ELECTRONICALLY FILED FEB 11, 2020 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 19–0892

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DERRICK EARL JOHNSON,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
THE HONORABLE JOEL A. DALRYMPLE, JUDGE

APPELLEE'S BRIEF

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Authorities

Apprendi v. New Jersey, 530 U.S. 466 (2000)
Ackelson v. Manley Toy Direct, L.L.C., 832 N.W.2d 678 (Iowa 2013)
Field v. Southern Sur. Co. of New York, 235 N.W. 571 (Iowa 1931)
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State v. Comreid, 693 N.W.2d 773 (Iowa 2005)
State v. Connor, 292 N.W.2d 682 (Iowa 1980)
State v. Dailey, No. 08–0909, 2009 WL 1492698 (Iowa Ct. App. May 29, 2009)
State v. Doe, 927 N.W.2d 656 (Iowa 2019)
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State v. Jeffries, 430 N.W.2d 728 (Iowa 1988)
State v. Joiner, No. 15–1600, 2017 WL 1400804 (Iowa Ct. App. Apr. 19, 2017)
State v. Kellison, 11 N.W.2d 371 (Iowa 1943)
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State v. Massick, 511 N.W.2d 384 (Iowa 1994)
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Iowa Code § 708.1(2)
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Eric A. Johnson, *Wrongful-Aspect Overdetermination: The Scope-of-the-Risk Requirement in Drunk-Driving Homicide*, 46 CONN. L. REV. 601 (2013)

II. Did the trial court abuse its discretion in excluding evidence that L.H., the seven-month-old who was killed when the T-bone collision rolled the minivan in which he was a passenger, was not sitting in a carseat? Was that evidence relevant to the issue of whether Johnson's act of OWI caused L.H.'s death?

Authorities

People v. Bailey, 549 N.W.2d 325 (Mich. 1996)
People v. Batts, No. 340032, 2019 WL 2552638 (Mich. Ct. App. June 20, 2019)
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State v. Adams, 810 N.W.2d 365 (Iowa 2012)
State v. Begey, 672 N.W.2d 747 (Iowa 2003)
State v. Bruce, No. 18–2151, 2019 WL 6358198 (Iowa Ct. App. Nov. 27, 2019)
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State v. Hubka, 480 N.W.2d 867 (Iowa 1992)
State v. Tribble, 790 N.W.2d 121 (Iowa 2010)
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State v. Wissing, 528 N.W.2d 561 (Iowa 1995)

III. Did the sentencing court impose an illegal sentence when it imposed a DARE surcharge that it is required to impose for any violation arising out of an OWI?

Authorities

State v. Konvalinka, No. 11–0777, 2012 WL 1860352 (Iowa Ct. App. May 23, 2012)
State v. Morris, 416 N.W.2d 688 (Iowa 1987)
State v. Parker, 747 N.W.2d 196 (Iowa 2008)
State v. Woody, 613 N.W.2d 215 (Iowa 2000)
Iowa Code § 321.279(3)(b)
Iowa Code § 707.6A(1) (2017)
Iowa Code § 911.2(1)

ROUTING STATEMENT

Johnson seeks retention on his claim that homicide by vehicle by reckless driving is a lesser-included offense of homicide by OWI. *See* Def's Br. at 14–15. Two recent challenges to Iowa precedent on this issue were routed to the Iowa Court of Appeals and rejected. *See State v. Ware*, No. 13–1072, 2014 WL 3931451, at *4 (Iowa Ct. App. Aug. 13, 2014); *State v. Halterman*, No. 12–1072, 2013 WL 1457148, at *1–2 (Iowa Ct. App. Apr. 10, 2013). Those opinions were based on *State v. Massick*, 511 N.W.2d 384 (Iowa 1994). Johnson's challenge can be resolved by applying those same established legal principles. *See* Iowa R. App. P. 6.1101(3)(a). Additionally, any error is harmless because the jury accepted all five of the State's alternative theories on Johnson's intoxication. *See* Interrogatory (4/4/19); App. 26.

Johnson also seeks retention to overturn *State v. Hubka*, 480 N.W.2d 867 (Iowa 1992). *See* Def's Br. at 15. A similar call to overrule *Hubka* was recently routed to the Iowa Court of Appeals and rejected. *See State v. Bruce*, No. 18–2151, 2019 WL 6358198, at *2 (Iowa Ct. App. Nov. 27, 2019) (further review application denied, Jan. 14, 2020). Again, his claim can be resolved by applying those same established legal principles. *See* Iowa R. App. P. 6.1101(3)(a).

Both of Johnson's claims raise questions about the implications of the opinion in *State v. Adams*, 810 N.W.2d 365 (Iowa 2012). To the extent that either claim has merit, it is only because *Adams* changed what must be proven for a conviction for vehicular homicide by OWI. But *Adams* said it was reiterating "long-established legal principles," not changing the law. *See Adams*, 810 N.W.2d at 370. Both of these challenges illustrate reasons why *Adams* was wrongly decided. It is not necessary to overrule or qualify *Adams* to affirm, but overruling or qualifying *Adams* would clarify the law surrounding section 707.6A. *See* Iowa R. App. P. 6.1101(2)(f). But in all other respects, this appeal involves application of existing legal principles and may be transferred to the Iowa Court of Appeals. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This is Derrick Earl Johnson's direct appeal from conviction for homicide by vehicle by operating while intoxicated, a Class B felony, in violation of Iowa Code 707.6A(1) (2017). Johnson ran a stop sign at 29 mph and struck a minivan in the intersection, in a T-bone collision. The minivan rolled. One passenger, seven-month-old L.H., was killed. A chemical test found both alcohol and cocaine in Johnson's blood.

In this appeal, Johnson argues: **(1)** the court erred in refusing to give a lesser-included offense instruction on vehicular homicide by reckless driving; **(2)** the court erred in excluding his evidence that L.H. was on another passenger's lap and not restrained in a carseat, and that L.H. may have survived if he had been properly secured; and **(3)** his sentence is illegal because the court assessed a DARE surcharge on his conviction under 707.6A(1).

Course of Proceedings

The State generally accepts Johnson's description of the relevant course of proceedings. *See* Iowa R. App. P. 6.903(3); Def's Br. at 16–20.

Facts

On August 2, 2017, Dr. Lewis was taking care of L.H., and took him along for the day. L.H. was seven months old. *See* TrialTr.V2 6:17–8:3. At around 6:30 p.m., Dr. Lewis was driving a red minivan, going northbound on Highway 63 in Waterloo (also called 1st Street). He entered the intersection with Sycamore without slowing down, because there was no traffic signal in that direction. *See* TrialTr.V2 7:11–9:7. But as he drove through it, he saw "a vehicle coming on [his] right side," and it was "coming at [them] fairly quickly." *See* TrialTr.V2 9:1–20. Dr. Lewis swerved and tried to avoid it, but did not succeed.

> The car hit our passenger side, and we — from — I think we rolled over kind of side over side and landed in the grassy pasture off to the left.

TrialTr.V2 9:21–10:5. Dr. Lewis did not see the oncoming truck try to swerve or avoid the collision. *See* TrialTr.V2 13:1–15.

After the vehicle rolled, Dr. Lewis got out of the vehicle, and he was able to get L.H. out—but L.H. was not moving or breathing. *See* TrialTr.V2 10:6–18. Dr. Lewis handed L.H. to a familiar bystander (who Dr. Lewis already knew, by pure happenstance) and that person began performing CPR. Dr. Lewis could tell he was doing it correctly. *See* TrialTr.V2 10:19–11:19; TrialTr.V2 35:11–36:15. L.H. was taken to the hospital by first responders. *See* TrialTr.V2 36:16–37:7.

L.H. never woke up, and he died in the hospital. An autopsy showed massive bruising inside his brain, along with fractures at the base of his skull. *See* TrialTr.V2 142:18–151:11; *see also* State's L-11; ExApp. 18. There were no other significant internal injuries that could have caused L.H.'s death. *See* TrialTr.V2 151:12–15. The cause of death was identified as "blunt force injuries of the head." *See* TrialTr.V2 152:15–24.

During an offer of proof, Johnson established that this was an injury from L.H.'s head striking something—not a "whiplash" injury.

See TrialTr.V2 156:1–12. The medical examiner testified that, while restraint devices like seatbelts reduced the risk of fatalities in crashes, they did not eliminate it entirely. *See* TrialTr.V2 156:13–157:6.

Kayce Gieser was directly behind Dr. Lewis's van as it went through the intersection, and she saw the crash firsthand:

> As we were approaching the intersection, I noticed a car coming up to the stop sign, which would have been on my passenger side. It didn't appear to be slowing down. That was the first thing I noticed.
>
> [. . .]
>
> Seemed to be probably a little faster than the speed limit, but it didn't seem to be slowing down, so faster than it should have been approaching a stop sign.
>
> [. . .]
>
> As he hit the van, it was in the passenger side, maybe a little towards the back end, I hit my brakes as to not become a part of the accident. The van rolled a couple of times and landed on its wheels across the street. The truck had spun itself around and was facing back the other way on Sycamore.

See TrialTr.V2 32:7–33:25. When asked to characterize the intensity of the crash, Gieser called it "pretty violent." *See* TrialTr.V2 34:1–6. She did not see the truck swerve, brake, or take any evasive action to try to avoid the crash. *See* TrialTr.V2 34:7–25. Gieser confirmed that there were no traffic control signals on the northbound section of the intersection, so Dr. Lewis would have had the right of way—and the red truck needed to stop at the stop sign. *See* TrialTr.V2 35:1–10.

Johnson had been driving the red pickup truck. *See* TrialTr.V1 212:2–216:18; *see also* TrialTr.V1 199:5–25. Officer Macabe Schmidt noticed "an odor of an alcoholic beverage" while he was interacting with Johnson—it was "rather strong." *See* TrialTr.V1 217:2–218:4.

