IN THE SUPREME COURT OF IOWA

No. 20-0030

STATE OF IOWA

Plaintiff-Appellee,

vs.

LATRICE L. LACEY

Defendant-Appellant

APPEAL FROM THE SCOTT COUNTY DISTRICT COURT

THE HONORABLE STUART P. WERLING

APPELLANT'S BRIEF
AND REQUEST FOR ORAL ARGUMENT

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/s/ Kent A. Simmons

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Code of Iowa

Rules of Appellate Procedure

STATEMENT OF ISSUES FOR REVIEW

I.

WHETHER THE CONVICTION ON COUNT 3 ALONE, WHILE THREE ADDITIONAL COUNTS WERE AWAITING RETRIAL SHOULD NOT HAVE BEEN CONSIDERED A FINAL JUDGMENT FOR THE PURPOSE OF APPEAL BECAUSE THE INTERESTS OF JUDICIAL ECONOMY ARE NOT SERVED BY THE LITIGATION OF MULTIPLE APPEALS ON A SINGLE CASE

State v. Clark, 814 N.W.2d 551 (Iowa 2012)

State v. Mootz, 808 N.W.2d 207 (Iowa 2012)

State v. Klinger, 144 NW 2d 150 (Iowa 1966)

State v. Coughlin, 200 NW 2d 525 (Iowa 1972)

Section 814.6, the Code

State v. Loye, 670 NW 2d 141 (Iowa 2003)

State v. Propps, 897 NW 2d 91 (Iowa 2017)

Rules 6.103 and 104, I.R.A.P.

Rhoades v. State, 880 NW 2d 431, 446 (Iowa 2016)

II.

WHETHER THE CONVICTION ON COUNT 3 MUST BE REVERSED BECAUSE THE STATE FAILED TO PRODUCE SUFFICIENT EVIDENCE ON THAT COUNT

State v. Williams, 695 N.W.2d 23 (Iowa 2005)

State v. Webb, 648 N.W.2d 72, 76 (Iowa 2002)

Section 708.7(3), the Code.

III.

WHETHER THE TRIAL JUDGE IMPROPERLY EXCLUDED EVIDENCE OF RICHARDSON'S PRIOR BAD ACTS AND MS. LACEY'S KNOWLEDGE OF THE PATTERNS OF DOMESTIC ABUSERS, AND ALL OF THAT EVIDENCE WAS MATERIAL TO THE QUESTION OF WHETHER MS. LACEY MADE CONTACT WITH RICHARDSON FOR A LEGITIMATE PURPOSE AND WITHOUT THE SPECIFIC INTENT REQUIRED TO COMMIT HARASSMENT

State v. Clark, 814 N.W.2d 551 (Iowa 2012)

State v. Tyler, 867 N.W.2d 136 (Iowa 2015)

State v. Taylor, 689 N.W.2d 116 (Iowa 2004)

State v. Dudley, 856 N.W.2d 668, 678 (Iowa 2014)

IV.

WHETHER THE TRIAL JUDGE ERRED IN IMPOSING A SUSPENDED ONE-YEAR JAIL SENTENCE AND SUPERVISED PROBATION BECAUSE THE DECISION WAS BASED ON ONLY ONE REASON, AND THAT REASON WAS BASED ON UNPROVEN CONDUCT

State v. Lathrop, 781 NW2d 288 (Iowa 2010)

State v. Gordon, 921 N.W.2d 19 (Iowa 2018).

State v. Thacker, 862 NW 2d 402 (Iowa 2015)

State v. Seats, 865 N.W.2d 545 (Iowa 2015)

State v. Covel, 925 N.W.2d 183 (Iowa 2018)

State v. Lambert, 612 N.W.2d 810 (Iowa 2006)

Section 901.5, the Code

State v. Laffey, 600 N.W. 2d 57 (Iowa 1999)

State v. Hildebrand, 280 NW 2d 393 (Iowa 1979)

State v. Lovell, 857 NW 2d 241 (Iowa 2014)

State v. Black, 324 NW 2d 313 (Iowa 1982

State v. Sailer, 587 NW 2d 756 (Iowa 1998)

Section 903.1(b)

ROUTING STATEMENT

The Supreme Court should retain this appeal because it presents an issue of first impression as to whether the Court should consider a verdict and sentence on one count to trigger the appeal process on that count, when other counts are set for retrial. Should the Court rule that any such sentence is not a final judgment and require an Appellant to delay filing a Notice of Appeal for direct appeal until all counts are fully disposed ?

STATEMENT OF THE CASE

NATURE OF THE CASE: This is a direct appeal Defendant Latrice L. Lacey takes after a trial by jury.

PROCEEDINGS: The County Attorney filed a Trial Information on June 14, 2018. The charges were filed in four counts. Counts 1, 2 and 4 were various charges of Domestic Abuse Assault. In Count 3, Ms. Lacey was charged with Harassment in the First Degree as a violation of Section 708.7(2) of the Code of Iowa. The charge states that on April 30, 2018, Ms. Lacey "did harass Clyde Richardson and threaten to commit a forcible felony." (Tr. Info; App. 5) The first line of the Minutes of Evidence filed the same day says: "On or about the April 30, 2018, the Defendant and Evelyn Nelson went to workplace of Clyde Richardson, McDonnell and Associates, to confront Richardson." [sic] (Minutes of Evidence, p. 2; Confidential App. 4)

The action proceeded to jury trial on March 22, 2019. The jury was unable to reach a verdict on any of the four counts. The trial judge entered the order

declaring the mistrial on March 25, 2019. (Order; App. 9) The case again proceeded to trial on September 16, 2019, before the Honorable Stuart P. Werling. The jury was again unable to reach a verdict on Counts 1, 2 and 4. On Count 3, the jury returned a verdict of guilty on the lesser offense of Harassment in the Second Degree, a serious misdemeanor. (Jury Note and Verdict Forms; App. 125-129) The complaining witness did not appear to testify at either of the trials.

The defense filed the Motion to Continue Sentencing on Count 3 on December 29, 2019. The motion advanced several reasons why the sentencing on a single count should not proceed until after all counts have been resolved by verdict or dismissal. (App. 148-150) The motion was overruled at the sentencing hearing on January 3, 2020, and Judge Werling proceeded to enter judgment of sentence on Count 3. He imposed the minimum fine and a sentence of one year of incarceration, to be suspended upon the condition of supervised probation. Ms. Lacey filed a Notice of Appeal the same day. (Order for Probation, Notice of Appeal, Sentencing Order; App. 151-157)

Appellant Lacey filed a Motion to Stay Proceedings in this Court on February 21, 2020, and on May 19, 2020, this Court issued the order directing that "the issue of whether the judgment on Count 3 is a final judgment shall be submitted with the appeal". (Motion, Order; App:158, 175)

Statement of the Facts

The story told in the facts of this case show the destructive emotional energy that can rise up and be sustained by the ongoing drive created by racism and sexual jealousy. Clyde Richardson's initial and continuing violent and threatening campaign against Ms. Lacey was not driven by the fact that she had moved him out of her home. It was driven by the fact that Latrice had fallen in love with a white man, Charley Davis. The power of Richardson's racial hate and his intent to keep that abusive campaign going were wrapped up in the statement he made to Latrice in the heat of the altercation in question. In the early morning hours of April 30, 2018, Latrice's garage was burglarized and Charley Davis's Chevy Impala that was parked inside was severely damaged on the windshield and rear window. (Ex's. E, F, H, and I; App. 14-17) (Tr. 394-396, L. 20-25, pp. 495-497, L. 9-6)) That burglary and damage to the Impala was the final event that led to Ms. Lacey seeking out and finding Richardson on that morning. After Richardson had pushed Latrice and caused her to stumble and fracture bones in her foot, Latrice attempted to leave the scene. (Tr. 508-510, L.16-16) She testified:

A. So we're about to leave. Evelyn is walking --

Q. Okay. What did we see right there?

A. Evelyn is walking around the front of the car to leave. I'm getting in the passenger's seat to leave.

Q. What happened to stop that?

A. When I got in the car, Clyde jumped in the car on top of me.

Q. Did he say anything to you?

A. He threatened to kill me. He said, yes, I did that last night at your house, and I'm gonna keep coming back as long as you have that white motherfucker living in your house. (Tr. 512, L. 9-20)

That threat from Richardson came after a long line of communications and actions he was using to intimidate and scare Latrice. That long line of abuse must be fully understood in order to analyze the evidentiary issues raised in the instant action.

For many years, Richardson had been a friend of Latrice's family, going back to her childhood in Chicago. Clyde was a friend of one of her older cousins. She had cousins who were the same age as her parents. In Black culture, it is not unusual to refer to an older person who is a friend of the family as "uncle".

