IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. STANLEY LIGGINS, Defendant-Appellant.	)	S.CT. NO. 19-0945

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
HONORABLE MARLITA A. GREVE, JUDGE

APPELLANT'S REPLY BRIEF AND ARGUMENT

MARTHA J. LUCEY
State Appellate Defender

MELINDA J. NYE
Assistant Appellate Defender
mnye@spd.state.ia.us
appellatedefender@spd.state.ia.us

STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX

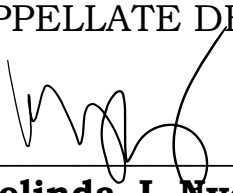
ATTORNEYS FOR DEFENDANT-APPELLANT

FINAL

CERTIFICATE OF SERVICE

On the 18th day of February, 2021, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Stanley Liggins, No. 1048544, Anamosa State Penitentiary, 406 N. St., Anamosa, IA 52205.

APPELLATE DEFENDER'S OFFICE



Melinda J. Nye
Assistant Appellate Defender

MJN/lr/2/21

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page:

Court Rules:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether Liggins' rights to a fair trial under the Sixth and Fourteenth Amendments to the U.S. Constitution and article I, section 9 of the Iowa Constitution were violated by juror misconduct and the district court's failure to investigate the issue?

Authorities

State v. Watson, 620 N.W.2d 233, 235 (Iowa 2000)

State v. Bigley, 202 N.W.2d 56, 58 (Iowa 1972)

State v. Frank, 298 N.W.2d 324, 327-328 (Iowa 1980)

Remmer v. United States, 347 U.S. 227, 229, 74 S.Ct. 450, 451 (1954)

II. Whether the district erred by admitting the former testimony of Donna Adkins in violation of the hearsay rule and Liggins' confrontation rights?

Authorities

United States v. DiNapoli, 8 F.3d 909, 914-15 (2d Cir. 1993)

Williams v. State, 7 A.3d 1038, 1053–54 (Md. 2010)

State v. Jones, 791 So.2d 622, 625-28 (La. 2001)

United States v. Koon, 34 F.3d 1416, 1427 (9th Cir. 1994), aff'd in part, rev'd in part, 518 U.S. 81, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996)

State v. Buelow, 951 N.W.2d 879, 890 (Iowa 2020)

State v. Brown, 656 N.W.2d 355, 361–62 (Iowa 2003)

State v. Kite, 513 N.W.2d 720, 722 (Iowa 1994)

State v. Elliott, 806 N.W.2d 660, 669 (Iowa 2011)

III. Whether W.H.'s testimony was not cumulative and should have been excluded pursuant to rule 5.403 because its probative value was outweighed by the risk of undue prejudice?

Authorities

Liggins v. State, No. 12-0399, 2013 WL5963013 at *4 (Iowa Ct. App., November 6, 2013)

IV. Whether error was preserved as to the entirety of the arguments that the district court should not have allowed Frank Reising Jr and Antonio Holmes to testify (Sections IV and V of the opening brief) because citing to authority from social science not cited in the district court is not raising a new issue on appeal?

Authorities

State v. Mann, 602 N.W.2d 785, 790 (Iowa 1999)

State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983)

State v. Taylor, 310 N.W.2d 174, 178 (Iowa 1981)

Varnum v. Brien, 763 N.W.2d 862, 881, 898–906 (Iowa 2009)

Miller v. Alabama, 567 U.S. 460, 471, 132 S.Ct. 2455, 2464 (2012)

State v. Doolin, 942 N.W.2d 500, 508-516 (Iowa 2020)

State v. Booth-Harris, 942 N.W.2d 562, 571 (Iowa 2020)

V. Whether Liggins was prejudiced by the court's failure to exclude the testimony of Donna Adkins, W.H., Frank Reising, Jr. and Antonio Holmes as argued in sections II, III, IV, and V of the opening brief?