Johnson told Officer Jessica Brownell that the crash occurred because he "wasn't paying attention." *See* TrialTr.V3 25:3–13. He said he was not on his phone, nor was he reaching for a dropped item. *See* TrialTr.V3 25:14–18. Officer Brownell said she "could smell an odor consistent with an alcoholic beverage coming from him, and his eyes were also bloodshot and watery." *See* TrialTr.V3 25:19–24. She asked if he had been drinking. Johnson said "no." *See* TrialTr.V3 25:25–26:4.

Johnson consented to field sobriety testing, and he scored clues indicating intoxication on all FSTs. *See* TrialTr.V3 26:5–31:11. After that, Johnson agreed to take a preliminary breath test (PBT)—but he retracted that moments later, and he refused to take the PBT test. *See* TrialTr.V3 31:12–32:21. After that, he admitted to Officer Brownell that he had been drinking, but he said that "he had stopped drinking around 1 o'clock that afternoon." *See* TrialTr.V3 32:22–33:1. All of his behaviors and admissions led Officer Brownell to believe that he was under the influence of alcohol. *See* TrialTr.V3 38:4–15. Johnson told

Sergeant Rasmussen that "he had had two 12-ounce Bud Light beers at his residence somewhere between 1 p.m. and 2 p.m." *See* TrialTr.V2 68:25–69:21. Sergeant Rasmussen said, in his experience, suspects in OWI investigations always say that they had two beers. *See* TrialTr.V2 74:19–75:10. As for his speed just before the crash, Johnson said "he was unsure but possibly 40 miles-an-hour." *See* TrialTr.V2 70:15–20. The speed limit on Sycamore was 25 miles per hour. *See* TrialTr.V2 61:1–11; TrialTr.V2 179:14–15.

Johnson was taken to a hospital. His blood was drawn pursuant to a valid search warrant. *See* State's Ex. P; TrialTr.V2 48:21–49:23; TrialTr.V2 63:22–65:1. If Johnson had only had two beers, his BAC when that blood sample was taken would have been about zero. *See* TrialTr.V2 128:4–15. But Johnson's BAC was 0.069 or 0.073. *See* TrialTr.V2 107:7–25. Dr. Justin Grodnitzky testified as the State's expert on toxicology. *See* TrialTr.V2 97:14–98:12. Dr. Grodnitzky said the normal elimination rate for alcohol in the bloodstream, for most people, is "between .001 and .0025"—about "one drink per hour." *See* TrialTr.V2 99:6–22. Using that, along with an array of generalizable assumptions, it is possible to use a blood-alcohol result to extrapolate a range of possible blood-alcohol levels at an earlier point in time. *See*

TrialTr.V2 99:23–101:8. Using the lower BAC result of .069, from a sample that was taken at "two hours and ten minutes" after the crash, Dr. Grodnitzky could estimate Johnson's BAC at the time of the crash at some amount "between a .090 to a .122" for 95% of the population, clustered around an average of .109. *See* TrialTr.V2 101:9–102:6. For those outside the 95% confidence interval, they tended to have *higher* BAC levels, matching up with higher burn-off rates that signified an enhanced tolerance (i.e., an alcoholic). *See* TrialTr.V2 121:16–122:11.

As for impairment, Dr. Grodnitzky testified that alcohol begins to cause impairment in functioning around .05 BAC, which is where "you expect to see some degree of impairment in everyone." *See* TrialTr.V2 104:16–106:20. He also testified that observed impairment typically increases as BAC increases. *See* TrialTr.V2 105:25–106:2.

Johnson's blood test also showed that he had "113 nanograms per milliliter of cocaine in [his] blood." *See* TrialTr.V2 108:4–109:17; State's Ex. C-1; ExApp. 4. That was much higher than "the average cocaine amount we see in apprehended drivers," which is 45 ng/mL. *See* TrialTr.V2 109:18–110:3. Moreover, Dr. Grodnitzky testified that the half-life of cocaine in the bloodstream is one hour—which means that Johnson's level of cocaine in his blood at the time of the crash,

about two hours before the sample was drawn, would be somewhere between 452 ng/mL and 462 ng/mL. *See* TrialTr.V2 110:19–112:5. And in terms of how cocaine affects human functioning and driving:

> In general, cocaine is a central nervous system stimulant. People take cocaine to feel euphoria. They're more awake, alert. They have a higher feeling of self confidence. These people — people on cocaine talk a lot, have rapid speech, sometimes incoherent. Some of the downsides of cocaine is they're agitated, aggressive or paranoid, and this is common not only with cocaine but all stimulants in general. Clinically speaking, you'd expect to see increased blood pressure, increased heart rates, increased body temperature, dilated pupils. These people tend to — people on cocaine tend to have motor restlessness, which is they're always moving and fidgeting. They'll sit and then they'll stand. They can't seem to stand still at one time.
>
> [. . .]
>
> . . . Driving behaviors for cocaine essentially are increased risk-taking behaviors. So people tend to speed, follow too close, make improper passing maneuvers, improper turns, don't obey traffic signs, and that's sort of the stimulant side of cocaine we see. . . .

TrialTr.V2 114:2–115:24. This set of "upswing" cocaine effects was what Dr. Grodnitzky would usually expect from levels of cocaine that Johnson would have in his bloodstream at the point of the crash. *See* TrialTr.V2 118:20–120:7.

Dr. Grodnitzky said that, from these results, he believed that Johnson was under the influence of both alcohol and cocaine at the time of the crash—and those effects interacted in a dangerous way:

> Combining these two at abuse level would exacerbate the risk of being on one substance by itself. So, for instance, a study in 2013 looked at drug use in fatal crashes and reported crash risk. So the crash risk for being a stimulant in a fatal crash here, 3.5 times more likely to be involved in a crash. When you add alcohol to . . . another drug, you're about 25 times more likely to be involved in a fatal crash.

See TrialTr.V2 115:25–117:9.

At the scene of the crash, officers did not see any "brake marks or skid marks" on the roadway leading up to the point of collision; those marks only appeared *after* the point of collision. *See* TrialTr.V1 234:24–236:20; State's Ex. G-18 through G-28; ExApp. 6–16.

> Basically in my experience if you are attempting to stop, there would be skid marks leading up to the — essentially the point of impact, which I believe was in that middle of the intersection there. So when I was taking those photos, I was showing that there wasn't any skid marks as if the driver attempted to stop.

See TrialTr.V1 237:2–238:5. There was a stop sign at the intersection, with colored flags that enhanced its visual prominence. *See* State's Ex. G-5; ExApp. 5; State's Ex. G-18; ExApp. 6. That stop sign was clearly visible to anyone approaching the intersection from Sycamore, on Johnson's path of travel. *See* State's Ex. H-11; ExApp.17. The weather on that day was clear, with no precipitation and full visibility. *See* TrialTr.V2 234:24–235:24. Footage from officer body-cams from right after the collision showed it was not yet dark. *See* State's Ex. F.

Iowa State Patrol Trooper Nathan Miller was trained as a technical accident investigator, and he investigated the crash scene. *See* TrialTr.V2 194:19–196:17. He used a "total station" to "measure and record roadway evidence," and it helped him generate a diagram showing the locations of key evidence surrounding the intersection. *See* TrialTr.V2 200:1–204:9; State's Ex. O-1; ExApp. 19.

Iowa State Patrol Trooper Lynn Oelsen was a trained collision reconstructionist. *See* TrialTr.V3 58:13–61:1. He was able to use data from the "black box" of the minivan, together with the total station measurements, to get an idea of how fast Johnson was traveling at the moment of the collision: 29 miles per hour. *See* TrialTr.V3 61:2–71:8. A video from further down Sycamore street showed Johnson's truck travelling at 55 miles per hour, and decelerating as he approached the intersection (but without slamming on the brakes in a way that would have left marks on the asphalt). *See* TrialTr.V3 72:24–81:6. Trooper Oelsen testified that, if Johnson had slammed on the brakes, he could have stopped in time to avoid the collision—but instead, Johnson's deceleration was "pretty gentle." *See* TrialTr.V3 79:17–81:15. All in all, Trooper Oelsen attributed the crash to "an extremely high rate of speed in a 25 mile-an-hour zone immediately prior to running that stop sign,"

even though he would have been "capable of getting to zero at that stop bar" if he fully engaged the brakes. *See* TrialTr.V3 88:11–89:21; *see also* TrialTr.V3 100:7–21 ("He's going along at 55 miles-per-hour, and then you can see the brakes come on. You see brake lights, you expect braking, you should have a slower speed, and that's what happened. He got down to 29 miles-per-hour at impact.").

Trooper Oelsen said that, even if someone did not know there was a stop sign at this intersection and did not see one, they would still need to slow down or stop because "the view at this intersection is blocked quite extensively by buildings" that made it impossible to see if someone was coming from the left or the right from Sycamore, until the driver pulled up to the intersection—so anyone driving on Sycamore would know that they would need to "stop and look before [they] enter that intersection." *See* TrialTr.V3 93:15–95:15; *accord* TrialTr.V3 105:23–106:15. The crash occurred 34 feet past the stop line on Sycamore street. *See* TrialTr.V3 71:9–22.

On an offer of proof, Trooper Oelsen said that a child restraint device would have helped reduce the risk of L.H.'s death, but it would not have guaranteed survival. *See* TrialTr.V3 108:18–110:24.

When Johnson moved for judgment of acquittal, the State said:

> The defendant's driving 55 miles-an-hour, which is more than double the speed limit in that area, shows that his judgment was impaired. The fact that he failed to stop at a stop sign, even though he had sufficient distance and time to do that, shows that his reasoning and mental ability as well as judgment was impaired. His impairment is the reason that he blew the stop sign in the first place. His impairment is the reason that he crashed into the van. His impairment is the reason that the van rolled, and it is the reason that [L.H.] died. But for his impaired driving causing him to barrel through a stop sign, the crash does not occur and [L.H.] lives.