Richardson asked Latrice to call him "uncle," even though he was not actually a relative. (Tr. 440-441, L. 5-10)

Lacey and Richardson had been roommates in Chicago in 2009 and 2010, and then Lacey went off to Des Moines to go to law school. Clyde then moved back in with his mother. Still, Clyde would stay with Latrice for periods of time at her apartment in Des Moines while he was working in that area. At one time, the two had an intimate relationship, but that ended around the time Ms Lacey was finishing law school. She graduated and passed the bar in 2013. Ms. Lacey continued to work as an attorney and lobbyist in Des Moines until she was hired by the City of Davenport Civil Rights Commission to be its Director. After renting a home for some time, Ms. Lacey purchased a house in Davenport in 2015. (Tr. 438-443, L. 12-19)

Richardson had lived in Chicago since the end of 2012, but again, he would stay at Latrice's house in Davenport for periods of time starting in 2016, as he was working in Davenport. He stayed in the guest room. Ms. Lacey had a teenage daughter. She was about 13 when Latrice bought the home in 2015. In the spring of 2017, Richardson had finally gotten his own apartment in Davenport. Ms. Lacey had helped him move into his new place. At trial, there was a contested fact as to whether Clyde made that move before or after April 30, 2017. The legal

definition for the one-year period from cohabitation status was an element for domestic abuse charges arising from the occurrences of April 30, 2018. The defense contended Clyde moved out of Ms. Lacey's home in middle to late April, while the State maintained he actually moved out May 1, 2017, just one day inside the one- year time span in question. (Tr. 443-445, L. 25-22)(Tr. Ex. 5)

The events that led up to the date of the 2018 occurrence began to unfold about five months after Richardson moved out of Latrice's home. In September of 2017, Latrice started dating Charley Davis, and she did inform Richardson in October that she was dating someone. (Tr. 450-451, L. 20-8)

The text messages Latrice received from Clyde after that disclosure were creating fear in Latrice. She is a black woman. Clyde is a black man. (Tr. 267-268, L. 20-10, p. 270, pp. 481, L. 7-16) (Trial Ex. 10 ; App. 11) Clyde had found out that Charley is a white man in October of 2017. It was not until January 27, 2018 that Richardson met Charley Davis. Richardson showed up at Latrice's house unannounced when she was there with Mr. Davis. Clyde did shake Charley's hand when he met him, but as he was leaving, he let Latrice know he was upset with her relationship with Charley. In a private conversation at the back door, he told Latrice he should push her down the basement steps and kill her. In a followup text message to her that night he reminded her: "I meant what I said."

Latrice took that message to mean that he meant what he said about murdering her when they were standing at the back door. After that, Richardson's text messages became more violent. (Tr. 450-456, L. 20-5, pp. 466-470, L. 12-10) (Ex. Q, p. 1; App. 19)

Latrice then blocked texts from Richardson. On January 29, Richardson showed up at Latrice's house again. After she blocked his number, Latrice had not been having any phone contact with Clyde for a couple of days. He showed up at her house again with no prior warning. Charley was again at Latrice's house and this time her daughter was home, also. Latrice answered the knock at the back door. Clyde is there. His eyes are bloodshot and watery, and he is slurring his speech. He was asking to come into the house. Latrice is whispering, telling him he cannot enter. Richardson pushed past her and started storming into the house, after saying again that he should push her down the basement stairs. Latrice followed him, still whispering, trying to keep him from causing a scene in front of her daughter. Clyde went up to the second floor and the attic to get a tarp and spackling tool he had left at the house. (Tr. 470-472, L. 11-25)

When he got back to the main floor, Clyde looked into the living room to see Latrice's daughter and Charley. He waved at them, and started walking toward the back door. Latrice followed him to make sure he would leave. He opened the

back door, but then stood in front of the door so it could not close. Richardson then told Ms. Lacey he would not leave until she gave him her Playstation 2. It did not belong to him. It was Latrice's game system. She told him he needed to leave. She said she would call the police. Richardson grabbed her watch and broke the metal band after she started to make the call with her watch. At that point, Latrice yelled for her daughter to bring her phone. Charley had already taken his sleeping pills for a sleep disorder. (Tr. 410, L. 13-18) (Tr. 473-476, L. 3-10)

As soon as Latrice yelled for her daughter to bring her phone, Richardson started strangling Latrice. After having trouble finding the phone at first, Latrice's daughter finally came around the corner to see Richardson's hands around her mother's neck. When Clyde saw her daughter, he took his hands off Latrice's neck and took a step back outside. Latrice slammed the screen door and locked it. She slammed the inner door and locked it. Then, she called 911. (Tr. 476-477, L. 11-20) Latrice's daughter testified at trial as to coming around the corner and seeing Richardson's hands around her mother's neck. (Tr. 420-422, L. 7-19)

The police officer who responded to Latrice's home on January 29, 2018, seemed to be most amazed by that fact that a black woman owned that house. Latrice gave him Richardson's name and home address and told him where he worked. The officer eventually told Latrice he did not see any sign of injury on her

neck, and he asked her if she would like to look in a mirror to see if she could find any mark showing an injury. Because she is Black, Latrice did not expect to be able to find red marks, bruising or any other sign of injury on her neck, but she did check in the mirror. That police officer did admit at trial that Latrice informed him her daughter had seen Richardson's hands around her neck. He chose not to speak with her daughter. No charges were filed. (Tr. pp. 359-365, L. 7-19, pp. 364-365, L.8-3, pp. 478-482, L. 5-5)

After the assault on January 29, Latrice then took the block off Richardson's texts because she believed he might make admissions as to strangling her. (Tr. 463-464, L. 6-2) The text messages then kept coming from Richardson from the end of January through April of 2018. He also was constantly calling Latrice to leave voicemails and parking outside of her place of employment at night. She was afraid to be out at night. Latrice explained:

> **Q.** Okay. And the text messages that you received, how did you perceive them? What was your -- How do they affect you?
>
> **A.** I was afraid to go outside at night. I used to go to the gym pretty late at night because that would be when I got home from work, so I stopped going because I was afraid to go outside at night by myself. He was texting and calling almost every day.

Q. After there -- Was it you saying he was calling in addition to the text messages?

A. Yes. He was showing up at my job. He was --

Q. Oh.

A. Yes.

Q. You didn't have to have contact with him when he came to your job, did you?

A. He would just be sitting outside because I stay at work late sometimes. So he would just park on Harrison and sit and watch me get into my car. (Tr. 464, L. 1-20)

Richardson's texts and phone messages constantly urged Latrice to meet with him. On February 13, 2018, Richardson said in a text: "I'm not threatening you in no shape or form. I'm just saying Happy Valentine's Day. Love, O.J." Latrice took that as a threat to kill her because "O.J. Simpson murdered his ex-wife and her boyfriend and slit their throats". That text caused great fear because Latrice was not home when she received it. Her daughter had texted her about the same time and said Richardson was at their home. (Tr. 482-485; L. 6-9) (Trial Ex. N; App. 18)

The texting and calls continued to April 27. Richardson was also showing up outside of Latrice's house, and saying by text that he wanted to speak with Latrice and Charley at her house. They never spoke to him. He stole things out of Ms. Lacey's garage. He asked if Latrice would go out to breakfast or dinner with him or meet him at his place of employment. Latrice was too afraid to have Richardson come to her house, or to go anywhere with him. From this ongoing line of constant contacts, Latrice concluded Richardson was not going to "stop doing things to her" until she talked to him. (Tr. 485-494, L. 10-3) (Ex. Q; App. 19-67)

The burglary of Latrice's garage and damage to Charley's car on April 30 was the last thing Clyde did to Latrice that finally forced her to talk to him. Latrice was on the phone with her friend, Evelyn, that morning when Charley came back into the house to tell her what had happened in the garage. Latrice went out to see the service door of the garage was kicked in, and the deadbolt had broken the door frame. The front and back windshields of Charley's Impala were "bashed in." A mini-sledgehammer was laying on the garage floor next to the car. A witness would later describe that hammer as weighing two to three pounds. (Tr. 200, L. 1-16; 495-496, L. 9-12) (Ex's E - I ; App. 14-17)

At that point, Latrice developed a plan to get her daughter to school and to make a complaint in person on the burglary and criminal damage. She asks Charley to take her car to give her daughter a ride to school, and then he could take her car to work.. Her friend, Evelyn, agreed to pick Latrice up to give her a ride to the police station. Latrice intended to expedite the complaint process by not waiting for a police officer to respond to her house. She also was going to take the mini-sledge to the police department for fingerprints. She picked up the hammer after putting on gloves. On the way to the station, Latrice spotted Richardson's truck out in front of his place of employment, McDonnell and Associates Property Management. She asked Evelyn to drive to the business. Latrice considers the following: she has a witness with her; she knows there are video surveillance cameras on the outside of the McDonnell building; they will be out in broad daylight; and they will be at Clyde's place of employment. Latrice decides that outside in front of the McDonnell building will be a safe place to talk to Clyde. If she grants his ongoing request to talk to him, perhaps this cycle of abuse will end. (Tr. 496-500, L. 8-10) Latrice was not aware that the video cameras outside of the building were not operative. Clyde had told her in a previous conversation that the cameras worked. (Tr. 208-209. L.28-29; pp. 507-508, L. 2-15)

Evelyn and Latrice got out of the car and knocked on doors at McDonnell. At that time, Clyde's co-worker, Mark McDonnell, arrived and informed the two the business was not yet open. It was about 8:15 a.m. and opening was at 8:30. Latrice told him they wanted to talk to Clyde, and McDonnell agreed to go inside to get him. As McDonnell was going in the office door shown in State's Trial Exhibit 22, Richardson was coming out. (Tr. 500-501, L. 11-9) (Ex. 22; App. 13)

The events that transpired after Richardson came out of the office are described in great detail in Argument II, below.