Authorities

State v. Russell, 893 N.W.2d 307, 314 (Iowa 2017)

Iowa R. App. P. 6.904(3)(p)

State v. Pena, No. 12-0082 2013 WL 5745608 at *4 (Iowa Ct. App. Oct. 23, 2013)

United States v. Gay, 774 F.2d 368, 373 n. 6 (10th Cir. 1985)

United States v. Saborit, 967 F.Supp. 1136, 1137 (N.D.Iowa 1997)

Liggins v. State, No. 12-0399, 2013 WL5963013 at *6-8 (Iowa Ct. App., November 6, 2013)

VI. Whether Liggins was prejudiced by the court's exclusion of J.L.'s statements to Judy Gonzalez?

Authorities

State v. Russell, 893 N.W.2d 307, 314 (Iowa 2017)

VII. Whether the district court abused its discretion when it denied Liggins' motion for a new trial?

Authorities

State v. Ary, 877 N.W.2d 686, 698-99, 706-07 (Iowa 2016)

State v. Maxwell, 743 N.W.2d 185, 193 (Iowa 2008)

State v. Ernst, No. 18-1623, 2021 WL 297250, at *7 (Iowa Jan. 29, 2021)

State v. Reeves, 670 N.W.2d 199, 202 (Iowa 2003)

State v. Ellis, 578 N.W.2d 655, 658-59 (Iowa 1998)

VIII. Whether under the circumstances of this case, where the State had withheld exculpatory evidence and Liggins was retried nearly thirty years after the crime and after his opportunity to present exculpatory evidence was lost due to the death of witnesses, the district court erred in denying his motion to dismiss?

Authorities

State v. Trompeter, 555 N.W.2d 468, 470 (Iowa 1996)

State v. Lange, 531 N.W.2d 108, 111 (Iowa 1995)

Liggins v. State, No. 99-1188, 2000 WL 1827164, at *1-5 (Iowa Ct. App., Dec. 13, 2000)

Liggins v. State, No. 12-0399, 2013 WL 5963013 at *1-2 (Iowa Ct. App., November 6, 2013)

New Jersey v. T.L.O., 469 U.S. 325, 373, 105 S.Ct. 733, 759 (1985)

Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 575 (1928)

STATEMENT OF THE CASE

COMES NOW the Defendant-Appellant, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's proof brief filed on or about December 29, 2020. While the defendant's brief adequately addresses the issues presented, a short reply is necessary to address certain contentions raised by the State.

ARGUMENT

I. Liggins' rights to a fair trial under the Sixth and Fourteenth Amendments to the U.S. Constitution and article I, section 9 of the Iowa Constitution were violated by juror misconduct and the district court's failure to investigate the issue.

Because Liggins is alleging the district court's failure to investigate juror misconduct and potential juror bias violated his constitutional rights, the appellate court's review is de novo. State v. Watson, 620 N.W.2d 233, 235 (Iowa 2000). However, even if the court reviews for an abuse of discretion under a permissive approach under Frank and Bigley, the court has abused its discretion in this situation. See State v. Bigley, 202 N.W.2d 56, 58 (Iowa 1972) and State v. Frank, 298 N.W.2d 324,

327-328 (Iowa 1980). After the jury had been admonished more than fifty times not to communicate with anyone about the case or do independent research, when the judge had struck a juror during voir dire for similar conduct, and when the information revealed by Juror Buehler demonstrate juror misconduct and potential juror bias by both discussing the case with outsiders and then reporting what she learned to other jury members, the district court abused its discretion by failing to inquire into the extent and content of the juror's communications with outside parties and her communications with other jurors. The case should be remanded to the district court for a Remmer-type hearing. See Remmer v. United States, 347 U.S. 227, 229, 74 S.Ct. 450, 451 (1954).

II. The district erred by admitting the former testimony of Donna Adkins in violation of the hearsay rule and Liggins' confrontation rights.

Liggins did not have a full and fair opportunity to cross-examine Donna Adkins in the first two trials, because he did not have knowledge of or access to the reports of Daryl Sheese, Shawn Saunders and Michael Armstrong. Thus, Adkins' testimony was inadmissible hearsay and should have been excluded.

The assessment of whether the defendant had a similar motive to develop testimony or cross-examine the witness at the prior proceeding is based on whether the defendant would have had "an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue." United States v. DiNapoli, 8 F.3d 909, 914-15 (2d Cir. 1993). The nature of the two proceedings and "the cross-examination at the prior proceeding—both what was undertaken and what was available but forgone—will be relevant though not conclusive on the ultimate issue of similarity of motive." DiNapoli, 8 F.3d at 915.

> The way to determine whether or not motives are similar is to look at the issues and the context in which the opportunity for examination previously arose, and compare that to the issues and context in which the testimony is currently proffered. The similar motive inquiry is essentially a hypothetical one: is the motive to develop the testimony at the prior time similar to the motive that would exist if the declarant were produced (which of course he is not) at the current trial or hearing?"

