IN THE SUPREME COURT OF IOWA
Supreme Court No. 19–0453

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ETHAN L. DAVIS,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR APPANOOSE COUNTY
THE HONORABLE MYRON L. GOOKIN, JUDGE

APPELLEE'S BRIEF

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I. Ross was killed while hunting. Davis was on the run from police at the time. Ross was shot with bullets that matched Davis's stockpiled ammunition. Shell casings at the scene were fired from a rifle that Davis owned, which was found hidden on Davis's farm property. The rifle scope had Davis's fingerprints on the lens cover, and Ross's blood was spattered on the lens.

Was the evidence sufficient to establish that Davis was the person who killed Ross?

Authorities

State v. Bass, 349 N.W.2d 498 (Iowa 1984)
State v. Gay, 526 N.W.2d 294 (Iowa 1995)
State v. Henderson, No. 15-1166, 2017 WL 108280 (Iowa Ct. App. Jan. 11, 2017)
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State v. Williams, 695 N.W.2d 23 (Iowa 2005)
Iowa R. App. P. 6.904(3)(p)

II. Did the court err in overruling Davis's request to include an additional instruction on reasonable doubt?

Authorities

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Victor v. Nebraska, 511 U.S. 1 (1994)
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State v. Chamberlain, No. 17-1426, 2018 WL 6719730 (Iowa Ct. App. Dec. 19, 2018)
State v. Finnegan, 237 N.W.2d 459 (Iowa 1976)
State v. Frei, 831 N.W.2d 70 (Iowa 2013)
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State v. Portillo, 898 P.2d 970 (Ariz. 1995)
State v. Quang, No. 12-0739, 2013 WL 4504934 (Iowa Ct. App. Aug. 21, 2013)
State v. Robinson, 859 N.W.2d 464 (Iowa 2015)
State v. Rupp, 282 N.W.2d 125 (Iowa 1979)
State v. Shipley, 146 N.W.2d 266 (Iowa 1966)
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III. Did the trial court sustain an objection to the defense closing argument, when the defense began to define "reasonable doubt" in terms that differed from the jury instructions? If it did, was that reversible error?

Authorities

Mumm v. Jennie Edmundson Memorial Hosp., 924 N.W.2d 512 (Iowa 2019)
State v. Clay, 824 N.W.2d 488 (Iowa 2012)
State v. Mark, 286 N.W.2d 396 (Iowa 1979)
State v. Mayes, 286 N.W.2d 387 (Iowa 1979)
State v. Melk, 543 N.W.2d 297 (Iowa Ct. App. 1995)
State v. Ryder, 315 N.W.2d 786 (Iowa 1982)
Stephen P. Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627 (2000)
Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105 (1999)
Darryl K. Brown, *Regulating Decision Effects of Legally Sufficient Jury Instructions*, 73 S. CAL. L. REV. 1105 (2000)

IV. Did the court err in giving a verdict-urging instruction when the jury indicated that it was deadlocked, after seven hours of deliberations? If so, was that error prejudicial, when the jury deliberated for more than four more hours before returning a verdict?

Authorities

Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
State v. Bogardus, 176 N.W. 327 (Iowa 1920)
State v. Campbell, 294 N.W.2d 803 (Iowa 1980)
State v. Czachor, 413 A.2d 593 (N.J. 1980)
State v. Gomez Garcia, 904 N.W.2d 172 (Iowa 2017)
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State v. Kelley, 161 N.W.2d 123 (Iowa 1968)
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Samantha P. Bateman, *Blast It All: Allen Charges and the Dangers of Playing with Dynamite*, 32 U. HAW. L. REV. 323 (2010)
Saul M. Kassin et al., *The Dynamite Charge: Effects on the Perceptions and Deliberation Behavior of Mock Jurors*, 14 L. & HUM. BEHAV. 537 (1990)
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Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201 (2006)

V. Did the trial court err in overruling objections to specific questions and argument that, in Davis's view, shifted the State's burden of proof to the defense?

Authorities

Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
State v. Bishop, 387 N.W.2d 554 (Iowa 1986)
State v. Christensen, 929 N.W.2d 646 (Iowa 2019)
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State v. Tipton, 897 N.W.2d 653 (Iowa 2017)

VI. Should the trial court issue a nun pro tunc order to make the written sentencing order conform to the court's oral pronouncement of sentencing, which found Davis was not reasonably able to pay restitution for court costs and court-appointed attorney fees?

Authorities

State v. Hess, 533 N.W.2d 525 (Iowa 1995)

ROUTING STATEMENT

Davis seeks retention to consider two challenges related to the jury instructions. *See* Def's Br. at 20–21. His challenge relating to the instruction on reasonable doubt is foreclosed by *State v. Frei*, which found no reversible error when a trial court gave the same instruction that was given here, and refused to give an instruction that is similar to the instruction that was requested and not given here. *See State v. Frei*, 831 N.W.2d 70, 75–79 (Iowa 2013), *overruled on other grounds by Alcala v. Mariott Int'l, Inc.*, 880 N.W.2d 699, 708 n.3 (Iowa 2016). This claim can be addressed by applying established legal principles. *See* Iowa R. App. P. 6.1101(3)(a).

The challenge to the verdict-urging instruction is controlled by *State v. Campbell*, 294 N.W.2d 803, 808–13 (Iowa 1980). Though it provided guidance, it also held "no error was committed in the giving of the verdict-urging instruction in the circumstances of this case." *See Campbell*, 294 N.W.2d at 813. Davis raises concerns about how to assess prejudice. But those questions are also answered by *Campbell*. *See id.* at 810–11. And here, where there was no error, they are moot. Because there is no issue requiring retention, this appeal should be transferred to the Court of Appeals. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This is Ethan L. Davis's direct appeal from his conviction for first-degree murder, a Class A felony, in violation of Iowa Code section 707.2(1)(a) (2017). The jury found him guilty as charged for killing Curtis Ross, who was bow-hunting on public land. The only contested issue was identity. Ross was killed with bullets that had been fired from an AR-15 rifle that was discovered on Davis's farm, hidden under farm machinery. Ross's blood was on the rifle scope. Davis's fingerprints were on the lid covering the lens of that scope.

On appeal, Davis argues: **(1)** the evidence was insufficient to prove identity; **(2)** the trial court erred by overruling his request to submit an additional instruction for "reasonable doubt," beyond the "firmly convinced" definition from *State v. Frei*; **(3)** the trial court erred in sustaining an objection to language in the defense closing that defined "reasonable doubt" differently; **(4)** the trial court erred in giving a verdict-urging instruction when the jury indicated that it was deadlocked, after seven hours of deliberations; and **(5)** the court erred in overruling objections that certain questions and arguments shifted the State's burden of proof to the defense.

Course of Proceedings

The State generally accepts Davis's description of the course of proceedings. *See* Iowa R. App. P. 6.903(3); Def's Br. at 22–24.

Statement of Facts

On Thanksgiving weekend, 2017, Curtis Ross was visiting Iowa to bow-hunt on public land in Appanoose County, in a particular spot that he nicknamed "Narnia." *See* TrialTr.V2 186:9–187:1; TrialTr.V2 192:19–193:19. Ross stayed with Tyler Jensen while he was in town. TrialTr.V2 194:10–15. On Friday, November 24, at some point in the early afternoon (before 2:30 p.m.), Ross left Jensen's residence after telling Jensen he was "going down to Narnia to hunt." *See* TrialTr.V2 195:23–198:5. Jensen spent the afternoon hunting somewhere else, and sent text messages and Snapchats to Ross from his tree stand at "[a]round 3:30" and "around 3:50." *See* TrialTr.V2 198:6–22. Jensen received no response from Ross, which was unusual. *See* TrialTr.V2 198:23–199:1; *see also* TrialTr.V2 190:10–191:21. By 11:30 p.m., Ross still had not returned or responded. Jensen became concerned. When Jensen drove out to Narnia to look for Ross, at about 1:00 a.m., he saw Ross's truck parked at the end of the access road. The truck was fine, but Ross was not there. *See* TrialTr.V2 199:2–204:10.

Jensen contacted the Appanoose County Sheriff's Office to report that Ross was missing. When officers arrived, Jensen helped look for Ross, all through the night. *See* TrialTr.V2 204:11–205:8; *see also* TrialTr.V3 14:21–16:6.

Ross's body was discovered around 8:00 a.m., submerged in murky water, in the middle of a creek. *See* TrialTr.V3 20:6–21:16; State's Ex. 9; XApp. 9; TrialTr.V3 50:1–24. Officers contacted DCI. They canvassed the area while they waited for DCI to arrive, and they noticed "a large area" in the tall grass "that was covered in blood, and the grass had been matted down," south of where Ross was found. *See* TrialTr.V3 22:3–23:12. Investigators generated a map that provided an overview of locations of key evidence. *See* State's Ex. 3; XApp. 5; TrialTr.V3 58:5–59:21. They noticed a "makeshift hunting blind" on the hill overlooking the bloodstained area. *See* TrialTr.V3 61:2–24 (explaining a makeshift blind: "you'll trim branches back on a tree so that you can sit back in the tree and be shielded from other areas so you can watch one certain area while hunting"). Those branches looked to be "fresh cut." *See* TrialTr.V3 74:16–19; TrialTr.V3 154:10–155:22. They found shell casings near the bloody area and on a nearby hilltop. *See* TrialTr.V3 127:19–129:25; TrialTr.V3 136:17–141:2, 145:2–146:25.

Ross had been stripped naked. He had "obvious stab wounds" and gunshot wounds. *See* TrialTr.V3 20:17–25:10; State's Ex. 11–14; CApp. 6–9; TrialTr.V3 54:4–56:25; TrialTr.V3 92:3–19. Ross's clothing and hunting gear were nowhere to be found. *See* TrialTr.V3 49:19–25; *accord* TrialTr.V3 116:21–117:9. Closer examination of Ross's body found multiple gunshot wounds to his head, some of which had left bullet fragments that were recovered and submitted for testing. *See* TrialTr.V5 177:1–181:12; TrialTr.V5 183:16–185:18. There was also some stippling on Ross's face, indicating that the firearm was within "a couple feet" of his face when it fired the shots that inflicted those specific wounds. *See* TrialTr.V5 181:13–182:24. When that happens, "either liquid or tissue can rebound backwards and then appear on a firearm or on the person who is operating it." *See* TrialTr.V5 182:25–184:15. Examiners also catalogued multiple gunshot wounds to Ross's chest, shoulders, arms, hips, and legs. *See* TrialTr.V5 185:19–193:19.

Ross had also sustained "at least 26 stab wounds" and "another five or so incised wounds." A pair of stab wounds to Ross's neck were each about six inches deep, and severed his carotid arteries—and the bleeding suggested that they were inflicted while Ross was still alive. *See* TrialTr.V5 193:20–204:6.