ARGUMENT

I.

THE CONVICTION ON COUNT 3 ALONE, WHILE THREE ADDITIONAL COUNTS WERE AWAITING RETRIAL SHOULD NOT HAVE BEEN CONSIDERED A FINAL JUDGMENT FOR THE PURPOSE OF APPEAL BECAUSE THE INTERESTS OF JUDICIAL ECONOMY ARE NOT SERVED BY THE LITIGATION OF MULTIPLE APPEALS ON A SINGLE CASE

PRESERVATION OF ERROR: The defense moved to continue the sentencing on Count 3 for reasons that closely track with the arguments asserted below. A written motion was filed, and the motion was argued at the top of the sentencing hearing. Obviously, the motion was overruled. (Motion; App. 148-150)(Sent Tr. 2-5, L. 5-23)

Appellant Lacey filed a Motion to Stay Proceedings in this Court on February 21, 2020. The motion pointed out that Ms Lacey was charged by Trial Information in the district court with four counts. The first jury trial ended with a hung jury on all four counts. The second jury trial resulted in a verdict of guilty on the lesser included Offense of Harassment in the Second Degree. A third trial was set for the remaining three counts. Ms. Lacey was sentenced to probation on Count 3 on January 3, 2020. The Motion for Stay maintained that several complications could arise if the appeal proceeded on one count while the other three remained unresolved, and that all those complications could be avoided if the instant appeal were stayed until there was a disposition on all of the counts set for the third trial. (Motion; App. 158-159)

The State did not resist the Motion for Stay, but by order of March 26, 2020, the Court ordered that the parties submit statements as to whether the instant appeal is from a final judgment. Ms Lacey filed a statement, the State filed a

responsive statement, and the defense filed a reply to that. On May 19, 2020, this Court issued the order directing that "the issue of whether the judgment on count 3 is a final judgment shall be submitted with the appeal". (Order; App. 175)

STANDARD OF REVIEW: The question of whether the judge erred in refusing to continue the sentencing is reviewed for abuse of discretion. *State v. Clark,* 814 N.W.2d 551, 564 (Iowa 2012) If the Court were to decide the judge abused discretion, the remedy would be to vacate the sentence, and remand the case with instruction to forego sentencing until all counts of the Trial Information have reached final resolution.

Alternatively, the Court is now also considering a motion to stay further proceedings on appeal. Depending on the status of further proceedings in the district court, this Court might determine the best remedy is to stay further proceedings in the instant appeal until all counts are resolved.

The question is one that seeks this Court's interpretation of its own Rules of Appellate Procedure and Section 814.6, the Code. When errors are assigned for a district court's interpretation of a rule of procedure or a statute, this Court will review for error of law. "Iowa court rules have the force and effect of laws, and therefore "we interpret rules in the same manner we interpret statutes." (Cite) … When interpreting a statute, our goal is to give effect to the intent of the legislature.

(Cite) When the statutory language is silent, legislative intent can be gleaned from the purposes and underlying policies of the statute, along with the consequences of various interpretations." *State v. Mootz,* 808 N.W.2d 207, 221 (Iowa 2012)

The Merits

This Court has never ruled on the instant question in a published opinion. There are decisions that address appeals on orders other than judgment that may be instructive. The beginning in the line of cases is at *State v. Klinger,* 144 NW 2d 150 (Iowa 1966). In that case, the Court faced the question of whether a ruling on a motion to suppress was a judgment from which the defendant could appeal. The case had not reached sentencing. The Court decided the case with this simple rule quoted from a U.S. Supreme Court case:

> "Final judgment in a criminal case means sentence. The sentence is the judgment. *** In criminal cases, as well as civil, the judgment is final for the purpose of appeal when it terminates the litigation between the parties on the merits and leaves nothing to be done but to enforce by execution that which has been determined."
>
> *Klinger,* 144 NW 2d at 151, (quoting *Berman v. U.S.*, 302 US 211,212-213, 58 S. Ct. 164, 166 (1937)

In *State v. Coughlin*, 200 NW 2d 525 (Iowa 1972), this Court rejected the State's attempt to appeal from an order granting a new trial for the defendant. The case had not yet proceeded to the retrial. The *Coughlin* court relied upon a statute and *Klinger* in concluding criminal appeals are only authorized upon a final judgment, and that means a sentence. The Court refused to extend to a criminal case a rule of civil procedure that allowed appeal on orders for new trial. 200 NW 2d at 526-527. Statutes enacted after the *Klinger* and *Coughlin* decisions provided for the State's right to appeal a grant of a new trial and provided provisions for both parties to appeal rulings on a Motion to Suppress.

In 1978, the legislature enacted Section 814.6. That section gives criminal defendants a right to appeal from "[a] final judgment of sentence" on indictable offenses. Discretionary review is provided on other orders, none of which apply to the instant case.

A defendant did not waive appeal when a sentencing was deferred upon guilty pleas and entry of an order to allow completion of a drug diversion program. That was the holding in *State v. Loye,* 670 NW 2d 141, 146 (Iowa 2003). Citing *Coughlin,* the Court held the Notice of Appeal was timely after the diversion proved unsuccessful, and a judge then sentenced the defendant to consecutive prison sentences. Time for appeal began running when the prison sentences were

imposed. This Court then concluded the guilty pleas were defective, and the convictions were reversed.

In *State v. Propps,* 897 NW 2d 91, 96 (Iowa 2017), the Court cited to *Loye* for the same rule that had been cited in *Coughlin* and first quoted in *Klinger*: "Final judgment in a criminal case means sentence." Section 814.6, the Code, says the same thing. That flat and simple statement suggests that the judgment on Count 3 is final and the right of appeal was triggered because there was a sentence. The ensuing language in *Klinger* supports the position that the judgment on Count 3 was not a final judgment: "[T]he judgment is final for the purpose of appeal when it terminates the litigation between the parties on the merits and nothing is left to be done but to enforce by execution that which has been determined." *Klinger,* 144 NW 2d at 151. In the instant case, the district court did execute upon the judgment and imposed a suspended jail sentence with supervised probation. The judge filed a Sentencing Order for execution of the judgment, and in a separate order, directed the Defendant to report immediately to probation services. (Sentencing and Probation orders; App. 151, 155-156) The January 3 sentencing transcript (p. 17, L. 7-12) and the January 6 Sentencing Order, at page 2, document that the judge informed Defendant she had 30 days to appeal from the

judgment. The judgment on Count 3 was clearly executed. Per the district court's direction, Defendant filed her Notice of Appeal. (App. 153-156)

Rules 6.103 and 104, I.R.A.P. do not give a clear indication as to whether the instant conviction would be considered a final judgment. Neither the caselaw, nor Section 814.6, specifically address a situation where a judgment on one count has been executed, but a retrial on remaining counts is pending. The Court will assume the legislature was aware of the *Klinger* decision. *Rhoades v. State,* 880 NW 2d 431, 446 (Iowa 2016) The interpretation of the legislature's intent in the use of the words "final judgment" for initiation of the right to appeal designates the status where all litigation between the parties is "terminated" in the district court, and "nothing is left to be done but to execute upon that which has been determined." The litigation between the parties has clearly not been terminated in the instant case, and the Court should rule that all proceedings in the instant appeal shall be stayed until all proceedings are concluded on the remaining counts set for trial. Appellant should not be required to initiate a new appeal and pay a new filing fee at that time.

In the Motion for Stay filed in this Court, Ms. Lacey pointed out the pitfalls in judicial economy presented by subjecting the same case to successive appeals on separate counts:

A. This Court will have to determine whether the judgment on Count 3 is a final judgment;

B. The investigation and preparation for the next trial, and in fact the testimony itself, may reveal newly discovered evidence that would impact the verdict or sentence on Count 3. The complaining witness has refused to appear to testify in the first two trials, but he may appear in the third; and

C. This Court may be unnecessarily burdened with adjudicating two appeals from the same case. Appellate counsel for both parties would also be unnecessarily burdened with dual litigation. (Motion for Stay, p. 2; App. 159)

Ms. Lacey closed the Motion for Stay by stating that the foregoing complications could all be avoided if the final judgment is not perfected until all adjudication as to guilt or acquittal on all counts is finalized, and "there is nothing left to but to execute upon that which has been determined". That is the rule of *Klinger,* and that is the rule that promotes judicial economy rather than thwarting it.