Williams v. State, 7 A.3d 1038, 1054 (Md. 2010)

The prior opportunity to develop testimony is satisfied when the defendant has been given "a full and fair opportunity to probe and expose [the] infirmities [of the testimony] through cross-examination." Williams, 7 A.3d at 1054-55.

Just because new information has come to light does not automatically render the former opportunity to cross-examine insufficient, but the fact that the "new" information was not known to the defendant because the State improperly withheld it will impact the court's consideration of whether the prior opportunity to question the witness was a full and fair one. Compare Williams, 7 A.3d at 1054 (holding that defendant's prior opportunity to cross-examine State's witness was "not an

adequate one" when State improperly withheld information that the witness considered herself to be "legally blind") with State v. Jones, 791 So.2d 622, 625-28 (La. 2001) (finding prior cross-examination was sufficient despite State's failure to disclose pre-trial statements of witness not a violation of statute nor Constitution) and United States v. Koon, 34 F.3d 1416, 1427 (9th Cir. 1994), aff'd in part, rev'd in part, 518 U.S. 81, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996) ("The failure of *a defendant to discover* potentially useful evidence at the time of the former proceeding does not constitute a lack of opportunity to cross-examine.")(emphasis added).

Adkins would have been impeached by information in police reports, rendering Liggins' earlier opportunities to cross-examine her insufficient. Daryl Sheese lived in the apartment and did not recognize the red Peugeot, even when he was shown a photograph. (Ex. MG)(Ex. App. p. 4). This contradicts Adkins' testimony that she saw the Peugeot on the 18th and that she'd seen it many times in the parking lot, parked right in

front of Sheese's apartment. (Ex. 501A p. 1136 L. l – p. 1144 L. 25)(Ex. App. pp. 32-40). Instead Sheese recalled seeing a brown Mustang—a similar-looking car—that Michael Armstrong and Shawn Saunders confirmed was frequently parked in the parking lot. (Exs. MG, MH, MI) (Ex. App. pp. 4, 5, 6). Although Adkins was helping Sheese move out because he had decided to check himself into some sort of rehab facility, there was nothing in her testimony to support a conclusion that he was actively intoxicated on the 18th. In fact, she testified that he had worked the night before, undermining any assumption that he was impaired. (Ex. 501A p. 1136 L. 14-18; p. 1137 L. 9 – 1141 L. 19)(Ex. App. pp. 33-37). As well, Sheese's accurate recollection of seeing the brown Mustang also demonstrates he was not impaired and was capable of trustworthy observations.

If Liggins had had access to these reports when he had the opportunity to cross-examine Adkins during the first two trials, he could have specifically questioned her about the Mustang

and whether she misidentified the Peugeot after seeing it on the news. Having a specific, similar-looking vehicle to suggest as an alternative, especially one placed at the same location by three other witnesses, substantially changes the nature of cross-examination. Thus, without access to these police reports that had been withheld by the State, Liggins' prior opportunity to cross-examine Adkins was insufficient to support hearsay exception.

In a case of nonconstitutional error, "we presume prejudice—that is, a substantial right of the defendant is affected—and reverse unless the record affirmatively establishes otherwise." State v. Buelow, 951 N.W.2d 879, 890 (Iowa 2020). As well, evidence admitted in violation of the confrontation clause is reversible unless "the State can establish the error was harmless beyond a reasonable doubt." State v. Brown, 656 N.W.2d 355, 361–62 (Iowa 2003). The court will consider "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative,

the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross examination otherwise permitted, and, of course, the overall strength of the prosecution's case." Id. (quoting State v. Kite, 513 N.W.2d 720, 722 (Iowa 1994)).

The State has not rebutted the presumption of prejudice or shown that the improper admission of Donna Adkins' testimony was harmless beyond a reasonable doubt. Adkins' testimony was not merely cumulative to the testimony of Brenda Adams. In fact, their testimony contained more contradictions than similarities.