See TrialTr.V3 113:10–114:4. And in closing arguments, the State summarized what the evidence showed about causation:

> Let's look at the "except fors." Except for the defendant's drinking, drugs and driving, he wouldn't be doing 55 miles-an-hour. Except for the defendant's drinking, driving and — or, drugs and driving, he would have recognized the road closed ahead sign. It's a giant orange sign right there on the side of the road. Except for the defendant's behavior, he would have recognized the road closed barrier sign in his lane of traffic. He would have stopped at the stop sign. He would have recognized that cross traffic. Except for his drinking, drugs and driving, he wouldn't have gone into the intersection, he wouldn't have crashed into the Lewises' van, their van wouldn't have rolled, and [L.H.] wouldn't have died. . . .

TrialTr.V3 236:2–22; *see also* TrialTr.V3 202:14–208:5; TrialTr.V3 230:19–232:4; TrialTr.V3 233:12–235:16. The jury found Johnson guilty on five alternative theories, submitted by special interrogatory. *See* Verdict (4/4/19); App. 25; Interrogatory (4/4/19); App. 26.

Additional facts will be discussed when relevant.

ARGUMENT

I. Vehicular homicide by reckless driving is not a lesser included offense of vehicular homicide by OWI.

Preservation of Error

Error was preserved when the court ruled on Johnson's request to submit homicide by reckless driving as a lesser included offense. *See* TrialTr.V3 143:16–149:16; *State v. Jeffries*, 430 N.W.2d 728, 737 (Iowa 1988) ("[T]o preserve error, a defendant must request a lesser-included offense instruction or object to the court's failure to give it.")

Standard of Review

Review of a ruling on whether to submit a jury instruction on a lesser included offense is for correction of errors at law. *See State v. Coffin*, 504 N.W.2d 893, 894 (Iowa 1993).

Merits

Johnson's argument proceeds by syllogism:

1. OWI is a set of actions that are inherently reckless (even if, under *Massick*, OWI does not require *driving*).
2. *Adams* requires a causal connection between the OWI act and the victim's death, which necessarily requires driving.
3. Therefore, *Adams* requires a causal connection between a specific kind of driving that is automatically reckless and the death of the victim—which means the charge contains every element of vehicular homicide by reckless driving, with an additional element of intoxication.

See Def's Br. at 34–46. There are three problems with his argument.

A. The kind of recklessness described by the maxim "all driving while intoxicated is reckless" is not the same as the kind of recklessness described in the causation element of vehicular homicide by reckless driving, which requires specific proof of a *manner of driving* that is worse than negligent.

For challenges like this, *State v. Miller* guides the analysis:

> To begin the process of determining the existence of a lesser included offense in this case, as in any case, the first task is to look at the elements of the marshaling instruction actually submitted to the jury. The elements of the crime described in the instruction are then compared with the statutory elements of the proposed lesser included offense to "determine if the greater offense can be committed without also committing the lesser offense."

State v. Miller, 851 N.W.2d 583, 590 (Iowa 2014) (quoting *State v. Hickman*, 623 N.W.2d 847, 850 (Iowa 2001)). The jury instruction defining the elements of vehicular homicide by OWI said this:

> The State must prove both of the following elements of Homicide by Vehicle:
>
> 1. On or about the 2nd day of August, 2017, the defendant:
>   a. Operated a motor vehicle while under the influence of alcohol or a drug or a combination of such substances, or
>   b. Operated a motor vehicle while having an alcohol concentration of .08 or more, or
>   c. Operated a motor vehicle while any amount of a controlled substance was present, as measured in the defendant's blood.
> 2. The defendant's act or acts set out in Element 1 unintentionally caused the death of [L.H.].

Jury Instr. 17; App. 22. It does not reference "recklessness" at all.

For comparison, section 707.6A(2)(a) requires proof that "the person unintentionally causes the death of another" by "[d]riving a motor vehicle in a reckless manner with willful or wanton disregard for the safety of persons or property, in violation of section 321.277." *See* Iowa Code § 707.6A(2)(a). Johnson's brief offers the model jury instruction for this offense, which was the same instruction that he requested and preserved error on. *See* Def's Br. at 39 (quoting ISBA, Iowa Criminal Jury Instr. 710.2 (2018)); TrialTr.V3 144:19–145:10. That instruction, like the statute, would require proof that Johnson was driving "in a reckless manner," and proof of a causal connection between "[t]he defendant's recklessness" and L.H.'s death. *See* ISBA, Iowa Criminal Jury Instr. 710.2.

This marshalling instruction for vehicular homicide by OWI does not require proof that Johnson was driving in a reckless manner. *See* Jury Instr. 17; App. 22. Indeed, if Johnson's driving were better than most other drivers on their best days, he *still* would commit the offense of vehicular homicide by OWI (even under *Adams*) if sobriety would have prevented a crash by improving his driving even further. The kind of recklessness that makes OWI inherently reckless is not a reckless *manner* of driving—it is recklessness in *choosing* to drive.

The recognition that OWI is inherently reckless arose from challenges to involuntary-manslaughter-by-OWI convictions, arguing that they violated a common-law rule that involuntary manslaughter required the State to prove recklessness, even when the State already proved that the defendant killed a victim by driving while drunk. *See State v. McQuillen*, 420 N.W.2d 488, 489 (Iowa Ct. App. 1988); *State v. Wullner*, 401 N.W.2d 214, 216 (Iowa Ct. App. 1986). Those holdings flowed from *State v. Kellison*, which held "[i]nvoluntary manslaughter may be committed where death results from drunken driving *or* from wanton and reckless operation of a vehicle." *See Wullner*, 401 N.W.2d at 216 (quoting *State v. Kellison*, 11 N.W.2d 371, 373 (Iowa 1943) (emphasis added)). Manslaughter by OWI had not required proof of "wanton and reckless indifference to others" (as would be required for a common-law manslaughter conviction for death caused by violation of any ordinary "rules of the road"), because "[d]runken driving of an automobile on a public highway in violation of a criminal statute is not merely malum prohibitum, it is malum in se, wrong in itself, and is clearly an unlawful act within the definition of manslaughter." *See Kellison*, 11 N.W.2d at 373. This was *not* because OWI was reckless—"[t]here is a clear distinction between the two kinds of cases." *See id.*

When involuntary manslaughter was codified in the 1978 Code, the Iowa Supreme Court interpreted the statutory enactment in light of the common-law requirement "that the unlawful act which formed the basis of the involuntary manslaughter charge, be either malum in se or performed recklessly." *See State v. Connor*, 292 N.W.2d 682, 685–86 (Iowa 1980). However, *Connor* only retained *half* of that common-law rule: it determined that the legislature "discard[ed] the malum in se/malum prohibitum distinction in favor of designating all public offenses . . . as possible unlawful acts which may form the basis for the unlawful act type of involuntary manslaughter." *See id.* at 686. That made it more important to preserve a recklessness requirement, because "[t]o single out and severely punish those motorists whose violations happen to also cause death, when committed without recklessness, is arbitrary and unreasonable." *See id.* at 687.

Even so, Iowa courts were unwilling to entertain arguments that manslaughter-by-OWI required proof of a reckless manner of driving. *See McQuillen*, 420 N.W.2d at 489; *Wullner*, 401 N.W.2d at 216. If the point of *Connor* was to preserve a common-law rule, then it would also preserve the common-law exception: OWI is categorically different, so proof of actual recklessness in the manner of driving was not required.

See Wullner, 401 N.W.2d at 217 (rejecting claim that codification of involuntary manslaughter "placed the burden upon the State to make the patently absurd and generally redundant showing that a defendant's drunk driving was reckless"); *accord Kellison*, 11 N.W.2d at 373.

Subsequently, *State v. Massick* held that the statutory offense of *operating* while intoxicated did not require driving, and thus did not encompass reckless driving as a lesser-included offense. *See Massick*, 511 N.W.2d at 387–88. That was the part of *Massick* that Judge Tabor discussed in her dissent in *Ware*, 2014 WL 3931451, at *4. But there was another rationale in *Massick*, which is critical: while *Massick* did state that "driving under the influence is certainly reckless behavior," it also explained that "proof of recklessness is not an essential element of operating while intoxicated." *See id.* at 387 (citing *McQuillen*, 420 N.W.2d at 489). This interacted with its formalistic holding because operation of a vehicle cannot be *reckless* unless the vehicle is moved. But that statement retains significance beyond the "elements test"—when the vehicle *is* moved, the State does not have to establish any recklessness in its manner of operation to prove an OWI offense. *See Massick*, 511 N.W.2d at 387–88. Drunk driving can be proven even when nothing about the manner of driving is otherwise reckless.

State v. Rohm cited *Massick* to explain its holding that, for some unique manslaughter offenses (and for some predicate crimes for the broader crime of involuntary manslaughter by commission of a public offense), *Connor*'s common-law requirement of recklessness is automatically satisfied without submitting a recklessness element to the jury because any decision to commit that predicate offense is *always* reckless, and *never* just negligent.