The Court must rule that in a criminal case, a judgment on a single count is not final until the judgments on all counts are final. On that basis, the trial judge erred in refusing to continue the sentencing. The Court must vacate the sentence, and remand the case with instruction that sentencing shall not proceed until all counts are finally resolved by a finding of acquittal or guilt or by a final dismissal.

II.

THE CONVICTION ON COUNT 3 MUST BE REVERSED BECAUSE THE STATE FAILED TO PRODUCE SUFFICIENT EVIDENCE ON THAT COUNT

PRESERVATION OF ERROR: In a challenge to the sufficiency of the evidence, trial counsel for the defense preserves the issue for appeal by moving for a Judgment of Acquittal. While the defense generally should refer to the element or elements of an offense where the State's proof has failed, the words spoken do not need to be delivered in absolute precision. The issue is preserved "when the record indicates that the grounds for a motion were obvious and understood by the trial court and counsel." *State v. Williams,* 695 N.W.2d 23, 27-28 (Iowa 2005) Defendant initially moved for judgment of acquittal at the close of the State's case-in-chief and summarily renewed the motion *in toto* at the close of all evidence. (Tr. pp. 370-372, L. 1-6: pp. 605-606, L. 4-1)

In the fully stated motion at the close of the State's case, defense counsel could only think of one detail in the State's evidence that could possibly be construed as the threat required for the key element of the Harassment charge. Defense counsel referred to a joking remark Ms Lacey had made in an interview

with a detective. In fact, the detective interviewing her in the office of the sheriff's department had asked Ms Lacey "if she had ever told Mr. Richardson she was going to shoot him". The detective testified Latrice did not affirm that proposition. Instead, she said "I *should* shoot him." and she also said "I should go right over there and get my permit." Then she added, "This isn't being recorded, right." The detective said that he did not take Ms Lacey's statements as a threat to Richardson, but rather the detective agreed "it was more of a joking discussion" and Latrice had just offered a kind of "smart aleck" answer to the question. (Dankert Tr. 9/18/19, p. 27, L. 10-25) (Tr. pp. 290-291, L. 25-18) (Ex. 4)

The defense attorney did not recount the testimony quite correctly in stating the motion for acquittal on the First-Degree Harrassment charge. He said, "I believe the language is that she said, I should shoot *you*. It wasn't, I'm going to shoot you. And so we don't believe that they have demonstrated that she harassed Mr. Richardson." The defense claimed the State failed to prove Ms. Lacey had conveyed a threat "to commit a forcible felony" against Richardson. (Tr. 371, L. 16-19) The argument was directed to element 2 on the greater charge of Harassment in the First Degree as charged by the Trial Information. That element required proof Latrice communicated a threat to commit a forcible felony to Richardson. The prosecutor effectively conceded that the joking statement in the

police interview was not a threat directed to Richardson. He knew the motion was directed to element 2, and pointed that out to the judge. The County Attorney argued the communication of a threat was proven by "the fact that she made the statement I'm going to beat your ass, and used a hammer". (Tr. 375, L. 16-20) That quote from the testimony was not quite correct either. The testimony from State's witness Emily Gordon had simply been that she heard somebody say to somebody, " I'm gonna beat you." (Tr. 263, L. 12-15)

The judge did state several particular facts about the domestic relationship between Richardson and Ms. Lacey and on the particulars of self-defense, but the ruling on the acquittal motion in regard to Harassment was covered in the general ruling that concluded "a jury question has been generated as to each of the elements of each offense". (Tr. 377, L. 1-4)

In addressing the Defendant's claim of self-defense on the Motion for Acquittal, Judge Werling reached this conclusion:

> The evidence further sustaining the allegation that the Defendant was the aggressor in this assaultive behavior could be sustained if the Court believes -- I'm sorry, if the jury believes the testimony of the witnesses, particularly Mr. McDonnell, who was apparently within about 5 feet of the entire event, and the witness who lived in the apartment building across the street and

> heard -- only heard the Defendant's very loud voice cursing and swearing and being aggressive towards someone, which the jury could reasonably extrapolate was being aggressive to Mr. Richardson. (Tr. 378, L. 10-20)

Somewhere along the line, and not on the record, the State chose to withdraw the first-degree charge in Count 3, and submit the included charge of Second-Degree Harassment to the jury. (Jury Instructions, p.1; App. 97) Element 2 of the lesser charge requires proof beyond a reasonable doubt that the Defendant communicated a threat to commit *bodily injury*. (Jury Inst 14; App. 108)

STANDARD OF REVIEW: This Court will review challenges to the sufficiency of the evidence supporting a guilty verdict for correction of errors at law. The verdict will be upheld if substantial record evidence supports it. "Evidence is substantial if it would convince a rational factfinder that the defendant is guilty beyond a reasonable doubt." The Court reviews the evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the evidence in the record. The court considers all the evidence in the record, *not* just the evidence that supports the verdict. "The State must prove every fact necessary to constitute the crime with which the defendant is charged. (Cite) The evidence must raise a fair inference of

guilt and do more than create speculation, suspicion, or conjecture." *State v. Webb,* 648 N.W.2d 72, 76 (Iowa 2002)

In the instant case, the State has presented only two witnesses who were actually present at the time of the altercation. Mark McDonnell was an eyewitness who was just steps away from the altercation in question throughout the entire incident. Emily Gordon was an earwitness who believed she heard a female say something about "I'll beat you". Those three words are the only evidence produced that could be considered evidence of the communication of a threat to commit bodily injury, which is the evidence required to prove element 2 of the Harassment offense. This testimony suffered fatal weaknesses as to reliability because of Ms Gordon's inability to see the speaker and her physical distance from the speaker. Even if the Court were to view this evidence as the words that actually were spoken, however, there is no evidence beyond speculation, suspicion or conjecture that connects that statement to Ms. Lacey. The trial judge erred in jumping to the conclusion Ms. Gordon was hearing Ms Lacey's voice. (Tr. 378, L. 10-20)

The Merits

In the marshaling instruction for Harassment in the Second Degree, the judge correctly instructed the jury as to the elements. The jury was informed the State was required to prove all of these these elements:

1. On or about the 30th day of April, 2018, the defendant purposefully and without legitimate purpose, had personal contact with Clyde Richardson.

2. The defendant communicated a threat to commit bodily injury.

3. The defendant did so **with the specific intent** to threaten, intimidate, or alarm Clyde Richardson. (Jury Inst. No. 14; App. 108) (emphasis added)

The marshaling instruction tracks with Section 708.7(3), the Code. The Trial Information had charged Ms. Lacey with Harassment in the First Degree under 708(2).

To view the facts in the light most favorable to the State, the Court must look to the testimony of State's witnesses Mark McDonnell and Emily Gordon. As stated above, the evidence showed Mr. McDonnell was going in the office door

of McDonnell and Associates when Richardson was coming out. He heard one of the two women say to Richardson a question to the effect of, "Is this the reaction you were looking for?" While he was still inside the building, McDonnell saw Ms. Lacey push Richardson up against the office's picture window. The witness admitted he had not seen the initial physical contact between Richardson and Latrice. McDonnell then went back outside. He heard Latrice "muttering something about him breaking into her garage and stealing her stuff." The front of the McDonnell building showing the storefront window and the office door to the right of it that Richardson and McDonnell used is shown in the photo admitted as State's Trial Exhibit 22. (Tr. 180-185, L. 11-1, p. 214, L. 1-18) (Ex. 22; App. 13)

As the two struggled outside the office window, McDonnell heard Ms. Lacey say something derogatory about Richardson's mother. The witness admitted he did not remember the statement verbatim. That statement "angered" Richardson. McDonnell then saw Richardson push Latrice. (Tr. 185-186, L. 2-3; pp. 224-227, L. 6-11) At that point, McDonnell attempted to call 911 on his cell phone, and he was telling Richardson to get back into the building. He was standing very close to the two, within a few feet, and being careful not to get tangled up in their struggle. At some point, another co-worker named Darell assisted McDonnell in unsuccessfully attempting to pull Richardson away from Ms

Lacey and back into the office. Latrice's friend, Evelyn, went back to her car and pulled out a baseball bat from the back seat. Then, she just stood there holding the bat. That drew Richardson's attention to Evelyn. He asked Evelyn what she was going to do with the bat. Mr. McDonnell characterized their exchange in this way: "Clyde did ask her, what are you going to do with that? And her friend, [Evelyn], said, I'll use it if I have to, and then Clyde said, you know you're not gonna use that." (Tr. 195-197, L. 6-16; pp. 223-227, L. 2-20)

It was while Richardson was talking to Evelyn about the bat that Ms. Lacey grabbed the mini-sledgehammer that was inside Evelyn's car. McDonnell testified Latrice struck Richardson once, then swung a second time when Richardson got a hold of the hammer. The two struggled for control of the hammer. McDonnell did not recount anything being said between Latrice and Richardson when Latrice allegedly struck him on the arm, or at any time in the struggle over the hammer, or afterward. Clyde finally pulled the hammer away and threw it on the ground. At that point, McDonnell picked up the hammer to make sure that no one else got a hold of it. (Tr. 196, L.6-21, pp. 198-200, L. 9-3)