Adkins testified that at 11:00am on September 18th, the day after J.L. was killed, the Peugeot was parked in front her friend's apartment and it had "a real strong smell of gas." Further, she thought saw a gas can in the back seat. (Ex. 501A p. 1136 L. 1 – p. 1144 L. 25)(Ex. App. pp. 32-40)

Brenda Adams, in contrast, testified that she when she went out to the car at 2:00am on the 18th to get cigarettes, she

neither smelled gasoline nor saw the gas can in the back seat. (2019 Tr. p. 769 L. 1 – 24). When she drove Liggins back to the Hillside Inn later that morning, about 8:00am, she did smell gas fumes but this was not the first time. She had smelled the odor of gas in the car on other occasions when the car was running. (2019 Tr. p. 752 L. 22 – p. 754 L. 2; p. 769 L. 6 – 24; p. 770 L. 20 – p. 771 L. 7). Further, she testified that after she dropped Liggins off that morning, she did not leave the car with him. She took the car and went shopping for birthday-related items and ran errands, including paying a phone bill. Officers collected Toys R Us receipts from Adams as well as an Illinois Bell receipt showing she paid her phone bill in cash at 12:55pm on September 18th. (2019 Tr. p. 765 L. 9 – p. 768 L. 15; p. 876 L. 14 – p. 877 L. 8) (Def. Ex. A) (Supp. App. p. 8). She recalled returning to the Hillside Inn later that afternoon. (2019 Tr. p. 772 L. 9 – p. 773 L. 2). Thus, Adams' testimony was substantially different than Adkins' testimony.

Even if some small part of her testimony is considered cumulative, its admission still prejudiced Liggins' substantive rights. "If the record contains cumulative evidence in the form of testimony, the hearsay testimony's trustworthiness must overcome the presumption of prejudice." State v. Elliott, 806 N.W.2d 660, 669 (Iowa 2011). The court will "measure the trustworthiness of the hearsay testimony based on the trustworthiness of the corroborating testimony." Id.

In this case, the trustworthiness of Brenda Adams' testimony indicates Adkins' testimony was not trustworthy. First, Adams' observations are generally more trustworthy because she was actually inside the car and not just once, but twice, that morning. She did not notice the gas odor at all in the middle of the night and did not notice it was unusually strong when she drove him home. She also testified it wasn't unusual to smell the odor of gas in the car when it was running. But most importantly, she testified that she was in the car, running errands, at the time Adkins' thought she saw it in the

Hillside Apartment parking lot. Her testimony was supported by the Toys R Us receipts and Illinois Bell receipt showing Adams paid a phone bill at 12:55pm that day.

Because the district court erred in admitting Adkins' prior testimony and because Liggins was prejudiced by its admission, his conviction should be vacated and his case remanded for a new trial.

III. W.H.'s testimony was not cumulative and should have been excluded pursuant to rule 5.403 because its probative value was outweighed by the risk of undue prejudice.

W.H.'s testimony that she saw a car with distinctive taillights similar to Liggins' Peugeot near the school while the fire burned is not cumulative to Lloyd Eston's testimony. Although Lloyd Eston saw a medium reddish car near the school, he did not see a fire and did not notice anything distinctive about the taillights of the car. (Ex. 513 p. 534 L. 24 – p. 545 L. 12; Depo p. 18 L. 25 – p. 27 L. 25) (Conf. App. pp. 242-253; 258-267). Further, he exhibited significant memory issues during his testimony. Thus, W.H.'s testimony, placing Liggins' car at the scene when the fire was burning cannot be

dismissed as merely cumulative—it was "by the prosecutor's own admission . . . crucial to the State's case." See Liggins v. State, No. 12-0399, 2013 WL5963013 at *4 (Iowa Ct. App., November 6, 2013).

IV. Error was preserved as to the entirety of the arguments that the district court should not have allowed Frank Reising Jr and Antonio Holmes to testify (Sections IV and V of the opening brief) because citing to authority from social science not cited in the district court is not raising a new issue on appeal.

In determining whether error has been preserved, "it is important to understand the purpose of our error-preservation rules." State v. Mann, 602 N.W.2d 785, 790 (Iowa 1999).

> "The orderly, fair and efficient administration of the adversary system requires that litigants not be permitted to present one case at trial and a different one on appeal. One reason is that the trial court's ruling on an issue may either dispose of the case or affect its future course. In addition, the requirement of error preservation gives opposing counsel notice and an opportunity to be heard on the issue and a chance to take proper corrective measures or pursue alternatives in the event of an adverse ruling."