Investigators interviewed Ross's friends and family, who were unable to suggest anybody who had harbored animosity towards Ross or had any motive to kill him. *See* TrialTr.V5 90:19–92:7. Ross had viewed two Snapchats at 1:38 p.m. *See* TrialTr.V5 94:18–99:2; *accord* TrialTr.V2 219:4–222:2. Ross did not open any Snapchats after that and did not send any other messages. *See* TrialTr.V5 99:3–100:11; *see also* State's Ex. 80. An ear-witness reported hearing "rapid-fire shots" around 2:30 or 2:45 p.m. *See* TrialTr.V4 43:18–46:24.

DNA analysis confirmed that the blood that formed a trail on the ground was Ross's blood. *See* TrialTr.V5 128:21–136:16. Despite extensive searching, investigators never found Ross's hunting gear or his clothing. *See* TrialTr.V5 106:11–22; *but see* TrialTr.V4 10:24–11:20 (describing trail cameras with Ross's initials and a tree stand, found in another part of the public hunting grounds, much further south).

Officers noticed an old refrigerator nearby. It appeared to be large enough to hide Ross's clothing or gear, so they checked inside. They found "a green ammo can" inside. *See* TrialTr.V3 159:3–162:21; State's Ex. 33–39; XApp. 10–16. It contained coins, ammunition, and an "AR-style polymer magazine" loaded with green-tipped bullets that were described as .223 rounds or 5.56 rounds. *See* TrialTr.V3 162:22–

163:20; State's Ex. 40; XApp. 17. Officers kept searching and found similar "AR-style polymer and steel magazines" containing similar green-tipped bullets, stashed in a concrete culvert, further north. *See* TrialTr.V3 164:12–170:8; State's Ex. 41–51; XApp. 18–28. All those items (except for the refrigerator itself) were collected and submitted to the DCI for analysis. *See* TrialTr.V3 163:21–164:11; TrialTr.V3 170:9–15; *see also* TrialTr.V3 173:9–174:1.

Davis became a possible suspect following the discovery of his fingerprints on evidence recovered from the area where Ross's body had been found. *See* TrialTr.V5 63:8–23. Specifically, DCI analysts found Davis's fingerprints on the box of ammunition that was in the canister that was found in the refrigerator. *See* TrialTr.V5 17:1–18:9; TrialTr.V5 19:23–23:15. The canister "would have to be open for the fingerprint to have been deposited." *See* TrialTr.V5 22:21–23:7. They also found Davis's fingerprints on some of the magazines that were stashed in the culvert, and on the plastic wrap on other magazines that were unopened. *See* TrialTr.V4 18:10–19; TrialTr.V5 23:16–24:24.

In the early afternoon on Friday, November 24, when Ross left Jensen's house for Narnia, Davis was already on the run from police. The parties stipulated to facts about an incident in Seymour:

> [T]here are two separate stipulations. The first one relates to a 911 call that was placed on November 24, 2017, by Shayla Stevens to Wayne County dispatch. That 911 call was made at 11:42 a.m. again by Shayla Stevens.
>
> The second stipulation relates to why the officers were called by her, and that stipulation is as follows: As a result of an incident on November 24, 2017, in Seymour, Wayne County, Iowa, Mr. Davis was charged with Burglary in the First Degree of Jarvis Kennebeck's residence, Willful Injury Causing Bodily Injury on Jarvis Kennebeck, and Assault Causing Bodily Injury on Jarvis Kennebeck.
>
> Mr. Davis was found not guilty of Burglary in the First Degree and Willful Injury Causing Bodily Injury and found guilty of Assault Causing Bodily Injury.

TrialTr.V3 71:22–72:23. Joseph Babbitt testified that Davis came to his house after that Seymour incident, along with his young son (L.). *See* TrialTr.V4 55:21–56:18. Davis told Babbitt "[t]hat he had an incident in Seymour where he said he went and got his kid out of a crack house. He said he walked in, fired a round in the air, grabbed his kid, and left." *See* TrialTr.V4 62:12–22. Davis was "pretty upset":

> Fast-talking. I could tell he'd been crying. I didn't know what had happened, you know, what had worked him up until later, you know.
>
> [. . .]
>
> He lays [his son] on my living room floor and tells me to call his mom.

See TrialTr.V4 56:19–57:4. Davis was driving his orange Hummer; Babbitt said that Davis's driving was "kind of erratic," and he parked behind the house, in the backyard (not where he normally parked).

See TrialTr.V4 57:5–24; TrialTr.V4 62:3–63:3. Davis left, without L. Babbitt said Davis arrived at his house around 1:00 p.m., and stayed for "[l]ess than 90 seconds probably." *See* TrialTr.V4 57:25–58:12. During that 90 seconds, Davis wrote down his mom's phone number for Babbitt, so that Babbitt could call her. When Babbitt told Davis that he would call him later, Davis replied: "I don't have a phone." *See* TrialTr.V4 58:13–59:11. Babbitt called Davis's mother (Tammy Davis). Ten minutes later, Tammy arrived, picked up L. and left with him. *See* TrialTr.V4 59:17–61:8.

Davis's cousin, Dillon Horton, had seen Davis on Wednesday, November 22. *See* TrialTr.V4 23:7–25:24. When Davis left Horton's, "[h]e left two cell phones on [Horton's] kitchen table." *See* TrialTr.V4 25:25–26:22. Horton held onto Davis's phones until he gave them to Tammy on Friday night, at about 7:30 or 8:00 p.m. *See* TrialTr.V4 26:23–28:12. Horton and other concerned family members "drove around a little bit Friday evening looking for [Davis]," at Tammy's request, but they never saw him. *See* TrialTr.V4 28:13–29:1.

The next time Horton saw Davis was Saturday, November 25, at Tammy's house. Horton got a phone call from Davis, telling him to come to Tammy's house. Davis told them about the Seymour incident.

See TrialTr.V4 29:2–30:16. They all "went out to the Hummer north of the house." *See* TrialTr.V4 30:17–31:19. It was unusual for Davis's Hummer to be parked where it was, right next to the treeline. *See* TrialTr.V4 31:20–32:25; State's Ex. 65–67; XApp. 37–39.

Horton asked Davis where he had been for the last two days. Davis replied, "Just in the woods is all." *See* TrialTr.V4 33:1–11. Horton said Davis was "calm," as if nothing was out of the ordinary—which Horton found unusual. *See* TrialTr.V4 33:7–19.

Jamison Davis was Davis's father. In November 2017, Davis was living with his parents in their house. *See* TrialTr.V4 107:22–108:8. Jamison knew that Davis had many guns, and took "[v]ery good care of them." *See* TrialTr.V4 109:13–110:22. But Davis was not a hunter—he was a "prepper," which Jamison defined like this:

> That's when you don't have a full belief that if there is a grid problem or a problem with the government, an electrical — the electrical grid goes down, if the government shuts down for a long period of time, et cetera, et cetera. There's programs on TV. And, you know, you take measures to become more self-reliant.

See TrialTr.V4 110:23–111:12. Davis also had "hunting-style knives" and ammunition canisters. *See* TrialTr.V4 111:21–114:2; State's Ex. 69–73; XApp. 40–44. A magazine with green-tipped bullets was found among his supplies. *See* TrialTr.V4 114:3–11; State's Ex. 74; XApp. 45.

Jamison said he saw Davis on Friday morning, and Davis said that he was leaving to run an errand. *See* TrialTr.V4 116:24–117:17. Davis returned with L., at about 11:00 a.m.:

> He pulled in the driveway and pulled up to the house with [L.]. They got out. They went in the house, and a few minutes afterwards—I can't say exactly how long—he come back out, put [L.] back in the Hummer, and then left.

See TrialTr.V4 118:12–119:6. Jamison assumed everything was fine. Later, Tammy called Jamison and told him something about the Seymour incident. *See* TrialTr.V4 119:7–24. Jamison decided not to look for Davis; he hoped Davis would return "on his own terms." *See* TrialTr.V4 120:10–122:19.

On Saturday evening, Tammy told Jamison that Davis "had made contact with her, and he was at home." *See* TrialTr.V4 123:25–124:15. When Jamison got home, Davis was there: "He was in his room. He had been resting in his bed. It was obvious that he had been crying. His eyes were swollen, red." *See* TrialTr.V4 123:25–125:6. Jamison told Davis to turn himself in, because of the Seymour incident—but Jamison did not ask Davis where he had been or what he had done while he had been missing. *See* TrialTr.V4 125:12–126:4. Davis and his parents went to the Wayne County Sheriff's Office that evening. *See* TrialTr.V4 128:10–14; TrialTr.V6 24:6–20.

When Wayne County Sheriff's Deputy Cody Jellison came on duty at 10:00 p.m. on Friday, November 24, he learned that police had been looking for Davis in connection with the Seymour incident. *See* TrialTr.V3 62:10–64:2. Deputy Jellison drove to Davis's camper. He saw a red Dodge pickup parked there. It was registered to Davis. *See* TrialTr.V3 64:1–66:5. Deputy Jellison did not see Davis's orange Hummer, and he did not see anyone there. *See* TrialTr.V3 66:6–67:6.

On Saturday, November 25, when Davis came to Wayne County to turn himself in, Deputy Jellison spoke with him. Deputy Jellison was friendly with Davis, and remarked that Davis "looked like hell."

> **STATE**: Did he respond to that?
> **JELLISON**: Yes.
> **STATE**: What did he say?
> **JELLISON**: He said, "Yes. I spent the night in a field."
> **STATE**: Did you tell him that you had been at his camper the evening before looking for him?
> **JELLISON**: Yes.
> **STATE**: And what did Ethan Davis tell you?
> **JELLISON**: He said, "I know. I saw you."

See TrialTr.V3 68:1–70:23. Deputy Jellison said that Davis's clothes "weren't necessarily messy"—rather, he "just looked kind of disheveled and very, very tired." *See* TrialTr.V3 76:12–19. Davis's fingerprints made him a potential suspect, days later. *See* TrialTr.V5 89:1–90:18.

Cell phone records showed a "ping" to Ross's phone at 3:31 p.m. located about 5 miles from a communications tower, north of Seymour. *See* TrialTr.V5 100:24–103:17. A "ping" is generated when a phone sends or receives data. That matched records from Jensen's phone showing that he sent Ross a text message at 3:31 p.m. *See* TrialTr.V3 34:8–38:14. The Davis farm property was within that 5-mile radius of the Seymour tower. *See* TrialTr.V5 101:18–102:24.