Emily Gordon testified for the State that she left the building where she lived to go to work on the morning in question. On April 30, 2018, she walked out of her building to go to work "sometime around" 8:00 am. The McDonnell and

Associates Property Management building is across Pershing Avenue from Ms. Gordon's residential building. State's Trial Exhibit 20 is a photo showing an aerial view of Ms. Gordon's four-story residential building in the upper half of the photo and the roof of the much smaller McDonnell building in the bottom half of the photo. The photo shows Pershing to be a four-lane street with parking on both sides. With a blue pen that was not working very well, the prosecutor had Emily Gordon draw a circle or oval on Ex. 20 at the approximate place where her car was parked in a lot as she headed toward it that morning. She also used the blue pen to scribble out a square on the photo where people were gathered in front of the McDonnell building across the street from the parking lot where Emily was parked. Those people were behind some parked cars as seen from Emily's vantage points. There was a lot of loud yelling and some kind of conflict among that group of people. (Ex. 20; App. 12) (Tr. 257-260, L. 19-21)

The people in the group where the yelling was occurring were in a location consistent with Mr. McDonnell's description of the altercation occurring on the sidewalk out in front of the McDonnell building in the time frame in question. The prosecutor also directed Ms. Gordon to draw an "X" on Exhibit 20 to show the approximate location of the back door of her building where she had exited that morning on her way to work. Ms. Gordon described that door as an "alley door".

Exhibit 20 shows the alley running perpendicular from Pershing Avenue, and the context of the whole photo shows the alley door marked by the "X" to be about a half block from Pershing. (Ex. 20; App. 12) (Tr. 258-259, L. 8-11, pp. 261, L. 18-22)

Ms. Gordon testified she heard the yelling as she came out of her alley door and was walking toward her parking spot. She testified the group involved in the "commotion" was in front of the McDonnell building. Emily explained, "I mean I could only sort of see what was happening. I could mostly hear, because, I mean, there were cars on both sides of the street and I wasn't really looking." She quickly went to her car "and called 911". She added, "I didn't like stick around to see what was happening. That didn't seem wise." Emily and everyone walking in her parking lot were "beelining for their cars". (Tr. 261-262, L. 12-20, pp. 265-266, L. 12-4)

While the "commotion" Ms. Gordon described was consistent with Mr. McDonnell's description, there is no context appearing in any of the testimony that would allow a reasonable inference as to which part of the entire incident Ms. Gordon heard while she walked quickly and directly to her car. Mr. McDonnell witnessed almost the entire incident from before the altercation happened until after it was over, and Richardson went back into the McDonnell building.

McDonnell was standing just a few feet from Latrice and Richardson. (Tr. 197, L. 7-22; pp. 218-219, L. 16-22)

Ms. Gordon did not recall much of anything as to any specific words she was hearing from the conflict. She testified, "There were people yelling, and there were several people out there. I don't remember all of the specifics. It's been over a year." Emily remembered, "there was a woman's voice that was yelling really loudly, and I remember lots of swearing." (Tr. 262-263, L. 21-5) Her recollection of specific words used came down to this, and this only:

> I know I heard the F word several times
> and some things that sounded like threats.
> I'm trying to think of the specifics.
> Something about somebody -- I'm gonna
> beat you. But there were several swear
> words. (Tr. 263, L. 12-15)

Ms. Gordon testified there was only one woman yelling louder than the other people, and she could hear that voice as soon as she walked out the alley door. She remembered the group as one African-American woman, and two or three males. At least one of the males was white. (Tr. 263-264, L. 16-13)

By Jury Instruction No. 10, the jury was instructed: "Decide the facts from the evidence. Consider the evidence using your observations, common sense and experience. Try to reconcile any conflicts in the evidence; but if you cannot, accept

the evidence you find more believable." (App. 104) The analysis for substantial evidence of guilt must proceed with the rule requiring a reasonable juror to find facts within the framework of reconciling the testimony of the State's witnesses. There is no conflict between the testimony of the two witnesses. Mark McDonnell stood just a few feet away from Richardson and Latrice throughout the entire incident. He did not hear Latrice say anything to the effect that Latrice uttered a threat of "I'm gonna beat you". McDonnell did hear Evelyn tell Clyde she was going to use the baseball bat on him if she needed to, however. Neither of the attorneys asked McDonnell if he remembered the exact words Evelyn used to convey that intent or how loudly she was speaking. It is most likely that Emily Gordon in all the distance and haste of her actions heard Evelyn yelling at Richardson, "I'll beat you if I have to." The identity of the speaker is not proven. Ms Gordon did not realize there were two women speaking amidst the fracas. McDonnell did realize it. The passing fragment of a conversation related by a distant earwitness and related to an unidentified speaker is not the type of evidence a rational juror can rely upon to find guilt beyond a reasonable doubt on the charge of a criminal offense.

The jurors could only use suspicion and speculation in these circumstances to conclude the person who spoke those few words was Latrice rather than Evelyn.

Speculation and suspicion do not qualify as substantial evidence upon which a rational juror could find proof of guilt beyond a reasonable doubt. The conviction must be reversed with instruction for entry of an acquittal due to the State's failure to adduce sufficient evidence of guilt.

III.

THE TRIAL JUDGE IMPROPERLY EXCLUDED EVIDENCE OF RICHARDSON'S PRIOR BAD ACTS AND MS. LACEY'S KNOWLEDGE OF THE PATTERNS OF DOMESTIC ABUSERS, AND ALL OF THAT EVIDENCE WAS MATERIAL TO THE QUESTION OF WHETHER MS. LACEY MADE CONTACT WITH RICHARDSON FOR A LEGITIMATE PURPOSE AND WITHOUT THE SPECIFIC INTENT REQUIRED TO COMMIT HARASSMENT

PRESERVATION OF ERROR: The defense first gave the State and the judge a proposed Trial Exhibit Q, which was a copy of a printout of text messages Ms. Lacey had received from Clyde Richardson between October of 2017 and April 30, 2018. During a break in the jury selection process, the State made a general objection indicating some undesignated portion of the messages were irrelevant

and showed prior bad acts of Richardson. The prosecutor generally mentioned insults and comments about sex acts in Richardson's texts. The objection was that some unspecified messages were irrelevant, much more prejudicial than probative, improper evidence of prior bad acts, and improper character evidence. (Tr. 124-131, L. 11-12) In opening statement, counsel for the defense emphasized to the jury that Ms. Lacey made the decision to go to talk to Richardson at his place of employment in order to concede to his repeated request to speak with him in person. It seemed to be a safe way to have the conversation he wanted. (Tr. 169-170, L. 16-22)

After the State had presented its first witness, the judge heard further argument on the State's objection. Defense counsel emphasized that it was important to show the jury the source and the extent of Latrice's fear of Richardson. Her decision to grant his wish to talk to him was a legitimate and lawful decision to attempt to end his ongoing harassment of her. The judge gave this reasoning for his ruling:

> However, the language used in the text messages makes references to sexual acts, makes -- There are some references to Mr. Richardson wanting to talk to the Defendant because he is having -- he is in imminent fear of going to jail. That's repeated several times. There are a variety of messages in which he

> expressed his disgust towards the Defendant personally in that she's having an intimate relationship with a white man and his detailed disgust as to his imagined sex acts that he imagines that they are doing, and I think those are highly prejudicial. (Tr. 235-236, L. 24-9)

The judge stated he was going to exclude exhibit Q, except for one text message that Richardson sent and signed "Love you, O.J." Defense counsel took exception to the ruling, but requested permission to offer a redacted version of the texts messages to excise the parts the judge found objectionable. (Tr. 236-238, L. 9-13) The judge agreed to this and clarified his ruling:

> THE COURT: If you believe that you can filter Exhibit Q to remove the statements about sex acts, Mr. Richardson's disgust as to the racial integration of the couple, and his concerns about his legal status, his criminal legal status, I'll reconsider the admissibility of the exhibit. (Tr. 238, L. 14-19)

The next day, Ms. Lacey was ready to take the stand. The judge conducted a colloquy to determine she understood her rights to testify or to refuse to testify. After that, defense counsel reminded the Court that at some point in her testimony, the defense would want to discuss the texts in Exhibit Q that Ms Lacey had

received from Richardson. The Court and counsel then went off the record for that preliminary discussion. (Tr. 436, L. 3-19) Upon dismissing the jury for the noon recess, less than half way through Ms. Lacey's testimony in her own defense, the judge directed defense counsel to take action over the noon hour "to excise the portions which the Court has indicated that [he was] not likely to make admissible". The defense attorney asked that judge for some direction as to which text messages he was likely to exclude. The judge replied:

> THE COURT: My objection to the exhibit previously was that it contained prejudicial material whose probative value was outweighed -- its prejudicial value was outweighed -- whose probative value was outweighed by the prejudicial material, the prejudicial material being the racist comments reflected by Mr. Richardson and the detailed and graphic sexual comments that he was making to Ms. [Lacey] throughout the trial -- or, throughout the course of the messages. If that is not sufficient, then we'll have to go through them one at a time, but I'm telling you, we're gonna be done at 1:30. We're gonna either have exhibits we can enter or we're not gonna have an exhibit, but this jury needs to get this case heard. (Tr. 457-458, L. 24-12)

The defense attorney persisted in pointing out to the judge that neither the prosecutor nor the Court had clearly explained to him which specific texts were objectionable. Counsel pointed out he did not want to take out the sexual content,

but he would. Counsel continued to object to exclusion of Richardson's racist comments, however. Mr. Bell, counsel for the defense, made the argument, and the judge responded:

> MR. BELL: Well, I understand that, but the problem is nobody will tell me. I mean, I don't have a problem -- I do have a problem taking the sex out, but I will take that out. But I don't want to take out the racist because I believe that that is a part of the whole dynamic. He was angry. Mr. Richardson was angry because she was with a white man.
>
> THE COURT: Then it's --
>
> MR. BELL: That's the underlying --
>
> THE COURT: That evidence is before the jury through the Defendant's testimony and others. The Court's direction is that that material needs to come out. That's the Court's ruling. It's been consistent. (Tr. 458, L. 13-25)

The session then broke for the noon recess. Counsel prepared a redacted set of the text messages according to the judge's ruling to be offered to the jury as Exhibit Q. After the noon recess, that redacted Exhibit Q was admitted without objection. (Tr. 482, L. 9-18) After the redacted text messages were admitted, and outside the presence of the jury, defense counsel offered Exhibit Q-1 to admit as evidence for the jury. Exhibit Q-1 contains all the text messages from Richardson that the judge had objected to for their racism, sexual content and "profanity".

Outside the presence of the jury, the judge sustained the State's objection to the offer of Exhibit Q-1 and ordered it preserved by the clerk for the instant appeal process. (Tr. 527, L. 6-24) After Exhibit Q-1 was rejected by the judge, the defense attorney sought further clarification as to what he could ask Ms. Lacey in her continuing testimony about Richardson's attitude in regard to the fact that Latrice's new boyfriend was white. (Tr. 528, L. 2-8) With that, Judge Werling further explained his ruling requiring redaction of the text messages:

> THE COURT: My complaint about Clyde Richardson's reference to Mr. Davis's ethnicity wasn't just that he was using white. It was usually expletives along with it. I don't think that -- The fact that Mr. Davis complained about the Defendant's now spouse being white, I think the entire jury has got that pretty well established. I don't think that's controversial anymore. My concern about the exhibits simply was that they contained other profanities that I thought were -- that the evidentiary value was not outweighed by the -- I'm struggling for the word.
>
> [PROSECUTOR]: Prejudicial effect.
>
> THE COURT: Prejudicial effect. Thank you.
>
> MR. BELL: Does that mean I can ask her if white was an issue for Mr. Richardson?
>
> THE COURT: Well, you sure can. (Tr. 528-529, L.19 -10

Another objection from the State had arisen just before the noon recess in the middle of Ms. Lacey's testimony on direct examination. Defense counsel asked her if she had received training in behavioral patterns of both the victims and the perpetrators of domestic abuse. When counsel asked her to explain what she had learned about those patterns, the State objected. The Court then dismissed the jury for the noon recess, and arguments were heard on the objection outside the presence of the jury before the jury returned. The State's objection to the testimony was that the proposed testimony was not relevant. The prosecutor said he assumed Ms. Lacey would testify "to the cycle of domestic abuse, abuse, how domestic abusers behave. I assume she's going into that they abuse then apologize, whatever." The prosecutor suggested the defense was attempting to offer the evidence because it went to Richardson's propensity for domestic abuse and it was improper character evidence. (Tr. 459-460. L. 13-2)

The defense attorney explained the evidence was not offered to show propensity to prove Clyde burglarized the garage and damaged Charley's car or anything like that. The evidence was offered to show Latrice's state of mind. The state of mind that was material to the defense of justification, but also to show the legitimate purpose she had for going to McDonnell and Associates that day to talk to Clyde. Latrice's knowledge of an abuser's cycle of apologizing and abusing and

repeating those behaviors, repeating over and over. The defense was not offering Latrice as an expert on domestic abuse. The testimony was offered to show that the cycle was scaring her, and out of that fear and knowledge, she went to his place of employment where she thought she would be safe in a legitimate attempt to resolve their issues and break the cycle. (Tr. 460-461, L. 17-11) The defense argued:

> And whether she can prove it was he who did the damage the second time, whether she can prove it was him that did the damage the third time isn't the issue. The issue is how it makes her feel. The issue is does it scare her, and she's entitled to justify her justification defense by demonstrating that she's afraid of him, so she went down there where there was a video camera and there were people watching to talk to him about it. (Tr. 461, L. 3-11)

Judge Werling said he believed the defense was attempting to offer Latrice as an expert on domestic abuse, and he did not think the testimony about the cycle of abuse was relevant to the justification defense. (Tr. 461-462, L. 12-6) Counsel explained to the judge the prejudicial effect of his rulings on both the domestic abuse and text message rulings and the importance of the evidence in proving Latrice's state of mind when she decided to concede to Richardson's ongoing requests to speak to her in person. As her fear continued to rise, her best option

appeared to be to have the conversation with him in a safe place with witnesses present and video surveillance:

> **MR. BELL [FOR THE DEFENSE]:** I think I've made my record. I think the Court has gutted our defense, has taken away all of the things that make it, a compilation of threats and intimidation and anger and apologies and everything that makes her afraid and made her afraid of it. We've only been able to put in half of it. (Tr. 462, L. 12-17)

STANDARD OF REVIEW: These errors were particularly prejudicial because they both infringed on the Defendant's testimony, and in both instances the evidence was material and important to her explanation as to her state of mind at the time in question. The right to present a defense in a criminal case is guaranteed by the Fourteenth Amendment to the United States Constitution. *State v. Clark,* 814 N.W.2d 551, 561 (Iowa 2012) The Defendant did not frame this issue as a constitutional question in the district court, and a constitutional standard of review cannot be applied here. The fact that a constitutional right was infringed, however, is pertinent to the determination of the effect on substantial rights for harmless error analysis. *State v. Tyler,* 867 N.W.2d 136, 153 (Iowa 2015) "The State has

the burden to affirmatively establish the substantial rights of the defendant were not affected." *State v. Dudley,* 856 N.W.2d 668, 678 (Iowa 2014).

> The rules of evidence provide the framework for our analysis of this issue. In general, relevant evidence is admissible and irrelevant evidence is not admissible. *See* Iowa R. Evid. 5.402. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401. Even when evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Iowa R. Evid. 5.403.
>
> *State v. Taylor,* 689 N.W.2d 116, 123 (Iowa 2004)

The *Taylor* case, quoted above, addressed prior bad acts of the defendant, but it is extremely helpful in the instant case because it was addressing prior bad acts of a domestic abuser. When a party proposes to introduce evidence of a witness's prior crimes or bad acts, the adjudication for admissibility takes on an additional consideration that merges with the balancing that takes place under Rule 403. Under Rule 5.404(b), a party cannot use prior crimes or bad acts evidence simply to prove the witness is of bad character and that he acted in conformity with that character in regard to a fact in issue. Such evidence cannot be used to show the witness acted in conformity with his propensity to commit bad acts. *Ibid.*

If the judge finds the proposed "bad acts" evidence does have a legitimate purpose, other than bad character and propensity, then the evidence undergoes the final step in the analysis. Is the probative value of the evidence outweighed by the danger of unfair prejudice?

> In determining whether unfair prejudice generated by evidence of a defendant's other misconduct substantially outweighs the probative value of the evidence, the court should consider the need for the evidence in light of the issues and the other evidence available to the prosecution, whether there is clear proof the defendant committed the prior bad acts,the strength or weakness of the evidence on the relevant issue, and the degree to which the fact finder will be prompted to decide the case on an improper basis. In considering whether the trial court properly admitted prior-bad-acts evidence, we apply an abuse-of-discretion standard of review. *Id.* Recognizing that " '[w]ise judges may come to differing conclusions in similar situations,' we give 'much leeway [to] trial judges who must fairly weigh probative value against probable dangers.' "
>
> *Taylor,* 689 NW 2d at 124

As with almost all criminal decisions, the Rule 403 and 404(b) question in *Taylor* was directed to evidence of prior bad acts the prosecution proposed to offer against the defendant. Ms. Lacey will argue below that the unfair prejudice question is significantly different when the evidence is offered against a complaining witness, especially a complaining witness who chooses not to testify.