Id. (quoting State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983)). See also State v. Taylor, 310 N.W.2d 174, 178 (Iowa 1981) (party

may not change the nature of the objection on appeal from what was said in court).

The arguments in this appeal challenging the court's rulings allowing Frank Reising and Antonio Holmes to testify are not intended as arguments that all jailhouse informants and all eyewitness identifications should be excluded from criminal trials. However, citations to social science authorities and caselaw demonstrating the inherent unreliability of jailhouse informants and eyewitness identifications are appropriately cited and relied upon by the appellate parties and the court when considering whether these particular witnesses were unreliable.

Certainly appellate argument and briefing is not strictly limited to reliance on the precise authorities cited in the district court. The very nature of appellate advocacy requires the development of and elaboration on the argument raised in the district court. See Varnum v. Brien, 763 N.W.2d 862, 881, 898–906 (Iowa 2009) (analyzing "all of the material tendered by

the parties," including public police arguments, to assist in the review of the constitutionality of a statute). As well, authorities from social science are routinely considered by the appellate courts in reaching their decisions. See, e.g., Miller v. Alabama, 567 U.S. 460, 471, 132 S.Ct. 2455, 2464 (2012)("Our decisions rested not only on common sense—on what "any parent knows"—but on science and social science as well."); State v. Doolin, 942 N.W.2d 500, 508-516 (Iowa 2020)(declining to overrule longstanding precedent and adopt per se rule excluding first-time, in-court identifications as violative of due process, after acknowledging social science research indicates such identifications are unreliable); State v. Booth-Harris, 942 N.W.2d 562, 571 (Iowa 2020)("We acknowledge the evolving

social science research without concluding that it serves as 'a basis for establishing fixed principles of constitutional law.'").

V. Liggins was prejudiced by the court's failure to exclude the testimony of Donna Adkins, W.H., Frank Reising, Jr. and Antonio Holmes as argued in sections II, III, IV, and V of the opening brief.

When the appellate court determines a non-constitutional error has occurred in the admission of evidence, the court will not review the remaining evidence for mere sufficiency. Instead, prejudice is presumed and the appellate court will reverse unless the record affirmatively establishes a lack of prejudice. State v. Russell, 893 N.W.2d 307, 314 (Iowa 2017).

As the parties agree, the evidence supporting Liggins' conviction was entirely circumstantial. While circumstantial and direct evidence are of equally probative value, see Iowa R. App. P. 6.904(3)(p), "'[t]here are, nevertheless, some dangers associated with the use of circumstantial evidence that are not associated with the use of direct evidence.'" State v. Pena, No. 12-0082 2013 WL 5745608 at *4 (Iowa Ct. App. Oct. 23, 2013) (Doyle, J., dissenting)(quoting United States v. Gay, 774 F.2d

368, 373 n. 6 (10th Cir. 1985)). "As was once aptly written, 'circumstantial evidence is a very tricky thing …; it may seem to point very straight to one thing, but if you shift your own point of view a little, you may find it pointing in an equally uncompromising manner to something entirely different.'" Id. (quoting United States v. Saborit, 967 F.Supp. 1136, 1137 (N.D.Iowa 1997)).

The evidence that remains when the challenged testimony of Donna Adkins, Frank Reising, Antonio Holmes, and W.H. is removed from consideration is insufficient to overcome the presumption of prejudice. While Liggins recognizes the appellate court will consider prejudice on each piece of challenged testimony independently, in the interests of efficiency, this section seeks to address the specific weaknesses of the remaining evidence relied on by the State to argue Liggins was not prejudiced in sections II, III, IV and V of the opening brief.

The weaknesses of the testimony of Donna Adkins, Frank Reising, Antonio Holmes, and W.H. are addressed in the opening brief. What remains amounts to little more than that Liggins was one of many people who were at the Glenn house the day that J.L. was killed and ultimately gave her money to buy gum. But the Glenn house was busy that day, visited by several men, including Joe Glenn, Eddie Zapien, John Brown, Fred Gonzales, Nate Rhoden Sr., and Nate Rhoden, Jr., as well as other unidentified black males in a brown Ford Escort. (Ex. 517 p. 227 L. 23 – p. 304 L. 25; Ex. 516 p. 499 L. 2 – p. 505 L. 13; 2019 Tr. p. 167 L. 13 – p. 171 L. 15; p. 234 L. 1 – p. 236 L. 24; p. 246 L. 5 – p. 249 L. 4; p. 255 L. 13 – p. 260 L. 20; p. 267 L. 17 – p. 269 L. 16; p. 1129 L. 12 – p. 1135 L. 1; p. 1138 L. 22 – p. 1145 L. 20) (Conf. App. pp. 363-390; pp. 278-284). Although the State implies something sinister about Liggins giving J.L. money to buy gum, Liggins initially asked the adults in the house for gum before the idea arose for J.L. to get it. (2019 Tr. p. 1157 L. 6-24; Ex. 517 Tr. p. 307 L. 17 – p. 309 L.