The Davis farm was about 400 acres, and included pastures, timber, cropland, and a homestead. *See* TrialTr.V3 141:20–142:8. Their property was near the public land where Ross hunted. *See* TrialTr.V3 33:3–34:5. Investigators obtained a warrant to search the Davis farm for relevant evidence. *See* TrialTr.V3 28:2–30:18. They found an AR-15 rifle with a scope, hidden underneath a hay mower. TrialTr.V3 183:9–189:24; State's Ex. 57–64; XApp. 29–36; TrialTr.V3 195:14–198:20. Davis had purchased the rifle. *See* TrialTr.V3 199:4–200:23; State's Ex. 79; CApp. 10. Jamison said the hay mower had been there for "maybe 30 days or so." *See* TrialTr.V4 128:20–129:7.

DCI criminalist Victor Murillo analyzed shell casings found at the scene, bullet fragments from Ross's autopsy, and that AR-15 rifle. *See* TrialTr.V3 205:5–208:6. The AR-15 rifle was the right kind of gun

to fire the .223 or 5.56 rounds. *See* TrialTr.V3 208:18–209:11. Murillo examined the shell casings and found unique identifying marks that established that Davis's rifle had fired those rounds. *See* TrialTr.V3 220:9–230:2; State's Ex. 81–84; TrialTr.V3 238:11–239:11. The bullet fragments recovered from Ross's autopsy could have been fired from Davis's rifle, but there were too few identifiers to make a conclusive determination. *See* TrialTr.V3 230:3–236:6.

Other analysts found Davis's fingerprints on the AR-15 rifle, and specifically "on the inside of the front lens cap." *See* TrialTr.V5 19:6–19; *see also* TrialTr.V5 33:17–35:25; State's Ex. 96. They noticed something else on the lens: "a red-appearing substance" that "could be blood." *See* TrialTr.V5 30:23–34:13. Laboratory testing confirmed that it was blood, and DNA analysis established that it was Ross's blood. *See* TrialTr.V5 136:17–139:11. Ross's blood was also discovered on the butt of the rifle, along with another DNA profile that was too weak to identify. *See* TrialTr.V5 139:12–140:25.

Investigators found an additional stash of AR-15 magazines concealed on Davis property, along with an empty AR-15 rifle case, multiple backpacks, and body armor. *See* TrialTr.V5 69:23–72:13; State's Ex. 75–77; XApp. 46–48.

Davis testified at trial. He said he learned that Shayla and L. were staying with Shayla's boyfriend (Kennebeck) while he was out running errands on Friday morning. Davis went to Kennebeck's house in Seymour, saw that Shayla's vehicle was there, and "stopped by." *See* TrialTr.V6 72:23–74:13. After that incident, Davis left with L.—he took gravel roads on the way to Horton's house, because he "didn't want to get stopped with [his] son in the car." *See* TrialTr.V6 74:14–75:21. Davis said Horton was gone, so he went to his parents' house. *See* TrialTr.V6 75:22–76:13. Davis said he went inside for "[m]aybe 10 minutes," but did not see anyone there. *See* TrialTr.V6 76:17–77:12.

Eventually, Davis went to Babbitt's house and dropped L. off. *See* TrialTr.V6 78:11–80:1. Davis said that, after that, he drove back towards his parents' house, but "went to the spot in the field and just stopped." *See* TrialTr.V6 80:2–81:3. He said he parked the Hummer there because it was out of sight, and he "didn't want to go to jail." *See* TrialTr.V6 80:15–81:25; *accord* TrialTr.V6 114:3–25.

Davis said that he stayed in the Hummer, smoking cigarettes and listening to music, until after it got dark. *See* TrialTr.V6 86:1–87:6. After that, Davis said, he "walked over to the Jones Church" to "pray and whatnot" for two hours, before returning to the Hummer.

See TrialTr.V6 87:7–21. He said he spent the night in the Hummer and slept there. Davis insisted that he never left the farm property, and never went to public hunting grounds. *See* TrialTr.V6 97:10–98:13.

Davis admitted that the AR-15 rifle, the ammo canister in the refrigerator, and the magazines in the culvert once belonged to him—but he said they were stolen from him, then planted after the murder. *See* TrialTr.V6 99:7–100:19; TrialTr.V6 115:1–117:16. Davis denied putting the AR-15 rifle, ammo canisters, or any of the other evidence in the locations where those items were found. *See* TrialTr.V6 99:7–100:19. But they had clearly been placed with care—the rifle was placed where it would be protected from the elements, and it was further away from the Davis residence than less incriminating items (like the backpacks and the empty rifle case). *See* TrialTr.V6 128:11–130:11. Additionally, the rifle was hidden under machinery that was far from any public roadway or access road. Davis admitted that an unknown person with a rifle trespassing on Davis property would be unusual and highly visible. *See* TrialTr.V6 126:13–128:10. And even as Davis insisted that the AR-15 rifle had been stolen from him, he was reluctant to agree that it was used to kill Ross. *See* TrialTr.V6 111:1–15 ("It seems that way but the ballistics were inconclusive.").

Davis said that AR-15 rifle was still in the trunk area of the orange Hummer when he last looked through its contents, a few weeks earlier (along with the vest, backpack, firearm case, and two ammo canisters). *See* TrialTr.V6 92:12–94:20; TrialTr.V6 119:6–18. Davis said that there was a period of time when he drove his red Dodge pickup, not the orange Hummer. *See* TrialTr.V6 85:10–19. Davis said that, while he drove the red pickup, the Hummer had been parked "several places," mostly unattended. But even then, it still had opaque plastic covering the space where the back windshield would have been. *See* TrialTr.V6 135:10–137:2; State's Ex. 66; XApp. 38; *cf.* TrialTr.V3 142:17–143:6.

Davis testified that he had sent somebody a text message on Saturday morning. *See* TrialTr.V6 90:18–91:22. Investigators could not access Davis's smartphone, because it was password-protected. They examined Davis's flip-phone, but found that "all of his call logs and text messages had been deleted." *See* TrialTr.V5 75:22–76:24.

Additional facts will be discussed when relevant.

ARGUMENT

I. The evidence was sufficient to establish that Davis was the person who killed Ross.

Preservation of Error

Davis moved for judgment of acquittal on the issue of identity. The court denied the motion. *See* TrialTr.V6 3:12–5:3. That ruling preserved error for this claim on appeal. *See State v. Williams*, 695 N.W.2d 23, 27–28 (Iowa 2005).

Standard of Review

"Sufficiency of evidence claims are reviewed for a correction of errors at law." *See State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012).

Merits

A verdict withstands a sufficiency challenge if it is supported by substantial evidence. "Evidence is substantial if it would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." *State v. Hennings*, 791 N.W.2d 828, 823 (Iowa 2010) (quoting *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008)). In this context, a reviewing court will "view the evidence in the light most favorable to the verdict and accept as established all reasonable inferences tending to support it." *See State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995). Here, strong inferences of guilt arose from the State's evidence.

Identity was proven through circumstantial evidence. "Direct and circumstantial evidence are equally probative." *See* Iowa R. App. P. 6.904(3)(p). Davis owned the AR-15 rifle that fired the shots that left those shell casings on the ground, at the scene of the murder. *See* TrialTr.V3 220:9–230:2; TrialTr.V3 238:11–239:11. That rifle was carefully hidden on Davis farm property, in a location that suggested a level of access to Davis property and a knowledge of farm operations that a trespasser would lack. *See* TrialTr.V3 183:9–189:24; TrialTr.V4 128:20–129:7. Davis was fleeing from police during the period when Ross was killed, and he was desperate to avoid being discovered. *See* TrialTr.V3 68:1–70:23. He had no alibi and was last seen driving a vehicle that contained the same kind of bullets that killed Ross. *See* TrialTr.V4 93:23–94:11. And, most convincingly, the rifle scope had Davis's fingerprint on the lens cover, and Ross's blood splattered onto the lens itself. *See* TrialTr.V5 33:17–35:25; TrialTr.V5 136:17–139:11.

Davis argues "[t]he victim would have bled heavily, and the perpetrator would necessarily have come into significant contact with Ross's blood," which means it was significant that investigators never found blood "on any of [his] clothing or shoes" or "anywhere in or on [his] vehicle." *See* Def's Br. at 41–42. But Davis had plenty of time to

incinerate his clothes, shower, and dispose of any obvious evidence. *See* TrialTr.V3 76:12–19 (noting that Davis arrived at Wayne County on Saturday evening in clean clothes). And investigators *did* find Ross's blood on Davis's rifle, which was hidden on Davis's property. Davis may have succeeded in hiding or destroying other evidence, but that does not entitle him to acquittal.

Davis argues that he had no connection to Ross and no motive to kill him. Davis recognizes that the State's argument was that Ross was on the lam, and "had a motive to kill Ross to prevent him from reporting Davis's presence in the woods." *See* Def's Br. at 42 (citing TrialTr.V6 114:22–25). Davis responds to this argument by stating that Ross did not know Davis, did not know Davis was hiding from law enforcement, and would not have known to report that he had seen Davis—so this motive is "too remote and speculative to inspire such a brutal attack on Ross." *See* Def's Br. at 42–43 (citing TrialTr.V7 64:13–23 and 73:23–74:1). But the State can prove that Davis had a reason to kill Ross without proving that it was a *good* reason—and it need not prove motive at all. "[M]otive is not an element of a crime and proof thereof is not essential to sustain a conviction." *See State v. Knox,* 18 N.W.2d 716, 724 (Iowa 1945); *see also State v. Solomon*, 210

N.W. 448, 450 (Iowa 1926) ("Just what the motive may have been is not disclosed by direct evidence, but proof of motive is not essential to conviction."); *State v. Henderson*, No. 15–1166, 2017 WL 108280, at *5 (Iowa Ct. App. Jan. 11, 2017).

Davis argues "it doesn't make sense" that he would kill Ross to stop Ross from turning him in, because he "ultimately turned himself in on the Seymour incident the very next night." *See* Def's Br. at 43. Indeed, this was a senseless killing. Ironically, murdering Ross was ultimately what motivated Davis to turn himself in. Davis knew he would be an obvious suspect because he had fled after committing another crime involving firearms; he knew nobody would be able to vouch for his whereabouts at the moment when Ross was killed; and he knew that his motive to kill Ross would become obvious to police if he continued to hide. Davis had tried to avoid arrest for his crime in Seymour—but then, erasing that motive for murdering Ross became Davis's best chance to avoid exponentially more severe punishment. He only turned himself in after the situation changed—and after he had enough time to dispose of critical evidence. That explains why he did not wave down Deputy Jellison on Friday night: he still needed more time. *See* TrialTr.V3 68:1–70:23; TrialTr.V6 114:3–25.