> The purpose and design of the involuntary manslaughter statute was not to impose its harsh penalty for negligent conduct which results in death, but to punish a public offense committed in a reckless manner. [*Connor*, 292 N.W.2d at 688]. Although the language of our involuntary manslaughter statute applies to the commission of any public offense, except a forcible felony or escape, the recklessness element serves to exclude the commission of a public offense by those who were not conscious of the grave risks of their conduct. *Id.* at 687.
>
> Unlike the crime of involuntary manslaughter, the language of the statutory crime of supplying alcohol to a minor which results in death does not apply to a broad range of general activity which requires an element to separate negligence from recklessness. The statute is designed to target the specific conduct of supplying alcohol to a minor. Thus, a recklessness element is not necessary to exclude other conduct not intended to be included.
>
> [. . .]
>
> Although recklessness ordinarily involves a factual inquiry, some conduct itself may constitute recklessness. [*State v. Kernes*, 262 N.W.2d 602, 605–06 (Iowa 1978)]. This is because the very nature of some activities are considered reckless due to the known, dangerous risks involved. *Id.*; *see also State v. Massick*, 511 N.W.2d 384,

> 387 (Iowa 1994) (drunk driving is a reckless act in itself); *State v. Wullner*, 401 N.W.2d 214, 217 (Iowa Ct. App. 1986) (it would be "patently absurd and generally redundant" for the State to have to show drunk driving was reckless). Thus, when the activity or conduct itself constitutes recklessness, the necessity of proof of recklessness is eliminated. The known and grave risks associated with the consumption of alcohol by minors would clearly justify our legislature in creating a statute which eliminates proof of recklessness for the crime of supplying alcohol to a minor which results in death.

State v. Rohm, 609 N.W.2d 504, 512–13 (Iowa 2000). Again, this means that recklessness is *not* an element of homicide by OWI, just like it is *not* an element of supplying alcohol to a minor that results in their death. Recklessness is not something that the State has to prove in either case. Moreover, Iowa courts only remarked on the inherent recklessness of OWI to explain why *Connor*'s judicially created rule that grafted a recklessness element onto involuntary manslaughter would *not* apply in involuntary-manslaughter-by-OWI prosecutions. *See id.*; *McQuillen*, 420 N.W.2d at 489; *Wullner*, 401 N.W.2d at 216.

Adams construed language that resembled the current version of section 707.6A, and it crafted a new requirement that is not present in subsection (1): the State must now prove a causal link that connects a victim's death to the *manner* of the defendant's driving. *See Adams*, 810 N.W.2d at 369–71. But it is not quite clear what that means:

> Although the statute does not impose a burden on the State to prove a specific causal connection between the defendant's *intoxication* and the victim's death, it does require proof of a factual causal connection between a specific criminal act—"intoxicated driving"—and the victim's death. Put another way, the statute demands more than mere proof that the defendant's *driving* caused the death of another person. A defendant may be found guilty of homicide by vehicle only if the jury finds beyond a reasonable doubt that his criminal act of driving under the influence of alcohol caused the victim's death.

Id. at 371. The only additional explanation given was a statement that but-for causation is sufficient to establish this connection, except in cases with multiple causes or superseding causes. *Id.* at 371–72 & n.7.

For causation, *Adams* requires the State to connect the death to something beyond the mere fact that the defendant was *driving*—and *Adams* suggests that the State would have failed to carry its burden if the fact-finder determined that "Adams' alleged intoxicated driving was not the factual cause of Brown's death because a driver who had not ingested alcohol before the crash would have struck the victim under the circumstances." *See id.* at 373 n.9. This is a critical caveat. Prior Iowa cases may have stated that OWI is inherently reckless, but those categorical statements apparently do not help prove a violation of section 707.6A(1) under *Adams*. Instead, the *manner* of driving is the focus of a fact-specific causation analysis under *Adams*.

If the State needed to prove some manner of driving that was equivalent to recklessness, Johnson's argument would make sense—then, all elements of homicide-by-reckless-driving would be proven by satisfactory proof of homicide-by-OWI. But the State does not have to prove a *reckless* manner of driving for homicide-by-OWI. Instead, all the State has to prove is that the defendant's manner of driving was affected by intoxication in a way that contributed to the victim's death. That may resemble proof of recklessness—or it may only be proof of *negligent* driving, or even proof that the defendant would have been capable of evasive action to avoid a catastrophe if he had been sober. Consider this analysis of a factually similar case from Arizona:

> At her trial for manslaughter, Rumsey claimed that the fatal accident was attributable not to her gross intoxication but to the defective design of the intersection where the accident occurred. She claimed, specifically, that the intersection's design . . . would have made it difficult for even a sober driver to notice and then avoid cyclists traveling on the side of the roadway. But Rumsey's gross intoxication plainly would have complemented whatever danger was created by the roadway's design. After all, any danger posed by the intersection would have inhered in the intersection's demands on drivers' abilities to perceive and react. And in Rumsey's case, these very abilities were badly impaired by her intoxication. Rumsey's intoxication did not just increase the likelihood that a fatal accident would occur. As the court said, it "increased the likelihood that any defect in the design of the roadway would result in a serious accident." It complemented the danger posed by the very defect to which Rumsey attributed the accident.

Eric A. Johnson, *Wrongful-Aspect Overdetermination: The Scope-of-the-Risk Requirement in Drunk-Driving Homicide*, 46 CONN. L. REV. 601, 636 (2013) (discussing *State v. Rumsey*, No. 2 CA-CR 2009-0041, 2010 WL 3410824 (Ariz. Ct. App. Aug. 31, 2010)).[1] Note that it was not necessary to decide whether Rumsey's manner of driving was reckless. Under *Adams*, it would be enough to find (1) her manner of driving was a but-for cause of the cyclist's death, and (2) her intoxication had a contributory effect that negatively affected her manner of driving.

If someone's drunkenness affects their manner of driving and causes it to fall to a standard that would otherwise be characterized as merely negligent, that can prove a violation of section 707.6A(1)—but not section 707.6A(2)(a). In *State v. Sutton*, the Iowa Supreme Court found that evidence was insufficient to support a conviction for vehicular homicide by reckless driving. Though the manner of driving was "arguably negligent," it fell short of being "*highly* unreasonable or such an *extreme* departure from ordinary care as to constitute not just negligence but recklessness"—especially when the driver seemed to have "a better-than-average reaction time to a crisis situation." *See*

[1] This article also discusses *Adams*, but the author readily admits that he is unable to pinpoint its precise causation requirement. *See id.* at 629 (discussing *Adams*, 810 N.W.2d at 371).

State v. Sutton, 636 N.W.2d 107, 112–13 (Iowa 2001). While it may well have been *negligent* to drive slightly faster than the speed limit, through a residential zone, where the view of children in a nearby yard was obscured by vehicles in the adjoining driveway, that manner of driving was not so obviously dangerous that it would suffice as proof of reckless driving. *See id.*; *see also State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993) (explaining that proof of recklessness requires that "the danger must be so obvious from the facts that the actor knows or should reasonably foresee that harm will probably—that is, more likely than not—flow from the act"). In contrast, picture a prosecution on facts mirroring *Sutton*, involving an identical manner of driving—but also including proof that the driver was moderately intoxicated. Would that transform the driver's *negligent* manner of driving into a *reckless* manner of driving? Maybe, but maybe not—especially if the driver still demonstrated that "better-than-average reaction time." *See Sutton*, 636 N.W.2d at 112. While the act of choosing to drive while intoxicated would be still be inherently reckless, it may still be harder to characterize the *manner of driving* as reckless—so it might present a close question on a homicide-by-reckless-driving charge. But homicide by OWI under section 707.6A(1) is a different inquiry.

Under *Adams*, it would be enough to show that intoxication at levels exhibited by the driver would have adverse effects on reaction time and situational awareness. If the manner of driving was affected by intoxication in a way that contributed to the driver's inability to avoid colliding with the victim, that would be enough to sustain a conviction for homicide by OWI, under *Adams*. The State would not have to prove a reckless manner of driving, a negligent manner of driving, or even a violation of the rules of the road—all that matters is whether "a driver who had not ingested alcohol before the crash would have struck the victim under the circumstances." *See Adams*, 810 N.W.2d at 373 n.9.

Indeed, *Adams* recognized that *Kellison* stood for the principle that "a conviction for 'death of another caused by drunken driving' could be sustained without proof that the defendant drove recklessly." *See id.* at 369 (quoting *Kellison*, 11 N.W.2d at 373). That was just what happened in *State v. Leonard*, No. 98–968, 1999 WL 668726, at *2 (Iowa Ct. App. Aug. 27, 1999), where the State charged with both homicide by reckless driving and homicide by OWI, as alternatives. The trial court granted his motion for judgment of acquittal on the homicide-by-reckless-driving charge. Leonard used that to challenge his homicide-by-OWI conviction. The Iowa Court of Appeals affirmed:

> The crux of Leonard's appeal is whether a defendant charged with both vehicular homicide under 707.6A(1) and vehicular homicide under 707.6A(2)(a) can be found guilty under 707.6A(1) when he is acquitted of reckless driving under 707.6A(2)(a). We hold a defendant may be convicted under 707.6A(1) even if he is acquitted under 707.6A(2)(a).
>
> Section 707.6A(1) . . . allows recklessness to be established by operation of law rather than by requiring direct proof of recklessness as a matter of fact. Once intoxication is demonstrated as defined in section 321J.2, defendant will be determined as a matter of law to have been operating in a reckless manner. This cannot be defeated by further argument, even if true, that as a matter of fact defendant was not driving recklessly . . . . It does not matter whether such an argument is made as a direct defense to a charge of vehicular homicide under section 707.6A(1) or is offered as an indirect defense via an acquittal of charges brought under 707.6A(2)(a). Clearly, the purpose of the statute would be vitiated if such a defense was allowed. Additionally, to allow such a defense would in reality require the State—in order to obtain a conviction under 707.6A(1)—to prove the factual elements of recklessness in addition to proving the defendant was driving while intoxicated. This was not the intent of the legislature in adopting the vehicular homicide statute . . . .