25) (Conf. App. pp. 393-395). After J.L. left to purchase gum, all the male guests left, not just Liggins. When Sherri McCormick came downstairs after feeding the baby, she found the house empty except for Joe Glenn. (2019 Tr. p. 1138 L. 22 – p. 1143 L. 1; Ex. 517 p. 308 L. 5 – p. 309 L. 9) (Conf. App. pp. 394-395). The police did little to verify the whereabouts of any of these other men. (2019 Tr. p. 241 L. 25 – p. 244 L. 25; p. 1055 L. 10 – p. 1056 L. 12).

As well, both Sherri McCormick and Joe Glenn told police about several men who had threatened Glenn and chased J.L. home from school when asked about possible suspects. They described an incident in which several men stole J.L.'s dog and refused to return him, demanding a reward. It resulted in several fights between the men and Glenn and culminated with the men chasing J.L. home from school and threatening that Glenn would "pay." (2019 Tr. p. 1119 L. 8 – p. 1122 L. 8; p. 865 L. 1 – p. 867 L. 6) (Exs. 132 and 133 (audio interviews)). This lead was overlooked and never pursued by police. (2019

Tr. p. 863 L. 13 – p. 865 L. 9; p. 866 L. 18 – p. 867 L. 6; p. 871 L. 6 – p. 876 L. 2).

And finally, the garbage bag found at Hillside Inn does little to establish a link between Liggins and J.L.'s death. The bag was found in an alcove at the Hillside Inn, covered by empty pop and beer cans, more than a week after the murder and six days after Liggins had been taken into custody. (2019 Tr. p. 212 L. 9 – p. 213 L. 21; p. 624 L. 14 – p. 625 L. 8; p. 986 L. 17 - p. 993 L 23) (Ex. 505 p. 1161 L. 2 – p. 1162 L. 24) (Ex. App. pp. 164-165) (Ex. 71, 72) (Supp. App. pp. 5,6). It was a single bag that was determined to be consistent with Hefty Steel Saks. The remnant of the bag found with J.L.'s body was also consistent with a Hefty Steel Sak. However, the State's own expert testified the two bags were not chemically identical and could not have come from the same manufacturing run. (2019 Tr. p. 721 L. 2 – p. 722 L. 4). The State's evidence further indicated Hefty Steel Saks were relatively rare in 1990 and could not be purchased by the public in grocery stores—rather they

were only available to contractors or municipalities. (2019 Tr. p. 720 L. 15 – p. 721 L. 1; p. 722 L. 13 – p. 723 L. 25; p. 993 L. 4-8). Although the bag was found at the Hillside Inn, police confirmed with the manager that the Hillside Inn did not use Hefty Steel Saks. (2019 Tr. p. 993 L. 9-17). No bags were found in the roofing trucks parked near the Hillside Inn.[1] (2019 Tr. p. 986 L. 24 – p. 988 L. 6). No Steel Saks were found in Liggins' apartment or car. (2019 Tr. p. 987 L. 5-9). The record was void of any evidence that Liggins had access to these specialized garbage bags. In the end, the State did not demonstrate Liggins had a steady source of Hefty Steel Saks that would have enabled him to get two different Hefty Steel Saks from different manufacturing runs. Thus, the bag found at Hillside is a red herring—it was a garbage bag that did not match the bag found near J.L.'s body found in a garbage alcove

[1] Detective Schaeffer acknowledged he searched the roofing trucks without a warrant and without the knowledge of the owners of the trucks. (2019 Tr. p. 1027 L. 6 – p. 1029 L. 15).

of a busy motel days nearly a week after Liggins no longer had access to the location.