Davis disputes motive, but he cannot dispute that he is the only person known to have had the opportunity to encounter and kill Ross, which is "circumstantial evidence that may be considered" and given "great weight." *See State v. Bass*, 349 N.W.2d 498, 501 (Iowa 1984); *accord State v. Moses*, 320 N.W.2d 581, 586 (Iowa 1982) (finding sufficient circumstantial evidence to uphold murder conviction, and noting the killing "could have occurred between 7:00 a.m. and 8:00 a.m., the period for which defendant's conduct was unexplained").

Davis argues that evidence connecting him to the rifle that was used to kill Ross does not automatically prove that he was the killer. *See* Def's Br. at 43–47. Of course, it is still theoretically possible that someone else stole the rifle from Davis, used it to kill Ross, and then planted it on Davis's farm. But Davis cannot prevail by showing that rational fact-finders *could* arrive at a different view of the evidence. Rather, he must prove that a rational fact-finder *could not* accept this as proof of identity beyond a reasonable doubt. *See State v. Keeton*, 710 N.W.2d 531, 535 (Iowa 2006). Davis relies entirely on his own testimony that "the rifle, as well as the ammo can and magazines from the refrigerator and culvert, had been stolen from his Hummer at some point in the month-and-a-half before Ross's death." *See* Def's

Br. at 46 (citing TrialTr.V6 93:24–94:16, 102:8–130:20, 115:1–119:18, 130:12–131:16, 135:10–136:21). This impliedly concedes that, without some explanation, the evidence gives rise to a natural inference that Davis was the person who wielded the gun that was purchased and registered in his name, bore his fingerprints, and was carefully hidden on Davis family property. This hinders his argument that the evidence was insufficient to prove identity after the State's case-in-chief. *See* TrialTr.V6 3:12–5:3. But even after hearing Davis testify, the jury was free to disbelieve his testimony if it found he lacked credibility. *See State v. Nitcher*, 720 N.W.2d 547, 559 (Iowa 2006).

Davis testified that his items had been stolen from his Hummer, used to kill Ross, and then scattered around the Davis property in an attempt to frame him. *See* TrialTr.V6 130:12–131:24. This would mean someone recognized an opportunity to kill Ross at the precise moment when Davis was fleeing arrest without his phones (so that location data could not create an alibi for Davis), and planted the evidence without being seen by Davis's family (or by anyone investigating Ross's death). *See* TrialTr.V6 133:16–18. Jurors were free to reject this wild theory. Once they did, the otherwise unexplained circumstantial evidence was sufficient to prove Davis killed Ross, beyond a reasonable doubt.

II. The trial court did not err when it submitted an instruction that defined "reasonable doubt" correctly. It had discretion to decline to submit Davis's proposed instruction that contained another correct definition.

Preservation of Error

Davis requested submission of his proposed instruction, along with the court's preferred instruction that defined reasonable doubt using language from *State v. Frei*, 831 N.W.2d 70 (Iowa 2013). *See* TrialTr.V1 9:15–11:10; TrialTr.V6 143:12–144:19. The court's ruling that rejected that proposed instruction preserved error for this claim on appeal. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review

"Absent a discretionary component, a court's refusal to give a requested instruction is reviewed for correction of errors at law." *See Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 707 (Iowa 2016). But when a court chooses between two competing versions of instructions conveying the same ideas, where *both* versions are correct, there *is* a discretionary component. "Trial courts have a rather broad discretion in the language that may be chosen to convey a particular idea to the jury." *See State v. Tipton*, 897 N.W.2d 653, 696 (Iowa 2017) (quoting *Stringer v. State*, 522 N.W.2d 797, 800 (Iowa 1994)). Thus, review of this particular ruling is for abuse of discretion.

Davis suggests that review might be for errors at law "because the topic of reasonable doubt is mandatory rather than merely a discretionary or cautionary instruction." *See* Def's Br. at 48–50. But this elides the key distinction. The logic of *Alcala* was that "Iowa law requires a court to give a requested instruction if it correctly states the applicable law and is not embodied in other instructions," and a claim that a trial court erred in concluding that it was not *required* to grant requested relief is reviewed for errors at law. *See Alcala*, 880 N.W.2d at 707 (quoting *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994)). This makes sense: "The verb 'require' is mandatory and leaves no room for trial court discretion." *See id.* However, a trial court is *not* required to grant a request for a jury instruction that *is* already "embodied in other instructions." *See id.* (quoting *Sonnek*, 522 N.W.2d at 47, and citing *Weyerhaeuser Co. v. Thermogas Co.*, 620 N.W.2d 819, 823–24 (Iowa 2000), and *Herbst v. State*, 616 N.W.2d 582, 585 (Iowa 2000)). Whenever a trial court is *required* to instruct on a particular concept, it satisfies that requirement if that concept is adequately explained in its other instructions, considered "as a whole rather than in isolation." *See State v. Benson*, 919 N.W.2d 237, 242 (Iowa 2018) (citing *State v. Harrison*, 914 N.W.2d 178, 188 (Iowa 2018)). But a request to replace

a correct instruction that adequately explains the applicable law with another instruction that uses different wording or provides additional explanation is a situation where "the requested jury instruction is not required or prohibited by law." *See State v. Plain*, 898 N.W.2d 801, 816 (Iowa 2017) (citing *Alcala*, 880 N.W.2d at 707–08). If something is neither required nor prohibited, it is discretionary—and review of a trial court's decision to grant or deny a request for discretionary action is for abuse of discretion. *See id.*; *accord State v. McNeal*, 897 N.W.2d 697, 710 (Iowa 2017) (Cady, C.J., concurring specially) ("Discretion expresses the notion of latitude."). This distinction comports with Iowa's longstanding recognition that "[a] trial court is not required to word jury instructions in any particular way," and that "[i]t is sufficient if the instruction states the applicable law so that a jury composed of nonlawyers can understand it." *See State v. Morrison*, 368 N.W.2d 173, 175–76 (Iowa 1985); *see also State v. Uthe*, 542 N.W.2d 810, 815 (Iowa 1996) ("It is well settled that a trial court need not instruct in a particular way so long as the subject of the applicable law is correctly covered when all the instructions are read together."); *accord Tipton*, 897 N.W.2d at 696 (quoting *Stringer*, 522 N.W.2d at 800); *State v. Grady*, 183 N.W.2d 707, 719 (Iowa 1971).

The most precise statement of the standard of review would recognize that there are two distinct questions. First, this Court must determine whether the concept described in the requested instruction is already present in other instructions. If not, then the trial court would be *required* to submit the requested instruction. Under *Alcala*, review of the court's determination that it was not *required* to submit an instruction (and had discretion to reject it) is for errors at law. *See Alcala*, 880 N.W.2d at 707; *accord Benson*, 919 N.W.2d at 241–42, 246–47 (reviewing for correction of errors at law, and finding that "denial of Benson's requested specific-intent instruction was not erroneous since the submitted instructions already embodied the requested instruction and accurately conveyed the law"). If the court was correct that its instructions were already adequate, then it had discretion to grant or deny the request for an additional instruction. Its ruling on that request would be reviewed for abuse of discretion. *See Plain*, 898 N.W.2d at 816 (citing *Alcala*, 880 N.W.2d at 707–08).

No matter what standard of review is applied, "[e]rror in giving or refusing to give a jury instruction does not warrant reversal unless it results in prejudice to the complaining party." *See id.* at 817 (quoting *State v. Hoyman*, 863 N.W.2d 1, 7 (Iowa 2015)).

Merits

Davis requested the ISBA uniform/model jury instruction on reasonable doubt, which includes a paragraph that characterizes a reasonable doubt as one that would make a person "hesitate to act." *See* Def's Br. at 51–64. But the jury instruction that *was* submitted matched the jury instruction approved in *State v. Frei*, word for word. *Compare* Jury Instr. 7; App. 7; *with Frei*, 831 N.W.2d at 76. Davis admits that "the submitted instruction is a legally correct formulation or explanation of reasonable doubt." *See* Def's Br. at 57 (citing *Frei*, 831 N.W.2d at 75–79). That concession answers the first question described in the discussion on the standard of review. The concept of reasonable doubt was already explained using language that has been approved by the Iowa Supreme Court, so the trial court did not err in finding that its proposed instructions already explained the concept. *See* TrialTr.V6 144:1–9. Therefore, the trial court had discretion as to whether to grant this request for an additional instruction, and Davis must establish that denying his request was an abuse of discretion.

Once the key inquiry is formulated correctly, the problem with this claim becomes clear: the trial court's discretion to choose among jury instructions that accurately explain the law is extremely broad.

> Trial courts have a rather broad discretion in the language that may be chosen to convey a particular idea to the jury. Unless the choice of words results in an incorrect statement of law or omits a matter essential for the jury's consideration, no error results.

See Stringer, 522 N.W.2d at 800 (citing *Grady*, 183 N.W.2d at 719); *accord State v. Stallings*, 541 N.W.2d 855, 857 (Iowa 1995) (quoting *State v. Rupp*, 282 N.W.2d 125, 126 (Iowa 1979)) ("The court may phrase the instructions 'in its own words as long as the instructions given fully and fairly advise the jury of the issues they are to decide and the law which is applicable.'"); *State v. Shipley*, 146 N.W.2d 266, 269 (Iowa 1966) ("[I]nstructions given must be taken and construed as a whole and if the point raised in the requested instruction is substantially given or covered by those given it may properly be refused even if it contains a proper statement of the law"), *overruled on other grounds by State v. Bester*, 167 N.W.2d 705 (Iowa 1969).

Trial courts even enjoy broad discretion in choosing between instructions that give correct definitions of "reasonable doubt." *See, e.g.*, *State v. McFarland*, 287 N.W.2d 162, 163 (Iowa 1980) (quoting *State v. Finnegan*, 237 N.W.2d 459, 460 (Iowa 1976)) ("[N]o particular model or form is required in advising the jury concerning the meaning of reasonable doubt as long as a suitable standard is given."); *accord*

State v. Chamberlain, No. 17–1426, 2018 WL 6719730, at *6–7 (Iowa Ct. App. Dec. 19, 2018) (noting that *Frei* held "failure to include the 'hesitate to act' language is not error" and rejecting similar challenge without further analysis); *State v. Quang*, No. 12–0739, 2013 WL 4504934, at *5–6 (Iowa Ct. App. Aug. 21, 2013) (noting that *Frei* held "there was no error in giving this instruction," and rejecting challenge without further analysis); *State v. Soni*, No. 11–1480, 2012 WL 3200852, at *2–3 (Iowa Ct. App. Aug. 8, 2012) (rejecting identical challenge because "[t]his instruction has been expressly approved by the supreme court as being an adequate explanation of the law"); *State v. Tabor*, No. 10–0475, 2011 WL 238427, at *2–3 (Iowa Ct. App. Jan. 20, 2011) (rejecting identical challenge because the instruction given at trial was an "adequate explanation of reasonable doubt," and explaining that "our job is not to determine whether Tabor's proposed instruction *also* would have been an accurate statement of law").