See id. at *2. This is the right analysis, because "implied recklessness" merely alleviates leftover concerns from common-law, and is not an actual element. Inserting a new fact-dependent recklessness element into homicide-by-OWI would also raise Sixth Amendment concerns about any homicide-by-OWI conviction that was obtained without requiring the jury to find reckless driving, beyond a reasonable doubt. *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

Finally, Johnson's claim fails because *Massick* is wholly correct. Even after *Adams*, it is possible to commit a homicide by *operating* while intoxicated, without *driving* at all. Consider a factual scenario where an intoxicated person places a child in a car in their garage, starts the car without opening the garage door, and passes out. If the child dies, the person violated section 707.6A(1) by causing the death of that child by *operating* the vehicle while intoxicated—even though the vehicle never moved. *See* Iowa Code § 707.6A(1); *accord Field v. Southern Sur. Co. of New York*, 235 N.W. 571, 575—76 (Iowa 1931) (noting that decedent was not "driving" car that was idling in garage, distinguishing that from question of whether he was "operating" it); *In re Rugh's Estate*, 234 N.W. 278 (Iowa 1931) (describing a similar factual scenario involving death of children). If the person would not have passed out *but for* intoxication, that satisfies *Adams* by linking the OWI act to the child's death. *See Adams*, 810 N.W.2d at 371. And, like all OWI, this was an inherently reckless act—but it would not be an act of reckless *driving*. Proving that violation of section 707.6A(1) will not involve or require any proof of reckless driving, which means that Johnson's claim fails the "impossibility test" for included offenses. *See Massick*, 511 N.W.2d at 387 (citing *Jeffries*, 430 N.W.2d at 740).

Leonard, the twist on *Sutton*, and this hypothetical establish that this is not a situation where "the greater offense cannot be committed without also committing all elements of the lesser offense." *See Coffin*, 504 N.W.2d at 894. The legal construct of categorical recklessness that is inherent in committing OWI is distinct from the fact-dependent reckless-manner-of-driving element set out in section 707.6A(2)(a). *Adams* requires some proof of manner of driving to show causation for homicide by OWI, but it need not be a *reckless* manner of driving—unlike homicide by reckless driving, which unambiguously requires it. That additional element means it cannot be a lesser-included offense. In that regard, nothing has changed since *Massick* was decided:

> [R]eckless driving requires proof of willful or wanton disregard for the safety of others or property. This is the recklessness element. Although driving under the influence is certainly reckless behavior, proof of recklessness is not an essential element of operating while intoxicated.

Massick, 511 N.W.2d at 387; *accord Halterman*, 2013 WL 1457148, at *1–2 (noting "[w]e need not decide whether or not the *Adams* holding obviates the distinction made by the *Massick* court" that differentiates between operating and driving because "there still remains another *Massick* distinction" that was unaffected by *Adams*). Therefore, even within the framework set out by *Adams*, Johnson's challenge must fail.

B. If these offenses did overlap, they would be alternative offenses. Requiring submission of instructions adding the "lesser" charge would subvert legislative intent.

The district court articulated a different reason for rejecting Johnson's requested instruction: "[T]he legislature's intent was to delineate operating while intoxicated from other types of reckless acts, and it was their intent to substantially punish that more so than just simply driving in a reckless manner." *See* TrialTr.V3 148:11–149:10. The district court was correct. Even if there *were* a complete overlap between all elements of homicide-by-OWI and homicide-by-reckless-driving offenses, it was right not to submit this instruction.

If Johnson is correct about the elements of these offenses, then the State effectively submitted a recklessness element by asking the jury to find that he was intoxicated. While there was evidence that his manner of driving was reckless in many other ways, the State did not submit any other "specifications of recklessness." So, if recklessness was automatically included in proof of elements that were charged, the lesser offense would be limited to homicide-by-reckless-driving-by-OWI; recklessness would be established by proof of intoxication. There is no other recklessness theory that is necessarily included in proof of all elements required to sustain a homicide-by-OWI charge.

In that scenario, these would not be included offenses—they would be alternative offenses. *See, e.g.*, *Coffin*, 504 N.W.2d at 896 ("[T]he greater offense *must* have an element not found in the lesser offense. Without such a dissimilar element, it is not proper to submit a lesser included offense."). "The legislature has chosen to make an unintentional death while committing the public offense of OWI a more egregious offense than an unintentional death while committing the public offense of reckless driving." *See State v. Dailey*, No. 08–0909, 2009 WL 1492698, at *2 n.1 (Iowa Ct. App. May 29, 2009). Submitting both offenses and allowing the jury to treat OWI as just another alternative route to proving recklessness would subvert the clear legislative intent: to set vehicular-homicide-by-OWI charges apart as unintentional killings of a different caliber. *See Rivera v. State*, No. 16–1253, 2017 WL 2461563, at *5 (Iowa Ct. App. June 7, 2017) ("Driving while intoxicated is inherently dangerous, and our legislature has determined one who chooses to drive while intoxicated and then takes the life of another has significant legal culpability.").

The State is not arguing that the legislature intended to permit convictions on both offenses for a single homicide—that would require language that abrogates the judicially created "one-homicide rule."

See State v. Wissing, 528 N.W.2d 561, 567 (Iowa 1995). Rather, if Johnson is right about the elements, then the legislature has enacted two different versions of homicide-by-reckless-driving, and mandated severe punishment for one version that specified a particular means of committing the crime it described. It would subvert that intent to allow Johnson to invite the jury to reduce his punishment on proof of *identical facts* that would establish the more severe crime. *See Coffin*, 504 N.W.2d at 896–97 ("All of the elements of robbery as submitted coincide with all of the elements of extortion. So the district court correctly refused to submit extortion as a lesser included offense.").

Johnson may argue that the legislature's intent is fulfilled when the jury returns a verdict on the level of the offense that corresponds to its findings of fact about the defendant's criminal acts. This would be true in situations involving classic examples of included offenses—like if a jury determines that the State's evidence in a murder trial established an intentional killing but did not establish premeditation, or if it concludes that the State has proved a domestic abuse assault but failed to prove that it was committed by strangulation. *See, e.g.*, *State v. Reese*, 259 N.W.2d 771, 778 (Iowa 1977); *State v. Joiner*, No. 15–1600, 2017 WL 1400804, at *1 (Iowa Ct. App. Apr. 19, 2017). But

the problem is that Johnson insists that OWI is *inherently* reckless, and there are no other allegations of recklessness in this indictment. Under Johnson's approach to the legal elements, he either committed *both* offenses (by causing L.H.'s death as a result of driving that was reckless because of his intoxication) or committed *neither* offense (because failure of proof on intoxication would extinguish the State's only charge of recklessness). This is fatal to Johnson's claim of error. "When absolute identity exists between the elements of two offenses, one offense may not be submitted as the lesser included equivalent of the other, irrespective of the level of punishment each offense carries." *Miller*, 851 N.W.2d at 589; *see also State v. Wilson*, 523 N.W.2d 440, 440–41 (Iowa 1994) ("Because commission of the included offense of assault while participating in a felony would in the present prosecution have required the State to establish all of the elements of the offense charged, i.e., robbery in the second degree, the court was not required to submit the lesser offense."). If Johnson is correct that the elements of these offenses inherently overlap, then Iowa courts would infer that the legislature intended to vest prosecutors with discretion to choose which charge to file—and their decisions must not be second-guessed by submitting alternative charges. *See Coffin*, 504 N.W.2d at 896–97.

In *Dailey*, the Iowa Court of Appeals rejected a challenge that demanded an instruction on involuntary manslaughter under section 707.5(1), as a lesser included offense of homicide by OWI. *See Dailey*, 2009 WL 1492698, at *4–5. Involuntary manslaughter requires proof of death resulting from commission of a public offense—but the only "public offense" that the State had charged was OWI, as part of its homicide-by-OWI charge. *See id.* Because all required elements were "common to the two offenses" as charged, *Dailey* held that "under the present circumstances, felony involuntary manslaughter is not a lesser-included offense of homicide by vehicle." *See id.* Instead, they were alternative offenses, which means "the decision of which violation to charge rests in the hands of the prosecutor." *See id.* The same logic would apply here: if Johnson is right that homicide-by-OWI belongs in the same conceptual category as homicide-by-reckless-driving, the legislature's decision to set it apart would enable the State to select homicide-by-OWI and to exclude homicide-by-reckless-driving by declining to include any other theory of recklessness in its charges. And just like in *Dailey*, Johnson's request for a jury instruction on homicide-by-reckless-driving-by-OWI would still be invalid because of a total overlap on all required elements, as charged.

If Johnson is correct that reckless driving is an implied element of homicide by OWI, then the legislature has enacted two provisions that prohibit the same homicide offense, prescribing punishments of widely disparate severity. In this situation, the "greater" charge of homicide by OWI would be proven *if and only if* the State established its only allegation that Johnson claims is proof of recklessness: OWI. There is no conceivable situation where the State would succeed in proving homicide-by-reckless-driving-by-OWI while failing to prove homicide-by-OWI. Johnson's claim that OWI is recklessness, if true, only proves that these are alternative offenses, not included offenses. *See Coffin*, 504 N.W.2d at 896; *Dailey*, 2009 WL 1492698, at *4–5; TrialTr.V3 148:11–149:10. Therefore, Johnson's challenge must fail.

C. If it was error to refuse to submit this instruction, any such error would be harmless. The jury was unanimous on Johnson's intoxication, on five separate theories—all independently sufficient.

When a trial court improperly refuses to submit an instruction on a lesser included offense, the mere fact of conviction is usually not enough to establish harmless error. *See State v. Turecek*, 456 N.W.2d 219, 222 (Iowa 1990). But that depends on the notion that "if the jury had been given an alternative it might have reached a different result." *See id.* That is simply not the case here, as this interrogatory shows:

> Answer the following only if you find the defendant guilty indicating which theory or theories the members of the jury relied upon in reaching their verdict. (You may select more than one alternative if true.)
>
> > √ All members of the jury found the defendant was under the influence of alcohol beyond a reasonable doubt.
> >
> > √ All members of the jury found the defendant was under the influence of a drug beyond a reasonable doubt.
> >
> > √ All members of the jury found the defendant was under the influence of a combination of alcohol and a drug beyond a reasonable doubt.
> >
> > √ All members of the jury found the defendant had an alcohol concentration of .08 or more beyond a reasonable doubt.
> >
> > √ All members of the jury found the defendant had any amount of a controlled substance present, as measured in his blood, beyond a reasonable doubt.
> >
> > ___ The members of the jury did not unanimously agree on any theory.