Thus, without the testimony from key witnesses—Donna Adkins, W.H., Frank Reising, and Antonio Holmes—the State's already circumstantial case becomes untenably weak and does not overcome the presumption of prejudice. See Liggins v. State, No. 12-0399, 2013 WL5963013 at *6-8 (considering all the evidence presented compared with evidence withheld and concluding the court's confidence in the verdict was undermined). Liggins' case should be remanded for a new trial.

VI. Liggins was prejudiced by the court's exclusion of J.L.'s statements to Judy Gonzalez.

Judy Gonzalez' testimony about J.L.'s statements that her step-dad did "bad things" to her, implicating Joe Glenn in J.L.'s murder, would have likely affected the outcome of the trial and the State has not overcome the presumption of prejudice that applies to the district court's error. See Russell, 893 N.W.2d at 314.

Glenn's whereabouts are not confirmed during the time when J.L. initially disappeared. When J.L. left to get gum, Sherri McCormick took the baby upstairs to feed him. She did not come back downstairs for thirty to forty-five minutes. When she did come down, Glenn was alone in the house, but evidently hadn't noticed that J.L. was gone. (2019 Tr. p. 1138 L. 22 – p. 1143 L. 1). The police did not attempt to verify Joe Glenn's activities that night nor did they search the Glenn home. (2019 Tr. p. 1055 L. 10 - p. 1056 L. 12).

That night Joe Glenn was wearing a leather jacket with fringe. He had long hair—long enough to put in a ponytail. (2019 Tr. p. 1154 L. 2 – p. 1155 L. 10; p. 136 L. 24 – p. 137 L. 7) (Def. Ex. GGG (video of funeral)). A defense witness recalled driving by the Jefferson school "in the area of" 9:00pm. She saw the fire, and she saw a white man with long hair and a fringed leather jacket running away from the fire towards the

woods.[2] (Ex. HHH p. 4 L. 3 - p. 5 L 25; p. 9 L 4 -p. 15 L. 21; p. 16 L. 14 – p. 17 L. 3; p. 1269 L. 25 – p.1276 L. 14)(Supp. App. pp. 13-14; 18-24; 25-26; 31-38). Joe Glenn was familiar with the Jefferson School area—he used to live near there and used to drive J.L. to school. (Ex. 517 Tr. p 324 L. 5 - p. 326 L. 6). The drive between Glenn's house and the Jefferson school took approximately six minutes. (2019 Tr. p. 189 L. 10 – p. 195 L. 25). Years later, Joe's neighbors testified that years later, Joe was upset and "looking for a fight." He yelled that he'd "killed his daughter" and threatened to kill them, too. (2019 Tr. p. 1169 L. 6 – p. 1171 L. 9)(Def. Ex. JJJ p. 16 L. 16 – p. 18 L. 18).

[2] Whether or not this was Joe Glenn, it certainly was not Stanley Liggins, who is not white and did not have long hair. It is also unlikely it was the school's night custodian who did not have long hair and was not wearing a jacket. (Ex. 522 p. 26 L. 4 – p. 30 L. 24; p. 32 L. 19 – p. 33 L. 2)(Conf. App. pp. 483-487; 489-490).

VII. The district court abused its discretion when it denied Liggins' motion for a new trial.

Error was preserved. In cases raising similar claims, the appellate court has consistently reviewed the district court's decision on a motion for new trial for an abuse of discretion without requiring further objection by the defendant. See State v. Ary, 877 N.W.2d 686, 698-99, 706-07 (Iowa 2016) (Supreme Court addressed whether district court applied the wrong standard to a motion for new trial without requiring further objection beyond the filing of the motion); State v. Maxwell, 743 N.W.2d 185, 193 (Iowa 2008) ("In denying Maxwell's motion, the district court must have found the jury's guilty verdict was not contrary to the weight of the evidence. Because Maxwell's motion raised the issue in the district court, we are allowed to review the record to determine whether a proper basis exists to affirm the district court's denial of Maxwell's motion for new trial.").

"[T]he weight-of-the-evidence standard allows the district court to make its own credibility determinations." State v.

Ernst, No. 18-1623, 2021 WL 297250, at *7 (Iowa Jan. 29, 2021). When ruling on a motion for new trial, the power of the court is broader than a motion for judgment of acquittal. In a motion for new trial, the court "'may weigh the evidence and consider the credibility of witnesses. If the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted.'" State v. Reeves, 670 N.W.2d 199, 202 (Iowa 2003) (quoting State v. Ellis, 578 N.W.2d 655, 658-59 (Iowa 1998)). Thus, the district court does not have to view the evidence in the light most favorable to the State and the question on appeal is not whether substantial evidence supports the verdict. Reeves, 670 N.W.2d at 202.