"Unfair prejudice arises when the evidence would cause the jury to base its decision on something other than the proven facts and applicable law, such as sympathy for one party or a desire to punish a party." *Ibid.*

The Merits

The rulings combined to deprive Ms. Lacey of substantial rights in the presentation of her defense. The domestic abuse testimony and the text messages were important evidence to demonstrate that Ms. Lacey was mindful of a recurring pattern whereby Richardson would continue to make threats and engage in abusive and assaultive conduct, and then apologize. It was also plain to her that this ongoing abuse was fueled not only by sexual jealousy, but also by racial hatred that intensified the jealousy and anger. The evidence was critical to the jury's understanding of how Latrice's state of mind progressed while Richardson's intimidating, assaultive and destructive behavior escalated. Defense counsel told the judge the evidence was important to the Defendant's state of mind for the purpose of the justification defense. The specific intent of Ms Lacey in going to Richardson's place of employment was "hotly contested" on the Harassment charge. The State argued at length in closing argument that Ms Lacey did not have a legitimate purpose in her mind when she went to speak with Richardson. (Tr. 626-634, L. 4-17) The question was whether Latrice initiated the in-person contact

with a "legitimate purpose" of nonviolent conflict resolution in her mind. The *Taylor* court noted the importance of state of mind evidence in that case: "As the district court noted when it admitted this evidence, the defendant's intent was "hotly contested." Because intent is seldom proved by direct evidence, but rather is usually established by inference, the circumstances surrounding the alleged assault and burglary were particularly important here." 689 NW 2d at 129

The defense argument is that Ms. Lacey did not go to see Richardson at his place of employment "to threaten, intimidate, or alarm" him. She went to McDonnell and Associates with the "legitimate purpose" to concede to Richardson's persistent requests to meet with him in person to have a conversation. The judge's rulings as to why he was excluding particularly powerful text messages and Ms. Lacey's knowledge as to the pattern of domestic abuse are prejudicial errors of law. The rulings do not demonstrate rational explanations.

The Text Messages:

The judge's rationale for excluding the text messages was a simple feeling that the messages were "more prejudicial than probative" He did not frame the question in an analysis of "unfair prejudice". For some reason, the judge

admittedly did not want the jury to understand the depth of Richardson's racism or the visceral nature of his extremely crude and "detailed and graphic sexual comments". (Tr. 235-236, L. 16-10, pp. 457-458, L. 24-12)

There is no rule that protects a juror's sensitivity to crude language, profanities, violent language or racist language. In fact, those categories of speech are the stuff of criminal cases. A trial judge has no authority to edit out statements that were actually made in the course of conduct of persons that led to criminal charges when the statements are material to questions of fact. This is especially important when there is an issue of fact as to the state of mind of the defendant. The highly offensive nature of the language Richardson constantly sent to Latrice in those texts in that relevant time frame does not make the statements less probative. It makes them more probative to the question of how the communications were affecting Latrice's state of mind.

The judge did not explain his finding of "prejudice" in the statements. Who is prejudiced? The State? The "complaining witness" who fails to show up for the trials? The standard under the evidentiary balancing of Rule 403 is not whether the probative value is outweighed by prejudice. The standard is whether the probative value is outweighed by *unfair* prejudice. The State is not entitled to an exclusion of evidence simply because it hurts the State's case. "Certainly a fact finder,

whether judge or jury, would have a tendency to conclude from the [witness's] past misconduct that he has a bad character. But that type of prejudice is inherent in prior-bad-acts evidence and will not substantially outweigh the value of highly probative evidence." *Taylor,* 689 NW2d at 130 In other words: Does the danger of the jury basing its conclusions on an improper basis *substantially* outweigh the value of this highly probative evidence? The judge did not make that finding in the instant case, and that finding cannot be made. Ms Lacey was entitled to show the jury the depth of Richardson's racial hatred and his crude, offensive, assaultive way of intimidating her. She is entitled to show why she found it imperative to attempt to break the cycle of this abuse she was suffering.

Knowledge of the Domestic Abuse Cycle:

The defense did not attempt to qualify Ms. Lacey as an expert on domestic abuse, and did not offer her knowledge of the cyclical behavior patterns of perpetrators of domestic abuse to suggest Richardson had propensities in bad character. She had the right to show the jury her state of mind in the hopeless ongoing struggle and the belief that Richardson's abuse was not going to have any chance to end unless she granted his request to talk to her. The question is not whether her decision on that question was a reasonable decision. The question is

whether she went to McDonnell and Associates with the specific intent to intimidate or threaten Richardson, or did she go there with the legitimate purpose of making an attempt to resolve his cycle of abuse.

Combined Prejudice: This Court must compare the admitted Exhibit Q and the excluded Exhibit Q-1 to Latrice's view of Richardson's cyclical abuse. The combination of the escalating, declining and escalating crude, offensive and abusive language of the text messages, was combined with Ms Lacey's knowledge of the cycle of attack-apologize-and attack behavior of domestic abuse perpetrators. It was powerful evidence of the state of mind of Ms Lacey.

The first nine pages of Ex. Q-1 show how Richardson's racial animus erupted as soon as he found out Charley is a white man. Those messages were from October of 2017, and they show not only the racial hatred Richardson held toward Charley Davis, but also how that racial hatred in turn led to an animus toward Latrice: " Yeah him being white makes me look at u in a whole nother way". And, shortly thereafter, there was this: "You have da nerve to show me a pic of u an yo white bitch ass lover an think some how i would be ok with it accept u telling me u in love with him fuck u & him". And, a couple weeks later, Richardson wrote: "How do u give a white man everything U have to offer in da

world in 30 days sad u swallow white boys cum you disgust me." (Ex. Q-1, pp. 1-8; App. 68-75) The hatred was powerful, but the messages subsided in November and December, only to flare up again when Richardson started appearing at Latrice's house and getting violent with her at the end of January. That continued through April 17. February of 2018 was apology month in Exhibit Q, the exhibit given to the jury. Those texts started on the first of the month, three days after Richardson strangled Latrice. The apologies ran all through February. The jury did not get to see the numerous crude and abusive texts Richardson was sending to Latrice starting on January 30, the very next day after he had strangled her. (Ex. Q, pp. 2-30: App. 20-48) (Ex. Q-1, pp. 11-23; App. 78-90) That long string ran through February 16 and picked up again in the final messages in April. The Court must examine how the messages in Exhibit Q and Exhibit Q-1 work together in chronological order.

Probably the longest and most crude text that was filled with obscenity and racial hatred was the one Richardson sent to Latrice on April 16, 2018. It was excluded from evidence. (Ex Q-1, p. 27; App 94) That highly abusive language was sent less than two hours after Richardson had sent a fully apologetic message that started with: "As i sit with tears in my eyes… ". At 8:03 p.m., Richardson was feigning remorse in attempting to sweet-talk an agreement for Latrice to meet with

him personally, and to have Charley present as well. When he did not get an answer by 9:52 p.m., he sent the most obscene text of them all. Only the sweet, apologetic text at 8:03 p.m. was allowed in evidence. (Ex Q, pp. 45-46; App. 63-64) (Ex. Q-1, pp. 27-28; App. 94-95) In the two weeks that followed April 16 in the lead up to the incident in question on April 30, Richardson was repeatedly attempting to arrange in-person contact with Latrice. In his last text on April 27, he was inviting her out to dinner after she finished work for the day. Latrice did not respond. (Ex. Q, pp. 45-49; App. 63-67) (Ex. Q-1, pp. 26-29; App. 93-96) Richardson responded with burglary and property destruction at Latrice's home on April 30.

The jury needed to see how all the events and the ongoing abuse created the hopeless state of mind for Latrice. It was a state of mind that would lead her to balance the risk for her safety with her need to resolve and end the cycle by talking to Richardson. It was evidence that was critical to completing the full picture showing Latrice went to talk to Clyde with a legitimate purpose. The exclusion of the evidence violated Ms. Lacey's substantial constitutional right to put on a defense, and the State cannot overcome the presumption that the error was prejudicial. The conviction must be reversed for a new trial.

IV.