Davis would need to show that submitting a "firmly convinced" instruction and rejecting a supplemental "hesitate to act" instruction was somehow unreasonable or incorrect, in order to demonstrate an abuse of discretion. *See, e.g.*, *Stringer*, 522 N.W.2d at 800. However, in *Frei*, the Iowa Supreme Court reached the opposite conclusion:

> We approved a very similar formulation of the reasonable doubt standard in *State v. McFarland*, 287 N.W.2d 162, 163 (Iowa 1980). The relevant instructions in *McFarland* authorized the jury to convict the defendant only if they were "firmly and abidingly convinced" of the defendant's guilt. We concluded the instructions sufficiently "set out an objective standard for measuring the jurors' doubts."
>
> Since [*Victor v. Nebraska*, 511 U.S. 1 (1994)] was decided in 1994, the "firmly convinced" standard has achieved extensive recognition and is likely the formulation of the reasonable doubt standard most widely approved by American jurists, academics, and litigants. . . .
>
> In her concurring opinion in *Victor*, Justice Ginsburg stoutly endorsed a reasonable doubt instruction proposed by the Federal Judicial Center, characterizing it as "clear, straightforward, and accurate." . . . That instruction embraced firmly convinced language comparable to that used in the instruction challenged in this case . . . .
>
> [. . .]
>
> We find no reversible error in the "firmly convinced" formulation used by the district court in this case. . . . The word "firmly" is not arcane or obscure, but rather is a plain, well-understood word commonly used in modern speech. We believe it adequately expressed—within the due process parameters articulated in *Victor*—the extent of certitude the jury must possess to convict a defendant of a crime in this state. Accordingly, we conclude the district court did not err when it instructed the jury on reasonable doubt.

Frei, 831 N.W.2d at 78–79. Davis is certainly right that "*Frei* also made explicit that this was not the *only* correct formulation." *See* Def's Br. at 57 (citing *Frei*, 831 N.W.2d at 79 n.7). But it *is* correct, and that is all that matters. *See Tabor*, 2011 WL 238427, at *2–3. Davis does not argue that *Frei* is wrong, so his claim cannot prevail.

Davis argues that providing multiple explanations or definitions of reasonable doubt would make the instruction even *more* correct. *See* Def's Br. at 60–64. But many prominent jurists disagree. In *Victor*, Justice Blackmun and Justice Ginsburg each expressed concerns that "the 'hesitate to act' language is far from helpful, and may in fact make matters worse by analogizing the decision whether to convict or acquit a defendant to the frequently high-risk personal decisions people must make in their daily lives." *See Victor*, 511 U.S. at 34–35 (Blackmun, J., concurring in part and dissenting in part) (citing *Victor*, 511 U.S. at 24–25 (Ginsburg, J., concurring in part and in the judgment)). The Indiana Supreme Court recommends that Indiana trial courts use a "firmly convinced" instruction, "preferably with no supplementation or embellishment." *See Winegeart v. State*, 665 N.E.2d 893, 901–02 (Ind. 1996). Both the Connecticut Supreme Court and the New Jersey Supreme Court have urged the use of model language that provides a "firmly convinced" definition, without any mention of hesitation. *See State v. Jackson*, 925 A.2d 1060, 1069–70 & n.6 (Conn. 2007) (citing *State v. Medina*, 685 A.2d 1242, 1251–52 (N.J. 1996)). The Arizona Supreme Court held that "[a]llowing varying definitions" of this tenet "detracts from the goal of a uniform and equal system of justice"—so

it crafted a model instruction using "firmly convinced" language, and it commanded Arizona trial courts to stop using "the multiple and varying definitions courts have developed over the years, some of which justify the criticism that definitions can distort its meaning." *See State v. Portillo*, 898 P.2d 970, 973–74 (Ariz. 1995); *accord Himple v. State*, 647 A.2d 1240, 1243 (Md. Ct. Spec. App. 1994) ("[T]he risk of reversal arises when an instruction departs from the pattern instruction and the risk of reversal increases with the degree of departure from that pattern instruction."). And Iowa courts, too, have been warned not to "innovate" in defining reasonable doubt:

> Whatever their value in other areas of the law in adding zest or currency to otherwise all too predictable proceedings, personal variations on elements such as reasonable doubt seldom represent sound judicial practice. A common effect of such variations is to excite both controversy and appellate litigation without any offsetting assurance that the attempted clarification is either necessary or successful. . . . [W]e share the concern of those courts which, although tolerating similar instructions, had disapproved of them as flirting unnecessarily with an impermissible lessening of the government's burden of proof. We therefore suggest that district courts in this circuit refrain in the future from going outside of the consistently approved stock of charges on reasonable doubt with variations such as the one employed here.

See State v. McGranahan, 206 N.W.2d 88, 92 (Iowa 1973) (quoting *United States v. MacDonald*, 455 F.2d 1259, 1263 (1st Cir. 1972)).

Thus, while the trial court had broad discretion to submit any of the acceptable definitions of reasonable doubt, its decision not to stray from the exact verbiage of the instruction that was approved in *Frei* was a prudent exercise of that discretion. *See Frei*, 831 N.W.2d at 79.

Davis claims that "research confirms" that "use of a differing but equally correct instruction can nevertheless generate a different outcome." *See* Def's Br. at 61–62. It is probably not possible to control for confounding effects of unique interactions among jurors in studies with small sample sizes. If measurable, such results would not create any right to demand submission of whichever definition might push jurors towards one party's desired result. But to the extent that any measurable differential impact on deliberations might exist, available research tends to suggest that the "firmly convinced" instruction is uniquely effective at communicating the heightened burden of proof:

> [T]he [firmly convinced] instructions produced a higher self-reported standard of reasonable doubt than the other four instruction conditions [including "real doubt means a hesitation"]. In addition, [firmly convinced] was the only instruction set that showed a significant increase in the self-reported standard of reasonable doubt from pre- to postdeliberation measurements in both the weak and strong cases. This finding suggests that the juries in this condition very probably identified the appropriate standard during their discussions.

See Irwin A. Horowitz, *Reasonable Doubt Instructions: Commonsense Justice and Standard of Proof*, 3 PSYCHOL. PUB. POL'Y & L. 285, 296 (1997), *cited in Frei*, 831 N.W.2d at 78. Davis quotes from an article by H. Richard Uviller to suggest that jurors need "parallel articulation" to understand the definition of reasonable doubt. *See* Def's Br. at 60 (quoting H. Richard Uviller, *Acquitting the Guilty: Two Case Studies on Jury Misgivings and the Misunderstood Standard of Proof*, 2 CRIM. L.F. 1, 38 (1990)). But Davis requested an instruction defining reasonable doubt by reference to judgment of a "reasonable person," rather than each juror's own evaluation of the evidence. *See* Def's Br. at 52. Uviller explains why such a "parallel articulation" is incorrect, and he describes how it misled one juror into acquitting a murderer:

> There are two possible ways of understanding the reasonable doubt standard as normally articulated to a jury by the judge presiding: the objective and the subjective. Under the objective understanding, if juror A concedes that juror B has a persistent, good-faith doubt based on the evidence, then juror A must vote "not guilty" even though she does not share juror B's doubt. Even if jurors conclude only that some imaginary, conscientious juror might entertain some doubt concerning the defendant's guilt, the objective view would acknowledge a reasonable doubt in the case and require the jury to acquit though none of them actually doubts the defendant's guilt.
>
> Under the subjective interpretation, the question is first whether an individual juror, carefully weighing all the evidence and giving due consideration to the views of fellow jurors, personally doubts the guilt of the defendant.

> If this step produces a subjective sense of doubt in a juror's mind, the juror must ask himself the next question: whether the doubt is reasonable. Under this subjective reading, if a juror personally has no reasonable doubt, then notwithstanding the imperfections in the proof that might give others reason for doubt, the juror should vote "guilty."
>
> I asked [juror] April Chamberlain which of these two she thought was the correct understanding and which she thought her jury had applied. Without hesitation, she chose the objective. It might have been a critical misunderstanding.
>
> [. . .]
>
> [The subjective version] correctly reflects a basic tenet of the jury system: after listening receptively to one another, each juror must use her or his own judgment to reach a personal conclusion. . . . [I]f the proof as a whole convinces a juror to the point of virtual or "moral" certainty, that juror should vote—and continue to vote—for conviction. Is it conceivable that one can appreciate that others might reasonably entertain a doubt where one feels moral certainty? I hope so, for that is the assumption of the law of verdicts.
>
> Perhaps, in a fair-minded person, to recognize that another's cause for doubt is completely reasonable is to share it. And once that reason for doubt is assimilated into one's own belief system, it becomes (under the appropriate subjective view) a doubt that undermines belief and should generate a "not guilty" vote . . . . But the contradiction left April Chamberlain confused and uncomfortable; she had voted to acquit a person she "believed" was guilty of a deliberate and unprovoked murder. That, to her, was a verdict contrary to her judgment.

See Uviller, 2 CRIM. L.F. at 34–37. Here, the court was right to reject Davis's request because his instruction gave an objective definition of reasonable doubt, which threatened to confuse and mislead the jury.

Davis suggests that, as the defendant whose liberty is at stake, he should get to choose the instructions. *See* Def's Br. at 62–63. But the State is also entitled to a fair trial. *See State v. Case*, 75 N.W.2d 233, 240 (Iowa 1956). And "[i]t is the trial court's duty to see that a jury has a clear and intelligent understanding of what it is to decide." *See Sonnek*, 522 N.W.2d at 47. This is especially true when trial courts must guard against post-trial allegations that ineffective assistance of defendant's counsel undermined confidence in the verdict, through a request for a flawed model jury instruction. *See State v. Robinson*, 859 N.W.2d 464, 490 (Iowa 2015) (Wiggins, J., concurring specially) ("We do not preapprove or give a presumption of correctness to the instructions published by the ISBA. . . . [W]e can never delegate the formulation of the law to the instruction committee."); *Chamberlain*, 2018 WL 6719730, at *7–8 (finding trial counsel was ineffective and reversing kidnapping conviction because the trial court submitted the ISBA model jury instruction that defined elements of kidnapping). The centrality of the burden of proof beyond a reasonable doubt to a criminal prosecution demands special attention from the trial court. It is not a minor nicety that can be conceded out of sportsmanship, nor a proper object of strategic gamesmanship from defense counsel.