The question is whether the district court abused its discretion. In a case like this, when the district court misconstrued the evidence by finding a witness was not credible yet attributing her testimony to another witness and assessed the credibility of another key witness by an inapplicable

standard, the district court abused its discretion by exercising its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Reeves, 670 N.W.2d at 202. The case should be remanded.

VIII. Under the circumstances of this case, where the State had withheld exculpatory evidence and Liggins was retried nearly thirty years after the crime and after his opportunity to present exculpatory evidence was lost due to the death of witnesses, the district court erred in denying his motion to dismiss.

Neither the parties below, nor the parties in this appeal, have been able to locate authority exhibiting the extremes found in this case: multiple findings of withheld exculpatory evidence resulting in a retrial nearly thirty years after the crime and long after it was too late for the defendant investigate or present the withheld evidence at the new trial. In these unique circumstances, a typical Brady remedy doesn't adequately address the due process violations that occurred. However, there are other situations in which the court recognizes the magnitude of the harm and provides the only remedy sufficient to address it--dismissal. One of those is in the case of pre-

accusatorial delay. To prove the State's pre-accusatorial delay violated due process, "the defendant must show: (1) the delay was unreasonable; and (2) the defendant's defense was thereby prejudiced." State v. Trompeter, 555 N.W.2d 468, 470 (Iowa 1996). "The length of the delay, and any valid reason for it, must be balanced against the resulting prejudice against the defendant." Id. "Before a defendant can claim relief for prosecutorial delay, the record must establish . . . the delay is unreasonable and without justification." State v. Lange, 531 N.W.2d 108, 111 (Iowa 1995).

In the pre-accusatorial delay context, "the due process protection is guaranteed to defendants to assure that the State will not employ tricks to gain such an advantage over defendant." Id. This is because there "is no constitutional right to be arrested and charged at the precise moment probable cause comes into existence." Trompeter, 555 N.W.2d at 470. Thus, in a pre-accusatorial delay case, the court will look at the intention of the State in assessing the reasonableness of the

delay. In this case, however, Liggins did have a constitutional right to have exculpatory evidence disclosed to him—a right that was violated repeatedly. (Ruling on PCR (LACE91830, pp. 8-14; Ruling (PCCE107989 p. 5)(App. pp. 12-18; 42). Liggins v. State, No. 99-1188, 2000 WL 1827164, at *1-5 (Iowa Ct. App., Dec. 13, 2000); Liggins v. State, No. 12-0399, 2013 WL 5963013 at *1-2 (Iowa Ct. App., November 6, 2013). Although there was no finding that the evidence was withheld intentionally, it was the State's affirmative constitutional responsibility to disclose the evidence and its failure to do so is at least reckless. Liggins deserves a sufficient remedy. Whether the court resolves this under Brady but provides a stronger remedy or whether the court analogizes to pre-accusatorial delay but considers the established Brady violation sufficient to find the delay "unreasonable," Liggins has demonstrated actual prejudice from the State's actions and should have his case dismissed.

"'Our Government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example.

Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to be become a law unto himself; it invites anarchy.'" New Jersey v. T.L.O., 469 U.S. 325, 373, 105 S.Ct. 733, 759 (1985) (Stevens, J., concurring in part) (quoting Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 575 (1928) (Brandeis, J., dissenting)).

CONCLUSION

For the reasons argued above and in section I of the opening brief, Liggins' conviction should be vacated and his case remanded for a Remmer-type hearing, and unless it is established that the juror misconduct was harmless, Liggins should be granted a new trial.

For the reasons argued above and in sections II, III, IV, V, and VI of the opening brief, Liggins' conviction should be vacated and his case remanded for a new trial.

For the reasons argued above and in section VII of the opening brief, Liggins' case should be remanded for a new hearing on the motion for new trial.

For the reasons argued above and in section VIII of the opening brief, Liggins' conviction should be vacated and his case remanded for dismissal.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $4.02, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

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) because:

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 5,247 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: *2/18/21*

MELINDA J. NYE
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
mnye@spd.state.ia.us
appellatedefender@spd.state.ia.us