THE TRIAL JUDGE ERRED IN IMPOSING A SUSPENDED ONE-YEAR JAIL SENTENCE AND SUPERVISED PROBATION BECAUSE THE DECISION WAS BASED ON ONLY ONE REASON, AND THAT REASON WAS BASED ON UNPROVEN CONDUCT

PRESERVATION OF ERROR: It is not necessary for a defendant to object to an abuse of discretion at sentencing in order to preserve the issue for appeal. *State v. Lathrop,*781 NW2d 288, 292 (Iowa 2010) A defendant is not required to raise an issue of abuse of discretion at sentencing for it to be heard on direct appeal because the general rules of error preservation are relaxed in these circumstances. *State v. Gordon,* 921 N.W.2d 19, 22 (Iowa 2018). It is the trial court's responsibility to provide reasons for a sentence, not the defendant's responsibility. *State v. Thacker*, 862 NW 2d 402, 409-410 (Iowa 2015)

STANDARD OF REVIEW: A sentence that falls within the statutory limits is reviewed "with a strong presumption in its favor." *State v. Formano,* 638 N.W. 2d 720, 724 (Iowa 2002). A judge's sentencing decisions are reviewed for an abuse of discretion. *State v. Seats,* 865 N.W.2d 545, 552 (Iowa 2015). An abuse of discretion is shown when the sentencing judge relied on a reason that is "clearly untenable or

unreasonable." *State v. Covel,* 925 N.W.2d 183, 187 (Iowa 2018). Evidence to support a sentence must be substantial. Evidence that raises only "suspicion, speculation or conjecture" is not substantial. *State v. Lambert,* 612 N.W.2d 810, 813 (Iowa 2006)

In exercising discretion as to a particular sentence that will be imposed, a sentencing judge must consider the essential factors set out in Section 901.5, the Code, and other factors established by caselaw. *State v. Laffey*, 600 N.W. 2d 57, 62 (Iowa 1999) The judge cannot base the decision on only one factor. At the same time, the judge cannot refuse to consider one of the factors. A sentencing decision based on only one factor is a decision based on the judge's personal policy. A proper discretionary decision must be based on more than one of the essential factors. *State v. Hildebrand*, 280 NW 2d 393, 395-396 (Iowa 1979)

This Court has held that, "when a challenge is made to a criminal sentence on the basis that the court improperly considered unproven criminal activity, the issue presented is simply one of the sufficiency of the record to establish the matters relied on." *State v. Grandberry,* 619 NW 2d 399, 401 (Iowa 2000) Defendant must show the conduct in question was not proven by a preponderance of the evidence. If the record is insufficient to prove the conduct in question, the sentencing judge has used an impermissible factor. A judge's use of an

impermissible factor will require an automatic reversal for resentencing, even if the factor was only a secondary consideration. This Court will not speculate as to the weight the sentencing judge gave the impermissible factor. *Grandberry,* 619 NW2d at 402 (Iowa 2000); *Gordon,* 921 NW 2d at 25-26.

In *State v. Lovell,* 857 NW 2d 241, 242-243 (Iowa 2014), the Court reaffirmed and fully relied upon one of the earliest cases that explained the impact of the consideration of uncharged or unproven conduct, and that is *State v. Black,* 324 NW 2d 313 (Iowa 1982). The *Black* decision quoted a slightly earlier case in explaining that the use of uncharged or unproven conduct in a sentencing decision is an abuse of discretion: "Although imposition of sentences is within trial court's discretionary power and will be set aside only for an abuse of discretion, (cite) that discretion is not unlimited." 324 NW 2d at 315 (quoting *State v. Messer,* 306 NW 2d 731, 732 (Iowa 1981) The use of unproven conduct is interchangeably termed an "illegal", "impermissible" or "improper" factor. The trial court's use of an improper factor "would overcome the presumption that the trial court properly exercised its discretion". *State v. Sailer,* 587 NW 2d 756, 763 (Iowa 1998) In *Gordon,* the Court explained that use of unproven conduct is an abuse of discretion because it is "an erroneous application of law". *Gordon,* 921 NW 2d at 24 The illegal factor is "untenable" as a reason for the sentence. While the use of

impermissible factors is commonly referred to as a "defect" in sentencing, it is not an illegal sentencing procedure. It is simply an abuse of discretion, and preservation of error is not required in the district court. "Finally, if a defendant challenges a sentence claiming the court used an illegal factor at sentencing, a defendant need not object at sentencing for us to address the issue on appeal if the issue can be decided without further evidence." *Gordon,* 921 NW 2d at 24-25.

The Merits

The totality of Judge Werling's reason for his decision to impose a one-year suspended jail sentence and supervised probation is quoted here:

> **THE COURT:** In this case, the Defendant was found guilty by the jury of the serious misdemeanor offense of harassment in the second degree, which constitutes harassment in which the person contacts the victim without a legitimate purpose, conveys a threat of bodily injury, and had the specific intent to threaten, harm, intimidate, or alarm the victim.
> That does not include the element of actual physical contact or injury to the victim in this matter. So I just want to make it clear on the record that I am only sentencing the Defendant based on the offense for which she was, in fact, convicted, not the matter which she was charged because this was a lesser-included offense. The Defendant has from the criminal history almost no criminal history of any kind which weighs in favor of a more lenient sentence. The Court agrees with the State that this offense is not a minor offense, that

> the Defendant appeared -- based on the findings from the jury in this verdict, the Court believes that the jury found that the Defendant appeared at Clyde Richardson's place of employment -- I'm sorry. Is it Richards or Richardson?
>
> **MR. HUFF:** Richardson, your Honor.
>
> **THE COURT:** Clyde Richardson's place of employment, threatened to -- while in his presence, within arm's reach of him, threatened him with physical harm, displayed a hammer or a sledge, and that is the basis upon which this particular offense of -- this verdict was returned by the jury. I think it's appropriate in this case that the Defendant not receive a deferred judgment because of the seriousness of this offense. The Defendant has not requested a deferred judgment, so that makes that issue easier for the Court. I do agree that based on the Defendant's criminal history, lack of criminal history, the attending circumstances of this offense, and the findings by the jury that the Defendant should be and is hereby sentenced to serve one year in the Scott County Jail and pay the fine of $315. That year is suspended. The Defendant is placed on probation for a period of one year and ordered to pay the fine and costs of this action. It is ordered that the State submit a statement of costs within thirty days of today, that that statement of costs will be adopted by the Court and ordered as the Defendant's liability to reimburse if the Defense does not object within fourteen days of the filing of the bill.
>
> (Sent. Tr. 10-12, L. 19-18)

It is true Ms. Lacey did not request a deferred judgment. However, less severe sentences were available as options for the judge. Under Section 903.1(b), the Code, the serious misdemeanor does not require the imposition of a jail

sentence, whether it would be suspended or not suspended. The statute requires a mandatory fine, but the imposition of incarceration is optional. The section states the judge "*may* order imprisonment not to exceed one year". (emphasis added) The imprisonment decision is unnecessary. In another alternative, the judge could have imposed a jail sentence, suspended or unsuspended, for any number of days less than a year.

The sole reason Judge Werling cited for choosing the maximum jail sentence was because he decided that in the course of the Harassment in the Second Degree Ms Lacey "within arm's reach of [Richardson], displayed a hammer or a sledge, and that is the basis upon which this particular offense of -- this verdict was returned by the jury" (Sent Tr. 11, L. 21-25)

Impermissible Factor: In fact, the jury made no findings regarding the hammer. In two trials, the juries hung on Counts 1, 2, and 4 on the questions of whether Ms. Lacey displayed a weapon or used a weapon to inflict an injury, or even committed a simple assault. (Jury Inst 12, 13, 16; App. 106, 107, 110) Ms Lacey testified that she told Richardson she would hit him with the hammer if he attacked Evelyn Nelson, but that statement cannot be incorporated into the conduct constituting Harassment. First, it was undisputed that Ms. Lacey did not take the hammer out of the car when she first approached the McDonnell office to speak to

Richardson. Secondly, it was undisputed that Latrice retreated to the car after Richardson pushed her and caused serious injury to her ankle and foot. The hammer was in the car. If Latrice harassed Richardson that episode was over with when Richardson pushed and injured her, and she retreated. Third, it was a contingency statement that only showed a specific intent to use justified force, if necessary, in the defense of another. The contingency specific intent was not the type of assaultive intent engaged in Harassment. (Tr. 513-514, L. 4-4)

There is no evidence Ms. Lacey ever had the intent to use the hammer or display the hammer in an illegal or improper manner in the course of conduct that would constitute Harassment. The use of the unproven conduct in the sentencing decision was use of an impermissible factor and an abuse of discretion.

Use of Only One Reason: Even if the consideration of the possession of the hammer was not an impermissible factor, it was the only factor the judge used for the increase from the minimum punishment. He mentioned that Ms. Lacey had no criminal record. The judge issued a policy decision by making the presence of a weapon the sole reason for imposing a jail sentence. The end result is that it is his policy that the possession of a weapon will always result in the imposition of a sentence for incarceration. *Hildebrand*, 280 NW 2d at 395-396.

On the basis of the use of an impermissible factor or insufficient reasons for the sentence, or both, the Court must vacate the sentence. In accordance with the law set out in Argument I, above, the Court must further order that the rentencing shall not take place until all counts are resolved and ready for sentencing.

CONCLUSION

By first analyzing Argument I, the Court may determine whether it should proceed to the other issues or grant a stay of proceedings pending resolution of the remaining counts in the district court.

At some point, the Court must find there was insufficient evidence to establish the element requiring proof beyond a reasonable doubt that Defendant communicated a threat on the day in question and remand the case for entry of a judgment of acquittal on Count 3. Failing that, the case should be reversed for a new trial due to the trial court's prejudicial error in refusing to allow Defendant to introduce evidence material to establishing her state of mind and specific intent on the morning in question. If the Court should find the case properly proceeded to sentencing, the Court must also conclude the sentence was imposed upon an abuse of discretion, and remand for a new sentencing. That remand should include an order to delay resentencing until all counts are adjudicated.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 6.908(1), Appellant requests to be heard in oral argument.

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