Finally, Davis relies on *Porter v. Iowa Power & Light Co.* and argues that it is reversible error to refuse a request for an instruction that "amplifies" a concept that is explained in other instructions. *See* Def's Br. at 55–57, 63–64 (citing *Porter v. Iowa Power & Light Co.*, 217 N.W.2d 221, 234–35 (Iowa 1974)). But this misrepresents the holding of *Porter*: refusing to submit an "amplifying" instruction is only reversible error where the "principle of law" that it would define is "not covered by other instructions." *See Porter*, 217 N.W.2d 234–35. This includes specifications of negligence that identify a specific duty that other instructions have not identified. *See id.* However, for other requested instructions that aligned with already-present instructions (and presumably would have amplified them further), *Porter* held that denying a request to submit them was not reversible error:

> Plaintiff's requested instructions 9, 11 and 12 all related to principles which we find were substantially incorporated in the court's instructions. When the matters raised in a requested instruction are so covered, 'no error results from a failure to submit the issues in the form requested.'

See id. (citing *McCarthy v. J. P. Cullen & Son Corp.*, 199 N.W.2d 362, 367–68 (Iowa 1972)). Consequently, Iowa cases applying *Porter* hold that it is not reversible error to refuse requests for instructions that are "adequately encompassed elsewhere in the instructions." *See, e.g.*,

Eisenhauer ex rel. T.D. v. Henry County Health Center, 935 N.W.2d 1, 10–16 (Iowa 2019). Thus, it cannot be reversible error to submit the *Frei* instruction that "adequately expressed . . . the extent of certitude the jury must possess to convict a defendant of a crime in this state." *See Frei*, 831 N.W.2d at 79. Therefore, Davis's challenge fails.

III. Davis cannot identify any ruling that could amount to reversible error during his counsel's closing argument.

Preservation of Error

As Davis's counsel began to talk about reasonable doubt in his closing argument, the State objected to "language that's on this particular slide" that was "not the proper instruction." *See* TrialTr.V7 53:9–12. Counsel for both parties approached for a bench conference, off the record. After that, Davis's counsel resumed by discussing the "firmly convinced" standard for reasonable doubt—but no ruling on the objection appears in the transcript. *See* TrialTr.V7 53:9–54:2. Davis's motion for new trial and the State's resistance both reference a ruling on that objection. *See* Motion for New Trial (3/8/19) at 1–2; App. 10–11; Resistance (3/15/19) at 2; App. 14. But it is unclear what this ruling said, and what it directed counsel to do (or not to do). And the ruling on Davis's motion for new trial did not mention or rule on this claim, beyond the instructional challenge. *See* Sent.Tr. 3:12–6:19.

"It is defendant's obligation to provide this court with a record which affirmatively discloses the error upon which he relies." *State v. Ryder*, 315 N.W.2d 786, 788 (Iowa 1982) (quoting *State v. Mark*, 286 N.W.2d 396, 402 (Iowa 1979)); *accord Mumm v. Jennie Edmundson Memorial Hosp.*, 924 N.W.2d 512, 520 (Iowa 2019). It is impossible to assess the rationale or scope of this unknown ruling, and this Court should not entertain this allegation of unascertainable error.

Standard of Review

If review were possible, review of a ruling on "[t]he scope of closing arguments" would be for abuse of discretion. *See State v. Melk*, 543 N.W.2d 297, 301 (Iowa Ct. App. 1995).

Merits

Davis argues that he should have been permitted to describe reasonable doubt with definitional terms that differed from the instruction selected by the trial court and submitted to the jury. *See* Def's Br. at 67–68. Logically, either he is wrong, or error is harmless. If counsel would have described reasonable doubt in a way that would have changed its meaning, the trial court would be right to disallow it. *See, e.g.*, *State v. Clay*, 824 N.W.2d 488, 497–98 (Iowa 2012) (noting counsel "can argue the law, but cannot instruct the jury on the law");

State v. Mayes, 286 N.W.2d 387, 392 (Iowa 1979) ("[C]ounsel is bound, in such arguments, by the trial court's determination of the law and is well-advised to acknowledge that the judge will be the one who instructs on the law. It is not proper argument to read from a law book."). On the other hand, if the court directed counsel to say "firmly convinced" in place of other verbiage that carried equivalent meaning, any error would be harmless. Counsel could still advance a view of the evidence where such doubt existed—indeed, he did. *See* TrialTr.V7 52:24–55:9. Either this unknown ruling was correct, or it changed nothing.

To argue prejudice, Davis refers back to his argument from the previous division. *See* Def's Br. at 68. In that argument, he claims that "[s]cientific study" proves that using a different correct instruction can affect the outcome. *See* Def's Br. at 66 (citing Darryl K. Brown, *Regulating Decision Effects of Legally Sufficient Jury Instructions*, 73 S. CAL. L. REV. 1105, 1110–13 (2000)). But that article primarily examines two studies. One of them found that the "firmly convinced" instruction is the only variant that actually gets the point across:

> [F]or the weak case, the only instruction for which there were no convictions was the Federal Judicial Center's. For all others, there were convictions about half the time. . . . Jurors perform differently in response to the firmly convinced standard, which keeps the focus on the government's burden of proof.

Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105, 122, 147 (1999); *accord* Brown, 73 S. CAL. L. REV. at 1110–11 (noting that "firmly convinced" instruction was the only instruction in study that "led jurors to acquit consistently" in a weak case). The other study did not examine instructions defining reasonable doubt. *See* Stephen P. Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627 (2000). There is no way for Davis to establish that error was prejudicial for either of his two claims targeting explanations of reasonable doubt, because he already benefitted from the best pattern instruction available.

IV. The trial court did not err in giving a verdict-urging instruction. The jury deliberated for four more hours after receiving the instruction. It was not coercive.

Preservation of Error

Davis objected to the verdict-urging instruction, and the court overruled his objection. *See* TrialTr.V8 3:9–6:22. This objection and ruling preserved error. *See Lamasters*, 821 N.W.2d at 864.

Standard of Review

Because "the trial judge has considerable discretion" on whether to submit a verdict-urging instruction, review is for abuse of discretion. *See State v. Campbell*, 294 N.W.2d 803, 808–09 (Iowa 1980).

Merits

After about seven hours of deliberations, the court received a note indicating "the jury may be deadlocked." *See* TrialTr.V8 3:7–12. After confirming that was true, the court gave this instruction:

> I'm going to instruct you further. You've been deliberating on this case now for a considerable period of time, yesterday afternoon and most of this morning, and the Court deems it proper to advise you further in regard to the desirability of agreement, if possible.
>
> The case has been exhaustively and carefully tried by both sides and has been submitted to you for decision and verdict, if possible. It's the law that a unanimous verdict is required, and while this verdict must be the conclusion of each juror and not mere acquiescence of the jurors in order to reach an agreement, it is still necessary for all jurors to examine the issues and questions submitted to them with candor and fairness and with proper regard for, and deference to, the opinion of each other.
>
> A proper regard for the judgment of others will greatly aid us in forming our own judgment. So each juror should listen to the arguments of the other jurors with a disposition to be convinced by them, and if the members of the jury differ in their views of the evidence, such difference of opinion should cause them to scrutinize the evidence more closely and to reexamine the grounds of their problem.
>
> Your duty is to decide the issues of fact which have been submitted to you, if you can conscientiously do so.
>
> In conferring, you should lay aside all mere pride of opinion and should bear in mind that the jury room is no place for espousing and maintaining in a spirit of controversy either side of a cause. The aim ever to be kept in view is the truth as it appears from the evidence, examined in the light of the instructions of the Court.

> So you will again retire to the jury room, examine your differences in the spirit of fairness and candor, and try to arrive at a verdict. So I am advising you to please continue to review the evidence, review the jury instructions that have been provided to you, and continue your deliberations.

TrialTr.V8 5:2–6:22. The jury resumed deliberations at 11:33 a.m., and reached a verdict at about 3:59 p.m. *See* TrialTr.V8 6:21–7:17.

Davis recognizes that, under Iowa law, "[t]he ultimate test is whether the instruction improperly coerced or helped coerce a verdict or merely initiated a new train of real deliberation which terminated the disagreement." *See* Def's Br. at 77 (quoting *Campbell*, 294 N.W.2d at 808). But he argues that it is impossible for him to show prejudice, given the bar on testimony from jurors about deliberations. *See* Def's Br. at 80–82. From that, Davis argues prejudice should be presumed if a trial court does not "closely follow" guidance in *Campbell*, which recommended directing the jury to re-read an ABA model instruction that it already received (which resembles a jury instruction that was submitted in this case). *See* Def's Br. at 82–85; *compare Campbell*, 294 N.W.2d at 812, *with* Jury Instr. 25; App. 9.

Davis recognizes that this verdict-urging instruction was adopted from *State v. Parmer*, No. 13–2033, 2015 WL 2393652, at *6–7 (Iowa Ct. App. May 20, 2015). *See* Def's Br. at 70; TrialTr.V8 4:8–12. But he

does not present any argument as to why *Parmer* was wrong to hold that this instruction "avoids those pitfalls" identified in *Campbell*, and to uphold it on appellate review. *See Parmer*, 2015 WL 2393652, at *6.

Davis returns to "scientific study" and "empirical research"—this time, relying on a student comment. *See* Def's Br. at 74–75, 87 (citing Samantha P. Bateman, Comment, *Blast It All: Allen Charges and the Dangers of Playing with Dynamite*, 32 U. HAW. L. REV. 323, 333–41 (2010)). This comment focuses on three empirical studies. *See* Bateman, 32 U. HAW. L. REV. at 333–41. The first one replaced jurors in actual deliberations with participants who passed notes through an experimenter and received canned, pre-written contributions—so it would be impossible to know if verdict-urging instructions prompted actual deliberation. *See* Saul M. Kassin et al., *The Dynamite Charge: Effects on the Perceptions and Deliberation Behavior of Mock Jurors*, 14 L. & HUM. BEHAV. 537, 539–42 (1990). Moreover, the instruction used in that experiment was a classic *Allen* charge—it included this:

> If most members of the jury are for conviction, a dissenting juror should consider whether his or her doubt is a reasonable one, considering that it made no impression upon the minds of so many other equally honest and intelligent jurors. If, on the other hand, the majority is for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which is not concurred in by the majority.

Id. at 541. It is no surprise that such language "empowers the voting majority relative to the minority." *See id.* at 542–43. That just shows that participants followed the instructions! Fortunately, Iowa courts prohibit use of instructions "directing only minority jurors to doubt the correctness of their judgments and to reevaluate their opinions." *See Campbell*, 294 N.W.2d at 809; *accord Parmer*, 2015 WL 2393652, at *6 (citing *Campbell*, 294 N.W.2d at 809) ("*Allen* instructions should not discuss the expense of litigation, the numerical split of the jury, or direct jurors in the minority to reevaluate their thought processes."). The instruction in this case contained none of that *Allen* dynamite, just as *Parmer* and *Campbell* instructed. *See* TrialTr.V8 5:2–6:22.