Interrogatory (4/4/19); App. 26. The jury was overwhelmingly sure of Johnson's intoxication, despite his best efforts to sow seeds of doubt on all five theories throughout the trial. *See* TrialTr.V3 211:17–220:9.

Johnson may respond by arguing that the jury could have found he was intoxicated, but still could have found that it was not his level of intoxication that caused the crash. *See* TrialTr.V3 220:10–223:5. But the jury rejected this too, by rejecting the lesser included offense of OWI. *See* Jury Instr. 18; App. 23. The jury was firmly convinced.

There is no real possibility that the jury would unanimously find that Johnson was intoxicated on all five of those alternative theories *and* find that his intoxication caused the fatal crash, but choose to return a verdict that rejected *all five* of those alternative intoxication theories if only the court had given an instruction on a lesser included offense that did not include intoxication. *See State v. Carberry*, 501 N.W.2d 473, 476 (Iowa 1993) (noting that the strength of evidence "continues to play an essential role in a harmless-error analysis" for challenges arguing improper failure to submit lesser included offenses). And the State did not minimize its burden on causation—far from it:

> Instruction Number 23 talks about the cause, the word "cause." So, "As used in element (2) of Instruction 17," that's the marshalling instruction, so this is now just about the word "cause," "cause is established if Derrick E. Johnson's act or acts," OWI, "were a substantial factor in bringing about the death of [L.H.]." That's what it has to be. It has to be a substantial factor. So, in other words, was it a significant part of [L.H.]'s death? That's what you need to look at. When you consider how impairment affects people, the risks that are inherent in driving under the influence, the speeding, the inability to maintain a proper lookout, the inability to properly control a vehicle, the inability to see and recognize a stop sign and actually stop for it, the inability to see and recognize a road closed sign ahead, the inability to see and recognize a barrier in your lane saying road closed, all of that goes to his impairment, and it's a direct cause of [L.H.]'s death. His operating while intoxicated was a substantial factor, and that's what we have to show is that it is a substantial factor.

TrialTr.V3 203:5–204:2; *see also* TrialTr.V3 233:12–244:8; Jury Instr. 23; App. 24. The State obtained this conviction by proving that Johnson's intoxication was a proximate cause of L.H.'s death, which is more than it really needed to prove. *See Adams*, 810 N.W.2d at 371 ("[T]he statute does not impose a burden on the State to prove a specific causal connection between the defendant's *intoxication* and the victim's death. . . ."); *id.* at 372 (adopting factual causation, rather than proximate cause, for homicide-by-OWI prosecutions). There is simply no way that submitting Johnson's requested instruction on a homicide-by-reckless-driving offense could have affected the verdict.

D. If this Court cannot affirm on any of those arguments, it should overrule *Adams*.

This Court should overrule precedent as a last resort. But if none of the other arguments allow this Court to affirm, it will need to confront the fact that *Adams* was incorrect to graft a new, nebulous causation requirement onto section 707.6A(1), for five reasons.

First, *Adams* purported to import established common-law—but its requirement was novel, and it *conflicted* with pre-existing law. The discussion in Division I.A shows that, before *Adams*, there was no requirement of proof of the *manner* of the defendant's driving to sustain a conviction for homicide-by-OWI, under any framework. *See*

Kellison, 11 N.W.2d at 373; *McQuillen*, 420 N.W.2d at 489; *Wullner*, 401 N.W.2d at 216. It is true that *Adams* purported to find support in *State v. Rullestad*, 143 N.W.2d 278 (Iowa 1966), which required proof of "a direct causal connection between the defendant's drunken driving and the death." *See Adams*, 810 N.W.2d at 370 (quoting *Rullestad*, 143 N.W.2d at 280). But that begs the question. *Rullestad*'s language is equally susceptible to a reading that only requires a causal connection between a death and a defendant's *driving* that occurred *while drunk*, and there is nothing in *Kellison* or any other case that *Rullestad* cites to push *Rullestad*'s meaning towards what *Adams* wanted it to mean. *See id.* at 380 (Waterman, J., concurring specially) ("Proof for a conviction under *Rullestad* is the same as proof for conviction under section 707.6A(1)—the jury must find the defendant's act of operating a motor vehicle *while* intoxicated caused the death, not that the intoxication itself was a cause."). The State could find no Iowa case before *Adams* that superimposed a requirement that the State prove anything about the *manner* of driving to establish homicide by OWI; *Adams* invented that new requirement out of whole cloth.

Second, *Adams* is flatly inconsistent with the plain language of section 707.6A(1). *Adams* found the law ambiguous, as to causation.

See id. at 370 (majority opinion). But *Adams* ignored the inclusion of a manner-of-driving causation requirement in the next subsection, for homicide by reckless driving—which required the State to prove that a victim's death was caused by "[d]riving a motor vehicle in a reckless manner with willful or wanton disregard for the safety of persons or property." *See id.* (quoting Iowa Code § 707.6A (1987)). Analogous language was deliberately *omitted* from homicide by OWI, where State must prove the defendant caused a death by "[o]perating a motor vehicle *while* under the influence." *Id.* (quoting Iowa Code § 707.6A (1987)) (emphasis added). "[L]egislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned." *See State v. Doe*, 927 N.W.2d 656, 665 (Iowa 2019) (quoting *Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 649 (Iowa 2013)); *cf. Adams*, 810 N.W.2d at 379 (Waterman, J., concurring specially) (noting omitted language). By including a manner-of-driving requirement in other parts of section 707.6A, and then omitting it from the definition of homicide by OWI, the legislature expressed its intent: when a defendant's driving causes a fatality *while* the defendant was intoxicated, the State does not need to prove anything else about the defendant's manner of driving.

Ironically, *Adams* was right that section 707.6A meant to adopt and codify the common-law approach—but it was wrong about what the legislature said, and about what the common-law approach was. Iowa precedent drew a distinction between involuntary manslaughter by *malum in se* and involuntary manslaughter by *malum prohibitum*; only the latter required any proof of recklessness or gross negligence. *Kellison* held "[d]runken driving of an automobile on a public highway in violation of a criminal statute is not merely malum prohibitum, it is malum in se, wrong in itself"—and it could find "no case holding that death resulting from the commission by another of some act which is a misdemeanor and not a mere civil wrong and malum in se and not merely malum prohibitum is not manslaughter." *Kellison*, 11 N.W.2d at 373. That means there is no situation where death resulting from the commission of OWI would not be common-law manslaughter—not even situations where manner of driving could never be proven. *Adams* quoted *Kellison*'s statement that "[i]nvoluntary manslaughter may be committed where death results from drunken driving *or* from wanton and reckless operation of a vehicle," which matches the split between those offenses in section 707.6A—but the holding of *Adams* matches neither. *See id.* at 370 (quoting *Kellison*, 11 N.W.2d at 373).

Third, *Adams* is so nebulous that it is impossible to apply. *Adams* is clear on what its causation requirement is *not*: it requires more than "mere proof that the defendant's *driving* caused the death of another person," and it "does not impose a burden on the State to prove a specific causal connection between [his] *intoxication* and the victim's death." *See id.* at 371. Instead, *Adams* says it requires proof that "his criminal act of driving under the influence of alcohol caused the victim's death." *See id.* But that must mean one of the two things that *Adams* just ruled out. It purports to require proof that something about the defendant's manner of driving was a but-for cause of death, not just his act of *driving* itself. But if "drunk driving caused a death" is sufficient and "driving by a person who was drunk caused a death" is insufficient, that requires the State to connect the victim's death to some flaw in the defendant's manner of driving that resulted from his intoxication, transcended "bad driving," and became "drunk driving." The State can discern no way to read *Adams* to require anything other than what it expressly states that it does *not* require: proof that, but for the defendant's intoxication, that victim would not have been killed. This puts Iowa prosecutors, defense attorneys, and lower courts in an impossible position—there is literally no way to do what *Adams* says.

Fourth, legislative acquiescence weighs in favor of overruling *Adams*, rather than letting it stand. This is because *Adams* ignored *Comried*, where the Iowa Supreme Court upheld a conviction for homicide-by-OWI against a sufficiency challenge. In *Comried*, tests of the defendant's urine and blood samples detected trace amounts of methamphetamines (80 ng/mL), and the State obtained a conviction for homicide-by-OWI under the "any amount of substance detectable" alternative of section 321J.2. The *Comreid* opinion did not need to decide whether the State could prove any effect of that low dose on Comreid's manner of driving—once it rejected Comreid's argument that "the blood test results should not have been admitted," it held *that* was sufficient to support conviction. *See State v. Comreid*, 693 N.W.2d 773, 774–78 (Iowa 2005). The majority in *Adams* asserted that Comried never challenged the State's proof of the connection between his intoxication and the victim's death, so "*Comried* does not stand for the proposition that a conviction under the statute may be sustained without proof of a causal connection between the defendant's intoxicated driving and a death." *See Adams*, 810 N.W.2d at 371 n.6. But all of the language in *Comreid* recognizes the legislative intent to forbid driving while on drugs, without requiring proof of their effects:

> [T]he legislature likely included the "any amount" language in the amendment to create a per se ban. Subsection (1)(a) already prohibited driving while under the influence of drugs. Thus, subsection (1)(c) was intended to do something more—to prohibit people from operating motor vehicles with controlled substances in their bodies, whether or not they are under the influence.

See Comried, 693 N.W.2d at 775–76. That is flatly incompatible with requiring proof of any effect on the defendant's manner of driving—especially when *Comried* goes on to discuss inactive metabolites that are "incapable of causing impairment." *See id.* at 777 (quoting *State v. Hammonds*, 968 P.2d 601, 603 (Ariz. Ct. App. 1998)). In *Adams*, the special concurrence noted the implications of *Comried*:

> Obviously, the jury, to convict, did not separately find that the trace amount of methamphetamine caused *Comried*'s fatal accident. A trace amount is unlikely to cause an accident. If a trace amount of a drug can support a conviction, it is nonsensical to require proof the alcohol an intoxicated driver consumed caused the accident.

