 'likely to be significant.'"); *see also United States v. Torees-Colon*, 790 F.3d 26, 35 (1st Cir. 2015) ("We view problematic statements during rebuttal with particular scrutiny, because the government's rebuttal argument offers the last word before the jury begins deliberations."). Several jurisdictions have found improper statements by the prosecutor during rebuttal necessitate a new trial. *See, e.g.*, *United States v. Sanchez*, 659 F.3d 1252 (9th Cir. 2011) (finding the prosecutor's improper statements during rebuttal required a new trial under plain error review); *Chitwood*, 370 P.3d at 328–29; *Alcantara-Castillo*, 788 F.3d at 1198.

The prosecutor improperly argued the golden-rule to the jury, encouraging it to be Bond's "voice" and hold Cotton accountable for her death. These comments were inflammatory and prejudicial, as they asked the jury to make its decision on factors other than the evidence in front of it. *See State v. Musser*, 721 N.W.2d 734, 755–56 (Iowa 2006) (citations omitted). This Court should reverse and

remand for a new trial. *See State v. Plain*, 898 N.W.2d 801, 818–19 (Iowa 2017) (citation omitted).

CONCLUSION

For the reasons outlined above, Defendant–Appellant Curtis James Cotton requests this Court reverse his conviction and remand to district court for further proceedings.

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

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(*g*)(1) and 6.903(1)(*i*)(1) because:

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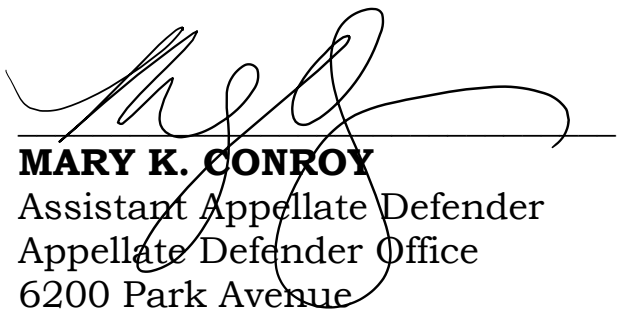

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