The second study used the same *Allen* dynamite instruction. *See* Vicki L. Smith & Saul M. Kassin, *Effects of the Dynamite Charge on the Deliberations of Deadlocked Mock Juries*, 17 L. & HUM. BEHAV. 625, 629 (1993). But this study had mock jurors participate in deliberations, and included an intermediate group that received a mid-deliberation instruction stating "the verdict requires a unanimous decision, which has not yet been reached," along with copies of the trial transcript. *See id.* at 629–30. Using a *weak* verdict-urging instruction produced results on par with groups where no such instruction was given at all.

> We had hoped that the transcript procedure would elicit changes in voting without bringing high levels of normative pressure to bear on jurors in the minority. However, there were actually somewhat fewer vote changes following this intervention. Videotapes of the deliberations revealed that this decline was due to the fact that jurors tended to page through the transcripts and quote individual pieces of evidence during this segment, rather than integrate information and discuss the case as a whole. Indeed, the rate of vote changes rebounded to its former level in later segments of deliberation, though it did not effectively move deadlocked juries toward a verdict.
>
> [. . .]
>
> As an alternative to the dynamite charge, we introduced a transcript intervention designed to break the deadlock by refocusing attention on the evidence. Our goal was to move juries toward unanimity through high levels of informational rather than normative influence. The results of this effort were mixed. . . . [It] did not facilitate the drive toward unanimity, as vote changes were no more frequent in this condition than in the no-instruction control group.

See id. at 632–33, 638, 641. Therefore, that Davis cannot be correct when he repeats Bateman's assertion that "[p]sychological research reveals a 'basic truth: no matter how "neutral" or sanitized judges render their *Allen* charges, those charges nonetheless exert an impermissible form of pressure on deliberating jurors.'" *See* Def's Br. at 74 (quoting Bateman, 32 U. HAW. L. REV. at 323). That is disproven by the empirical research that Bateman discusses at length: there *must* be ways to remind jurors that unanimity is required without coercing them into it, because these researchers stumbled on one by accident.

Davis also claims: "[s]tudies of actual deliberating Arizona juries show the charge comes at an already low point during the deliberations and 'plays upon already extant stressors to encourage those jurors to abandon their conscientious-held beliefs in order to appease the judge and their fellow jurors." *See* Def's Br. at 75 (citing Bateman, 32 U. HAW. L. REV. at 340). The Arizona study that Bateman references cannot and does not show that—it examined "real civil jury deliberations when unanimity is not required." *See* Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 210 (2006).

As a final remark on Bateman, note that Bateman believes that the ABA model instruction that Davis applauds is *also* coercive. *See* Bateman, 32 U. HAW. L. REV. at 350–53 ("[E]ven a neutral ABA charge may again be nothing more than a superficial solution that fails to solve the substantive coerciveness problem inherent in any supplemental instruction, beyond perhaps a mere exhortation to 'please continue deliberating.'"). The State cannot find any court that has ever agreed, nor any empirical research that supports that view. *But see Campbell*, 294 N.W.2d at 812 (stating ABA instruction is acceptable because it includes "[n]o extraneous, irrelevant and potentially coercive factors").

Campbell recommended the ABA model instruction, but it also reiterated the point that "the trial judge has considerable discretion in determining whether the verdict-urging instructions should be given." It also rejected any bright-line rule of total impermissibility with the observation that "each case is to be decided on its own circumstances." *See Campbell*, 294 N.W.2d at 808–09. Davis claims that submitting this instruction was error, but does not identify any actual problem with the instruction's language—there is no objectionable statement that can be identified as coercive under *Campbell* or under any other Iowa precedent. *See* Def's Br. at 85–86; *but see* TrialTr.V8 5:2–6:22; *Parmer*, 2015 WL 2393652, at *6–7; *State v. Power*, No. 13–0052, 2014 WL 2600214, at *4 (Iowa Ct. App. June 11, 2014) (determining trial court did not abuse its discretion in using similar instruction). Davis argues "[t]his was the jury's first indication of a deadlock, and the jury had deliberated seven hours—a simple direction to continue deliberations would have sufficed." *See* Def's Br. at 85. But the court had broad discretion in assessing the severity of that "first indication," based on facts reported by the jury attendant. *See* TrialTr.V8 3:7–12. And before giving the instruction, the trial court asked the foreperson whether he "consider[ed] the jury to be deadlocked." *See* TrialTr.V8

5:4–10. Davis cannot show that it was an abuse of discretion to credit the foreperson's affirmative answer as signifying true deadlock, after seven hours of deliberation over two days. The instruction in *Campbell* was given after "approximately six and one-half hours" of deliberation. *See Campbell*, 294 N.W.2d at 808. Giving the instruction in *Campbell* was not reversible error—and *this* instruction omitted every part of the *Campbell* instruction that *Campbell* found to be problematic. *See id.* at 809–12; TrialTr.V8 5:2–6:22; *accord Parmer*, 2015 WL 2393652, at *6–7 (cataloging problematic features of some instructions, then explaining that "[t]he instruction given here avoids those pitfalls"); *Power*, 2014 WL 2600214, at *4. Davis's claim of error is meritless.

Even if the trial court erred by giving this instruction, Davis would need to establish that error was prejudicial. *See Campbell*, 294 N.W.2d at 809–10 (noting "the fact that such a statement is inaccurate does not mean that it is necessarily or even likely prejudicial" and also noting that "reversal on grounds of its usage has been limited to cases where surrounding circumstances demonstrated prejudice"). Davis disagrees. He argues that "appellate courts are ill-equipped" to assess the actual coercive effect on jurors. *See* Def's Br. at 73 (quoting *State v. Czachor*, 413 A.2d 593, 595–96 (N.J. 1980)). But that just strengthens

the rationale for committing the issue to the trial court's exercise of reasoned discretion after making a record, hearing arguments, and evaluating the verdict-urging instruction's potential impact firsthand. Indeed, in *State v. Wright*, the Iowa Court of Appeals upheld an order granting a new trial after the trial court gave an instruction containing the disfavored "must be decided by some jury" language. *See State v. Wright*, 772 N.W.2d 774, 776 (Iowa Ct. App. 2009). On appeal, the State challenged that order—but the appellate court held that it was not an abuse of discretion for the *trial court* to decide that a retrial was warranted. *See id.* at 778–79. It observed: "That discretion was exercised by an experienced and well-seasoned trial judge who was in the best position to observe the trial dynamics and to sense whether something went awry in the jury room." *See id.* at 778. That illustrates a guiding principle: trial courts are well-equipped and well-positioned to exercise discretion on whether to give supplemental instructions and whether to grant relief on a post-trial claim that such instructions were coercive. An appellate court should decline to reverse unless that broad discretion was exercised "for reasons clearly untenable or to an extent clearly unreasonable," and unless prejudice is apparent. *See State v. Gomez Garcia*, 904 N.W.2d 172, 177 (Iowa 2017).

For prejudice, "[t]he ultimate test is whether the instruction improperly coerced or helped coerce a verdict or merely initiated a new train of real deliberation which terminated the disagreement." *See Parmer*, 2015 WL 2393652, at *6 (quoting *Campbell*, 294 N.W.2d at 808). No indicia of coercion are present here. The instruction does not single out minority jurors, mention the expense of trial or retrial, ascribe significance to the current numerical split, or urge any juror to defer, acquiesce, or surrender—and indeed, it forbade them from returning a verdict that was "mere acquiescence of the jurors in order to reach agreement." *See* TrialTr.V8 5:2–6:22. Davis argues that coercion is apparent because there were no additional jury questions after this instruction, "as might indicate the jury was struggling with a particular legal question which, once resolved by the court, generated true juror unanimity." *See* Def's Br. at 87–88. But jurors can resolve disputes of fact through deliberations, and the absence of questions (or further notes indicating deadlock) shows that jurors spent those next five hours *actually deliberating*—weighing the evidence and untangling any snarls that arose from conflicting views of the facts. *See State v. Piper*, 663 N.W.2d 894, 912 (Iowa 2003), *overruled on other grounds by State v. Hanes*, 790 N.W.2d 545, 551 (Iowa 2010)

("Contrary to the defendant's contention that the length of time [of deliberation after a similar instruction] indicates coercion, we think it is indicative of the jurors' careful reconsideration of the evidence.").

Davis argues that "the language of the instruction supports its coercive impact." *See* Def's Br. at 88–90. But his argument hinges on jurors obsessing over specific phrases in the supplemental instruction and interpreting those phrases as personal attacks on their motives. Jurors were specifically cautioned against "mere acquiescence," and it asked them to reach unanimity "if [they] can conscientiously do so." *See* TrialTr.V8 5:11–6:22. This limited any coercive impact, and "[w]e presume jurors follow the court's limiting instructions." *See Gomez Garcia*, 904 N.W.2d at 183–84 (citing *Sanford*, 814 N.W.2d at 620). The instruction did not target minority jurors; it applied to "each juror" and "all jurors." *See* TrialTr.V8 5:17–6:7. This Court should reject Davis's call to abandon the presumption that jurors can heed neutral instructions urging them to "examine [their] differences in the spirit of fairness and candor" without spiraling into self-loathing and sabotaging the deliberations. *See* TrialTr.V8 6:8–20; *Campbell*, 294 N.W.2d at 812 (finding no coercion when instruction "merely encourages the thoughtful consideration of all viewpoints").

Campbell rejected a claim that prejudice was shown from the fact that "the jury returned its verdict within approximately two and one-half hours" after receiving the verdict-urging instruction. *See Campbell*, 294 N.W.2d at 811. It noted that another Iowa case had held that "the fact that the jury deliberated an hour and one-half after receiving the practically identical instruction given here showed the absence of coercion." *See id.* (citing *State v. Bogardus*, 176 N.W. 327, 329 (Iowa 1920)). And it quoted a third Iowa case where "two and one-half hours of deliberation following delivery of the *Allen* charge was considered indicative of 'further worthwhile consideration before a verdict was agreed to.'" *See id.* (quoting *State v. Kelley*, 161 N.W.2d 123, 126 (Iowa 1968)). In *this* case, the jury deliberated for more than four hours after receiving the additional instruction. *See* TrialTr.V8 6:21–7:17. Still, Davis argues that "examination of the deliberation times also supports a finding of prejudice." *See* Def's Br. at 90–91. Davis is wrong. The length of deliberation after jurors received the instruction undermines any claim of coercive impact (because actual coercion would have produced a unanimous verdict without the need for four more hours of deliberation) and supports the contrary view that it "initiated a new train of real deliberation." *See Campbell*, 294

N.W.2d at 808; *accord Piper*, 663 N.W.2d at 912. Iowa precedent emphatically forecloses Davis's claim of coercion:

> The record here does not suggest coercion. In fact, it rather demonstratively negatives it. The fact the jury deliberated 3 hours 52 minutes following the giving of the verdict-urging instruction (which elapsed time included time out for the evening meal), indicates the jury gave additional consideration to the record before a verdict was reached.