Adams, 810 N.W.2d at 378 (Waterman, J., concurring specially). And if *Comried* misconstrued the statute, the legislature would likely have responded by adding a causation requirement to section 707.6A(1)—but it did not, and *Adams* failed to respect that. *Cf. State v. Childs*, 898 N.W.2d 177, 187 (Iowa 2017) ("We apply the Iowa statute as written and leave it to the legislature whether to revisit the zero-tolerance ban on driving with even nonimpairing metabolites of marijuana.").

"When many years pass following such a case without a legislative response, [Iowa courts] assume the legislature has acquiesced in [their] interpretation." *See State v. Iowa District Court for Jones County*, 902 N.W.2d 811, 818 (Iowa 2017) (quoting *Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678, 688 (Iowa 2013)). *Adams* should have deduced, from legislative inaction after *Comreid* and all of the other prior homicide-by-OWI cases that did not require any proof of the defendant's manner of driving, that those cases had accurately discerned the legislature's intent. And while Johnson may respond that legislative inaction after *Adams* proves it was correct, the Iowa Supreme Court has rejected such arguments when deployed in defense of holdings which themselves "ignored this very principle." *See McElroy v. State*, 703 N.W.2d 385, 395 (Iowa 2005). Indeed, when Iowa courts read statutory language to mean the opposite of its plain meaning, it effectively confounds any attempts to amend it. *See, e.g.*, *State v. Fountain*, 786 N.W.2d 260, 264–65 (Iowa 2010); Iowa Code § 708.1(2) (no substantive amendments since *Fountain*). This Court should take this opportunity to "correct an incorrect analysis" that ignored legislative acquiescence to established Iowa precedent. *See State v. Williams*, 895 N.W.2d 856, 867 (Iowa 2017).

Fifth, *Adams* ignores the reality that "it is impossible and unnecessary to separate the intoxication from the act of driving." *See Adams*, 810 N.W.2d at 377–78 (Waterman, J., specially concurring) (citing and quoting *State v. Caibaiosai*, 363 N.W.2d 574, 577–78 (Wis. 1985)). For cases where *any* driver would have caused the same harm that befell the victim, pre-*Adams* caselaw enabled defendants to avoid criminal liability by establishing that some other factor was the sole proximate cause of the harm. *See, e.g.*, *State v. Wieskamp*, 490 N.W.2d 566, 567 (Iowa Ct. App. 1992). But when it can be shown that the defendant's driving *caused* the victim's death and that there are no superseding causes of death, *Adams* still requires a fact-finder to untangle the defendant's relevant decisions and reactions, to isolate the impact of intoxication on those decisions. Would Johnson have driven at 55 mph if he were sober? Would he have run the stop sign? Nobody can know. *Adams* might preclude conviction if the answer to both was "yes"—but why should that *diminish* Johnson's culpability?

Homicide by OWI is often an example of *overdetermined* harm. Intoxication amplifies risks of injury or death by reducing a driver's reaction time or eroding her aversion to risk. A but-for causal link from intoxication to harm is often unprovable—and legally unnecessary:

> Causal overdetermination . . . appears to explain, first, why the courts in these cases intuitively have required something less than a but-for causal connection between the defendant's intoxication and the fatal accident. In most drunk-driving homicide cases, as in . . . *Rumsey*, the causal mechanism behind the fatal accident is the interplay of roadway hazards with limitations on the driver's ability to perceive and react. The driver's intoxication usually will contribute to this causal mechanism by exacerbating existing limitations on the driver's ability to perceive and react. What is more, this contribution nearly always will be potentially decisive; the roadway hazards almost never will make the accident inevitable. This sort of incremental contribution is enough, according to the standard accounts of causal overdetermination. On these accounts, the law requires at most that the defendant's conduct—or the wrongful-aspect of the defendant's conduct—make a potentially decisive contribution to the mechanism underlying the victim's injury. It does not require in addition that the defendant's contribution qualify as a but-for cause of the injury.

Johnson, 46 CONN. L. REV. at 637–38; *accord State v. Shorter*, 893 N.W.2d 65, 74 (Iowa 2017) (holding that "[a]lthough not all blows delivered to Daughenbaugh were a cause of his death, this case involves an aggregate group assault in which the State showing who delivered which blow to a specific body part is not required," even for establishing Shorter's principal liability for murder). If the defendant was intoxicated, driving, and the cause of a fatal collision, no further proof should be required to convict under section 707.6A(1), because his conduct increased the risk of the same fatal harm that materialized.

Adams imposed a new requirement that the State establish a causal connection between drunk driving and the death of the victim to sustain a homicide-by-OWI conviction. It seemed to determine that defendants were less culpable if that causal link could not be shown. Ironically, Johnson's argument is that, before *Adams*, Iowa caselaw already recognized *all* OWI as inherently reckless—which gives the lie to the implied rationale of *Adams*. In truth, all homicide-by-OWI results from inherently reprehensible conduct: intoxicated driving.

> The statute does not include as an element of the crime a direct causal connection between the fact of defendant's intoxication, conceptualized as an isolated act, and the victim's death. Under this statute there is an inherently dangerous activity in which it is reasonably foreseeable that driving while intoxicated may result in the death of an individual. The legislature has determined this activity so inherently dangerous that proof of it need not require causal connection between the defendant's intoxication and the death.

Adams, 810 N.W.2d 377–78 (Waterman, J., concurring specially) (quoting *Caibaiosai*, 363 N.W.2d at 577–78). *Adams* was wrong when it was decided, and it is still impossible to apply it. This Court should overrule *Adams* and return to a sensible causation requirement for homicide-by-OWI under section 707.6A(1): it should only require the State to prove that the defendant was driving while intoxicated, and caused a fatality—it should *not* have to prove any manner of driving.

II. The district court was correct to exclude evidence that L.H. was not restrained in a carseat. It was irrelevant.

Preservation of Error

Error was preserved when the trial court ruled that Johnson's proffered evidence was inadmissible, and Johnson provided offers of proof on that issue throughout trial. *See* Ruling on Motion in Limine (1/31/19) at 1–3; App. 13–15; *See* TrialTr.V2 156:1–157:6; TrialTr.V3 108:18–110:24; *Hubka*, 480 N.W.2d at 868–69.

Standard of Review

Rulings excluding evidence are reviewed for abuse of discretion. *See State v. Heard*, 934 N.W.2d 433, 439 (Iowa 2019).

Merits

Johnson argues that he should have been allowed to present evidence that L.H. was not in a carseat and was being held in the lap of another passenger, because "it is a factor in determining whether [he] caused L.H.'s death." *See* Def's Br. at 50–56. In a civil trial, he may be correct. But in most criminal trials, causation looks different: "[w]hen causation does surface as an issue in a criminal case, our law normally requires us to consider if the criminal act was a factual cause of the harm." *See State v. Tyler*, 873 N.W.2d 741, 747–48 (Iowa 2016) (quoting *State v. Tribble*, 790 N.W.2d 121, 126–27 (Iowa 2010)). There

is one limited exception: "for an intervening act to relieve a defendant of criminal responsibility for homicide, the intervening act must be the *sole* proximate cause of death." *See State v. Garcia*, 616 N.W.2d 594, 597 (Iowa 2000) (citing *Wissing*, 528 N.W.2d at 565). The fact that L.H. was not secured or restrained in a carseat is certainly not the sole proximate cause of his death: if nobody had collided with the minivan during that trip, L.H. would have been unharmed. This was the logic that animated *State v. Hubka*, which controls the analysis:

> [W]e conclude that Hubka cannot be relieved of criminal responsibility due to the mere fact that the children were not wearing seat belts or other restraints at the time of the collision. More specifically, the failure of the children to wear seat belts or other restraints was not a "superseding cause" of their deaths so as to preclude the imposition of criminal responsibility upon Hubka. Even assuming the lack of seat belts or other restraints was a proximate cause of the victims' deaths, i.e., that this was a "substantial factor" contributing to their deaths, it certainly was not the *sole* proximate cause thereof. There is substantial evidence in the record . . . that the collision with Hubka's vehicle also was a "substantial factor" causing the children's deaths. However, the mere fact that this may not have been the *sole* proximate cause of their deaths is not sufficient to relieve Hubka of criminal responsibility. . . .
>
> Our conclusion is supported by numerous cases from other jurisdictions holding that the failure of a victim to wear a seat belt or other restraint is not so substantial an act as to constitute a superseding cause which absolves a defendant of criminal responsibility for negligent or vehicular homicide.

> . . . [T]he court did not abuse its discretion in excluding opinion testimony that one of the children would have lived had she been wearing a seat belt or other restraint. . . . [T]he fact that the children were not wearing seat belts or other restraints simply was not relevant.

Hubka, 480 N.W.2d at 870–71. This aligns with the general principle that "the alleged contributory negligence of a homicide victim may not be used as a defense in a subsequent homicide prosecution," even when the homicide offense includes a causation element. *See id.* at 869–70 (citing *State v. Williams*, 28 N.W.2d 514, 518 (Iowa 1947)).

Johnson argues that *Adams* changes the analysis, by requiring the State to prove a causal connection between Johnson's intoxicated driving and L.H.'s death. He argues that attributing L.H.'s death to other contributing factors (like Dr. Lewis's failure to use a carseat) might have weakened that causal connection. *See* Def's Br. at 50–51. But Johnson's intoxication, at best, could only affect *how he drove*—once he collided with the minivan at a certain velocity, no amount of intoxication or sobriety could change that collision's effects. Arguing that securing L.H. in a carseat would have prevented his death is not an argument that has anything to do with *Adams*. Moreover, *Adams* focuses exclusively on but-for causation, and it would foreclose his "contributory negligence" claim. *Adams*, 810 N.W.2d at 372 & n.7.

Johnson urges this Court to overrule *Hubka* and adopt the logic of a case from the Michigan Court of Appeals: *People v. Moore*, 631 N.W.2d 779 (Mich. Ct. App. 2001). *See* Def's Br. at 51–56. Johnson's argument about *Moore* misses key facts that led the *Moore* court to decide that testimony about seatbelt was relevant: that case involved critical testimony that the victim's failure to use the seatbelt was the sole proximate cause of the fatal *collision*, not just the injury:

> [T]he evidence of the decedent's failure to wear his seat belt is directly relevant to whether defendant's conduct, even assuming it was negligent, was a substantial cause of the accident resulting in Williams' death. In fact, defendant states that two of her expert witnesses will testify that the decedent would not have died had he been wearing his seat belt and one expert will testify that the decedent's loss of control of his vehicle after it struck defendant's truck was caused by the failure to wear a seat belt because the decedent was thrown in his vehicle and struck his head on the window. Consequently, such evidence is clearly relevant to whether the decedent's death was the natural and necessary result of defendant's act.
>
> Accordingly, we hold that evidence of the decedent's failure to wear his seat belt at the time of the accident, while not a defense to negligent homicide, is a factor for the jury to consider in determining whether the defendant's negligence, should the jury even find negligent conduct on the part of defendant, caused the victim's death. We believe that this evidence is clearly relevant regarding causation in the present case, especially under the circumstances where the decedent's vehicle struck the front of defendant's truck and the decedent apparently lost control of his vehicle, which crossed several lanes of traffic and hit head on a van coming in the opposite direction.

See Moore, 631 N.W.2d at 783–84. It is debatable whether *Moore* would be properly decided under Iowa law, which is clearer about limiting the analysis to but-for causation, with a narrow exception for superseding events that are the sole proximate cause of harm. *See, e.g.*, *State v. Dalton*, 674 N.W.2d 111, 118–19 (Iowa 2004); *State v. Begey*, 672 N.W.2d 747, 749–50 (Iowa 2003); *Garcia*, 616 N.W.2d at 597. Indeed, *Moore* concerned a prosecution under a statute that expressly stated a proximate cause requirement. However, for Michigan statutes that do not contain such a requirement, Michigan courts would apply a very familiar analysis: "[w]here an independent act of a third party intervenes between the act of a criminal defendant and the harm to a victim, that act may only serve to cut off the defendant's criminal liability where the intervening act is the sole cause of harm." *See People v. Werner*, 659 N.W.2d 688, 697 (Mich. Ct. App. 2002) (quoting *People v. Bailey*, 549 N.W.2d 325, 334 (Mich. 1996)). And Michigan courts have largely confined *Moore* to its facts. *See, e.g.*, *id.* ("Unlike in *Moore*, where the facts actually showed that wearing a seat belt might have changed the outcome of the accident, the facts here do not show that the decedent could have affected the course of events by wearing a seat belt. Defendant merely argues that the

decedent might have survived the collision if she had been wearing a seat belt, but this argument is purely speculative and is without evidence to support it."); *People v. Batts*, No. 340032, 2019 WL 2552638, at *4 (Mich. Ct. App. June 20, 2019) ("The holding in *Werner* applies here. Motley's death was not at all remote from defendant's conduct. Again, she drove at high speeds through a residential zone, in wet conditions, while intoxicated, and struck Motley's FedEx van, resulting in his death."); *accord People v. Kuch*, No. 250812, 2004 WL 2072065, at *3 (Mich. Ct. App. Sept. 16, 2004) ("The facts here can be distinguished from *Moore*. Here, there was no evidence that [the injured victim] was driving in a negligent manner."). *Moore* has no application to an Iowa statute that does not contain a proximate causation requirement, and very little persuasive value when Iowa courts have resoundingly rejected any causation defense like contributory negligence (other than sole proximate causation).

None of Johnson's other out-of-state authority provides any reason to depart from this well-established point of Iowa law. *See* Def's Br. at 53–54. Indeed, the phrases "sole proximate cause" and "intervening cause" do not even appear in Johnson's brief, despite their centrality to the district court's ruling. *See* Def's Br. at 49–58;

Ruling on Motion in Limine (1/31/19) at 2–3; App. 14–15. Johnson does not attempt to show that his proffered evidence could have been relevant to establish that failure to put L.H. in a carseat might have been the sole proximate cause of L.H.'s death, and for good reason. Such evidence could not dispel the causal connection between his collision with the minivan and the injuries sustained by L.H. (who would not have been injured in the absence of that collision). *See Hubka*, 480 N.W.2d at 869–70. Nor could it show that L.H.'s death would have been equally likely to occur, in the absence of Johnson's intoxicated driving. *See, e.g.*, *Wieskamp*, 490 N.W.2d at 567. That makes any comparisons to *Adams* inapposite and wholly illogical: if Johnson's intoxicated driving caused the crash, then it caused all of the natural and probable consequences of the crash, including the injuries sustained by everyone in the minivan when it was T-boned.

The Iowa Court of Appeals recently rejected a similar challenge in *Bruce*, where a victim named Johnson was not wearing a seatbelt:

> We agree with the district court that under either test—the *Hubka* "substantial factor" test or the *Tribble* "but-for" test—Bruce was not prejudiced by exclusion of the seatbelt evidence. Bruce's driving his truck into a ditch certainly was at least a substantial factor in Johnson's injuries. His conduct was, therefore, a proximate cause of Johnson's harm under Hubka.

> In addition, Bruce's conduct was a "but-for" cause of Johnson's injuries. Had Johnson been sitting in the backseat with no seatbelt and Bruce drove them safely back to Hamburg, Johnson would not have been injured. Bruce's conduct of driving the truck into a ditch while intoxicated is an act without which "the harm would not have occurred." *See Tribble*, 790 N.W.2d at 127.
>
> To the extent Bruce argues the harm would not have been "serious" if Johnson had been wearing a seatbelt, we conclude the law only requires the defendant's act to cause the harm. Whether or not Johnson would have had a "serious" injury with the seatbelt on is irrelevant to Bruce's conduct. Bruce insists he is not invoking the concept of contributory negligence. But this misses the point: his conduct need only have been one factual cause of the harm, and the jury found it was. Offering evidence of Johnson's conduct could only serve to detract from his culpability for his own acts. In *Hubka*, this court stated "the alleged contributory negligence of a homicide victim may not be used as a defense." 480 N.W.2d at 869. Whether Johnson was wearing a seatbelt or not is irrelevant—it does not make it more or less probable that Bruce's conduct was a factual cause. We cannot say the district court decision was based on clearly untenable or unreasonable grounds and conclude the district court did not abuse its discretion in granting the State's motion in limine excluding evidence related to seatbelts.

Bruce, 2019 WL 6358198, at *4. The same logic applies to defeat Johnson's challenge, no matter what causation standard applies.

OWI is prohibited because of the risk of harms like these: that an intoxicated driver "might crash his vehicle into other vehicles on the roadway, seriously injuring their occupants." *See Adams*, 810 N.W.2d at 378 (Waterman, J., concurring specially) (quoting *People*

v. Martin, 203 N.E.2d 638, 646 (Ill. 1994)). An unbuckled passenger is not an unforeseeable development that could be categorized as a superseding cause or sole proximate cause. It would be nonsensical to relieve Johnson of responsibility for causing L.H.'s injuries when he T-boned the minivan with so much momentum that it rolled over, especially when Johnson has made no argument to refute the finding that Iowa law did not require L.H. to be secured when there were no open seats left in the minivan (so this cannot be so unexpected that it supersedes other but-for causes of injury). *See* Ruling on Motion in Limine (1/31/19) at 2; App. 14. Thus, Johnson's challenge fails.

III. The sentencing court properly assessed the DARE surcharge under section 911.2.

Preservation of Error

Generally applicable rules of error preservation do not apply. Johnson may raise this challenge for the first time on appeal. *See*, *e.g.*, *State v. Woody*, 613 N.W.2d 215, 217 (Iowa 2000).

Standard of Review

Johnson's claim that his sentence contained an illegal surcharge is reviewed for errors at law. *See State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008); *State v. Morris*, 416 N.W.2d 688, 689 (Iowa 1987).

Merits

Johnson asserts the district court imposed an illegal sentence by ordering him to pay the $10 DARE surcharge under section 911.2. *See* Def's Br. at 59–61 (citing Sent.Tr. 20:3–9; Sent. Order (5/13/19) at 3; App. 32). Section 911.2 applies "if a violation arises out of a violation of an offense provided for in chapter 321J or chapter 124, subchapter IV." *See* Iowa Code § 911.2(1). Johnson was convicted of violating section 707.6A(1), which requires proof of a violation of section 321J.2—which the jury found, five different ways. *See* Iowa Code § 707.6A(1); Interrogatory (4/4/19); App. 26. Thus, this case is indistinguishable from *State v. Konvalinka*, where the Iowa Court of Appeals rejected a similar challenge to a DARE surcharge:

> Konvalinka's felony eluding conviction included the element, "The driver is in violation of section 321J or 124.401." [Iowa Code] § 321.279(3)(b). Therefore, his eluding conviction arose out of a violation of one of the enumerated offenses that made the DARE surcharge applicable. We affirm this portion of the sentence.

State v. Konvalinka, No. 11–0777, 2012 WL 1860352, at *8 (Iowa Ct. App. May 23, 2012). Just like in *Konvalinka*, Johnson's conviction for homicide while committing an OWI in violation of section 321J.2 arose out of a violation of section 321J.2. Thus, the DARE surcharge was properly imposed, and his challenge fails.

CONCLUSION

The State respectfully requests that this Court reject these challenges and affirm Johnson's convictions.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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