State v. Quitt, 204 N.W.2d 913, 914 (Iowa 1973).

Finally, Davis attempts to infer coercion and prejudice from the other challenges that he raises on appeal, including his challenge to the instruction on reasonable doubt. *See* Def's Br. at 92. But he gives no reason why multiple non-prejudicial errors would interact in a way that would generate prejudice, where it would not otherwise exist. Even an intrinsic error in *this* instruction would require Davis to show real prejudice. *Campbell* rejected "a standard of presumed prejudice to a verdict-urging instruction in which the deadlocked jury was told as a central feature of the instruction that the case would have to be retried if it failed to agree upon a verdict"—which is a form of pressure that was wholly absent from the verdict-urging instruction in this case. *See id.* at 809; TrialTr.V8 5:2–6:22. This instruction does not include any technical error or create any potential for prejudicial coercion. Therefore, this Court should reject Davis's demand for reversal.

V. No impermissible burden-shifting occurred.

Preservation of Error

Half of Davis's argument challenges this ruling, during the redirect examination of DCI fingerprint analyst Dennis Kern:

> **STATE**: All of the items that [defense counsel] talked about that were not examined by you, would they have been kept in evidence and been available to re-examine, if needed?
>
> **DEFENSE**: Objection. Irrelevant. Also a violation of burden of proof.
>
> **STATE**: It's not. He brought this issue up as to what was not tested. He has opened this door.
>
> **THE COURT**: Overruled.
>
> **STATE**: Was it available to be re-examined if that is, in fact, what needed to be done?
>
> **KERN**: Yes, sir.

TrialTr.V5 57:22–58:7. The ruling on that objection preserved error for a claim that challenges the ruling and the admission of testimony that answered the question. *See Lamasters*, 821 N.W.2d at 864.

The other half of Davis's argument targets this exchange, during the State's rebuttal argument at the close of trial:

> **STATE**: No person has ever been identified as having a motive to frame Ethan Davis. He didn't suggest a name. His folks didn't suggest a name. People that knew him didn't suggest a name. Police didn't find anybody. There was nothing that was brought to them that would suggest that he was framed for Curt Ross's murder. Who would do it? Who would frame Ethan Davis? Give me a name.

> **DEFENSE**: Your Honor, I'm going to object. This shifts the burden of burden of proof away from the State and requires me to go forward and present another speculative theory about other individuals that, frankly, is not part of our burden.
>
> **THE COURT**: Mr. Brown, I'm going to instruct you not to suggest that the burden ever shifts to the defendant from the State. And you may continue with your closing.
>
> **STATE**: I don't believe that I'm doing that, Your Honor. This was — this came up during the defendant's testimony, evidence he presented. That's what I intend to comment on.
>
> **THE COURT**: All right. Comment on the evidence presented.
>
> **STATE**: What connection does anyone else — what evidence was discovered in this case that would have any other connection anyone else — any other connection to Curt Ross's death?

TrialTr.V8 57:10–58:16. This appears to be a sustained objection, or at least an admonition that the jury would understand as clarification that the State always bears the burden of proof. Davis did not raise any further objection or ask for any particular remedy—he did not request that the trial court instruct the jury to disregard something, and he did not move for a mistrial. Thus, error is not preserved for whatever argument Davis is making about some additional action that the trial court should have taken. *See, e.g.*, *State v. Krogmann*, 804 N.W.2d 518, 516 (Iowa 2011); *State v. Radeke*, 444 N.W.2d 479 (Iowa 1989); *State v. Gibb*, 303 N.W.2d 673, 678 (Iowa 1981); *State v. Dahlstrom*, 224 N.W.2d 443, 448–49 (Iowa 1974).

Standard of Review

Review of evidentiary rulings is for abuse of discretion. *See Tipton*, 897 N.W.2d at 691. If review were possible, review of a ruling on "[t]he scope of closing arguments" would be for abuse of discretion. *See Melk*, 543 N.W.2d at 301.

Merits

On the first claim, Davis argues "[t]he prosecutor's suggestion that Davis could have employed fingerprinting or forensic testing to himself examine the physical evidence he complained was left untested by the State was improper." *See* Def's Br. at 95. But that suggestion is not present in the State's question. *See* TrialTr.V5 57:22–58:7. Rather, the State was refuting the assertion that investigators had closed off or ignored potential leads and jumped to conclusions. *See* TrialTr.V5 55:24–57:21. This was a fair response to Davis's cross-examination, which raised and dwelled on those complaints. *See* TrialTr.V5 44:12–45:18; TrialTr.V5 46:14–49:22. The State asked Kern if evidence was still testable *by the DCI*—not by Davis. *See* TrialTr.V5 57:22–58:7. And even if the State *had* suggested that Davis was free to conduct his own investigation of relevant evidence, that would not be burden-shifting and would not be objectionable. That would not violate *Hanes*, which

disapproved of the prosecutor's suggestion in closing argument that "the jury could infer from the defendant's failure to call the witnesses that they would not have said anything helpful to the defense." *See Hanes*, 790 N.W.2d at 557. That argument was problematic because it urged jurors to draw an inference that the *content* of their testimony would help prove guilt, if they *had* testified (which, if allowed, would permit juries to convict on speculation about facts not in evidence and effectively shift the burden to defendants to call those witnesses and prove otherwise). *See id.* at 556–57. This is very different—the State raised no inference about the likely results of fingerprint testing of any of these items, one way or the other. *See* TrialTr.V5 57:22–58:7.

Recently, a decision on a claim about *Hanes* rebuked the State for failing to discuss *Hanes* and citing other cases instead. *See State v. Christensen*, 929 N.W.2d 646, 660 (Iowa 2019). But *Hanes* did not discuss Iowa precedent that it conflicted with. *Compare Hanes*, 790 N.W.2d at 556–57, *with State v. Craig*, 490 N.W.2d 795, 797 (Iowa 1992) (quoting *State v. Bishop*, 387 N.W.2d 554, 563 (Iowa 1986)). Davis's challenge resembles the claim in *Christensen*, which alleged misconduct "when the State elicited testimony from [a criminalist] that the physical evidence was available for testing by others." *See*

Christensen, 929 N.W.2d at 659. But here, the State never elicited testimony that evidence was available for testing *by others*, so the burden to test it could not shift to Davis. *See* TrialTr.V5 57:22–58:7.

Christensen noted that *Craig* and *Bishop* conflict with *Hanes*, but it assumed *Hanes* was correct and did not address the conflict. *See Christensen*, 929 N.W.2d at 660. This is a simmering issue that will eventually demand resolution. *See State v. Davisson*, No. 15–1893, 2016 WL 7393890, at *4–5 (Iowa Ct. App. Dec. 21, 2016) (McDonald, J., concurring specially). But here, the absence of testimony that the evidence could be tested *by someone else* distinguishes *Christensen*, and the lack of an inference about what such tests would have shown distinguishes *Hanes*. *See* TrialTr.V5 57:22–58:7; *Hanes*, 790 N.W.2d at 556–57; *Christensen*, 929 N.W.2d at 652, 659. This was a question and answer that defended the State's investigation—nothing more.

One thing is still clear after *Hanes*: no misconduct occurs when the State's argument "generally reference[s] an absence of evidence supporting the defense's theory of the case." *See Hanes*, 790 N.W.2d at 557; *accord Bishop*, 387 N.W.2d at 563. That principle forecloses Davis's unpreserved attack on the State's closing argument, which highlighted the lack of support for Davis's theory that he was framed.

See TrialTr.V7 57:10–58:16. Davis argues that "the line was crossed here when the prosecutor affirmatively stated or implied that Davis had the burden to identify an alternate perpetrator or prove someone had the motive to frame him." *See* Def's Br. at 96–98. But the State never shifted the burden as Davis describes. Its rebuttal focused on arguing that someone who had framed Davis for murder would have no reason to pick up most of the shell casings that would link the kill to Davis's rifle, or to hide Ross's clothes and hunting gear at a location other than Davis's farm (where investigators had found *other* evidence with Davis's fingerprints, which Davis claimed had been stolen and then planted to frame him), or to conceal the murder weapon in a separate and less obvious location on Davis's farm. *See* TrialTr.V7 56:25–61:7; TrialTr.V7 68:23–69:10; TrialTr.V7 72:13–73:5. Nobody would need to do any of that to frame Davis—which helped establish that Davis was not framed. And the State was entitled to argue that all the evidence showing that Davis was *not* framed was not undermined by any evidence showing that he *was* (other than his own testimony). Prosecutors need not treat unsupported conjecture as authoritative, and may respond with "statements aimed at the theory of the defense." *See State v. Coleman*, 907 N.W.2d 124, 140 (Iowa 2018).

In attempting to show prejudice, Davis argues "[t]he jury would have understood the court's overruling of [his] objection as indication that the implications being made by the State were correct" and that "he *did* have the burden to provide an alternative perpetrator or person with motive to frame him." *See* Def's Br. at 99. But the jury heard the trial court instruct the prosecutor "not to suggest that the burden ever shifts to the defendant from the State." *See* TrialTr.V8 57:21–58:3. And the prosecutor agreed: his response was to deny that he was shifting the burden, which implied agreement that the burden of proof always remains with the State. *See* TrialTr.V8 58:4–9. And the prosecutor fully embraced the State's burden of proof beyond a reasonable doubt, throughout closing arguments. *See* TrialTr.V7 11:19–12:13; TrialTr.V7 70:4–10; TrialTr.V7 74:2–17. Davis cannot point to any indication that jurors were misled about the applicable burden of proof, and he cannot show prejudice or need for reversal.

VI. The court should issue a nunc pro tunc order to strike repayment for court costs and attorney fees, and make the sentence conform to its oral pronouncement.

The State agrees that the sentencing order should be corrected as Davis describes. *See* Def's Br. at 100–03; Order (3/18/19) at 4–5; App. 20–21; *State v. Hess*, 533 N.W.2d 525, 527–29 (Iowa 1995).

CONCLUSION

The State respectfully requests that this Court reject Davis's challenges and affirm his conviction.

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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