ELECTRONICALLY FILED MAR 02, 2021 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 20–0030

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LATRICE L. LACEY,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
THE HON. STUART P. WERLING, JUDGE

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Is entry of judgment of conviction and pronouncement of sentence on one count of a multi-count information (while the others are set for retrial) a "final judgment" that confers a right to appeal and enables exercise of appellate jurisdiction?

Authorities

Berman v. United States, 302 U.S. 211 (1937)
United States v. Abrams, 137 F.3d 704 (2d Cir. 1998)
United States v. Johnson, 327 U.S. 106 (1946)
United States v. Kaufmann, 951 F.2d 793 (7th Cir. 1992)
United States v. King, 257 F.3d 1013 (9th Cir. 2001)
United States v. Leichter, 160 F.3d 33 (1st Cir. 1998)
United States v. Powell, 24 F.3d 28 (9th Cir. 1994)
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Davis v. State, 443 N.W.2d 707 (Iowa 1989)
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State v. Babers, 514 N.W.2d 79 (Iowa 1994)
State v. Blair, 60 N.W. 486 (Iowa 1894)
State v. Carter, 158 N.W.2d 651 (Iowa 1968)
State v. Catt, 435 P.3d 1255 (N.M. Ct. App. 2018)
State v. Compiano, 154 N.W.2d 845 (Iowa 1967)
State v. Coughlin, 200 N.W.2d 525 (Iowa 1972)
State v. Craig, 151 N.E.3d 574 (Ohio 2020)
State v. Davis, 944 N.W.2d 641 (Iowa 2020)
State v. Einfeldt, 914 N.W.2d 773 (Iowa 2018)

State v. Farmer, 234 N.W.2d 89 (Iowa 1975)
State v. Hawkeye Bail Bonds, Surety, 565 N.W.2d 615 (Iowa 1997)
State v. Heard, 934 N.W.2d 433 (Iowa 2019)
State v. Huser, 894 N.W.2d 472 (Iowa 2017)
State v. Iowa Dist. Ct. for Jones County, 902 N.W.2d 811 (Iowa 2017)
State v. Lekin, 271 N.W.2d 697 (Iowa 1978)
State v. Loye, 670 N.W.2d 141 (Iowa 2003)
State v. Lundeen, 297 N.W.2d 232 (Iowa Ct. App. 1980)
State v. McCave, 805 N.W.2d 290 (Neb. 2011)
State v. Pickett, 671 N.W.2d 866 (Iowa 2003)
State v. Propps, 897 N.W.2d 91 (Iowa 2017)
State v. Richards, 809 N.W.2d 80 (Iowa 2012)
State v. Schlitter, 881 N.W.2d 380 (Iowa 2016)
State v. Soppe, 374 N.W.2d 649 (Iowa 1985)
State v. Sullivan, 326 N.W.2d 361 (Iowa 1982)
State v. Talerico, 290 N.W. 660 (Iowa 1940)
State v. Uranga, 950 N.W.2d 239 (Iowa 2020)
State v. Waters, 597 S.W.3d 185 (Mo. 2020)
State v. Willet, 305 N.W.2d 454 (Iowa 1981)
State v. Williams, 929 N.W.2d 621 (Iowa 2019)
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Iowa Code § 902.4
Iowa Code § 903A.2(1)(a)(2)
Iowa Code § 903.2
Iowa R. App. P. 6.104(1)(b)(2)
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Iowa R. App. P. 6.108
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Iowa R. Crim. P. 2.6(1)
Iowa R. Crim. P. 2.23(1)
Iowa R. Crim. P. 2.26(1)(a)
Iowa R. Crim. P. 2.26(2)(c)
15B Wright, Miller, & Cooper, *Federal Practice and Procedure* § 3918.7 (2d ed. 1992)

II. Was the evidence sufficient to support this conviction?

Authorities

Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
State v. Banes, 910 N.W.2d 634 (Iowa Ct. App. 2018)
State v. Evans, 671 N.W.2d 720 (Iowa 2003)
State v. Huser, 894 N.W.2d 472 (Iowa 2017)
State v. Sanford, 814 N.W.2d 611 (Iowa 2012)

III. Did the trial court abuse its discretion in excluding evidence of the victim's prior bad acts and evidence of Lacey's generalized knowledge about domestic abuse?

Authorities

Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
State v. Einfeldt, 914 N.W.2d 773 (Iowa 2018)
State v. Evans, 672 N.W.2d 328 (Iowa 2003)
State v. Happe, No. 19–0144, 2020 WL 4497428 (Iowa Ct. App. Aug. 5, 2020)
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State v. Newell, 710 N.W.2d 6 (Iowa 2006)
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State v. Rodriquez, 636 N.W.2d 234 (Iowa 2001)
State v. Taylor, 689 N.W.2d 116 (Iowa 2004)
State v. Windsor, 316 N.W.2d 684 (Iowa 1982)

IV. Did the sentencing court err in relying on evidence that was presented at trial in explaining its reasons for imposing a suspended sentence?

Authorities

State v. Ayers, 590 N.W.2d 25 (Iowa 1999)
State v. Evans, 672 N.W.2d 328 (Iowa 2003)
State v. Formaro, 638 N.W.2d 720 (Iowa 2002)
State v. Hopkins, 860 N.W.2d 550 (Iowa 2015)
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State v. Loyd, 530 N.W.2d 708 (Iowa 1995)
State v. Thomas, 547 N.W.2d 223 (Iowa 1996)

ROUTING STATEMENT

Lacey requests retention. *See* Def's Br. at 9. This question of appellate jurisdiction has not been resolved under Iowa law. But it is not necessary to resolve that jurisdictional question in this appeal, because this Court can choose to treat this appeal as an application for interlocutory review, grant it, and reach the merits. *See* Iowa R. App. 6.108. The Iowa Court of Appeals can resolve the remaining issues by applying established law. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This is Latrice L. Lacey's direct appeal from her conviction for second-degree harassment, a serious misdemeanor, in violation of Iowa Code section 708.7(1)(b) and (3)(a). She was also charged with three counts of assault-related crimes, but the jury had deadlocked on those charges. Her retrial on those charges is still pending. Lacey was sentenced on this conviction; that sentence was suspended and she was placed on probation. *See* Sentencing Order (1/6/20); App. 155.

In this appeal, Lacey argues: **(1)** the district court erred by pronouncing sentence and entering a judgment of conviction and sentence on this single count, because this Court does not have appellate jurisdiction until all counts are resolved; **(2)** the evidence

was not sufficient to support the conviction; **(3)** the trial court abused its discretion in excluding certain proffered evidence of the victim's text messages and her own knowledge about cycles of domestic abuse; and **(4)** the sentencing court abused its discretion by considering unproven facts and by only considering the severity of the offense.

Course of Proceedings

The State generally accepts Lacey's description of the relevant proceedings. *See* Iowa R. App. P. 6.903(3); App's Br. at 10–12. But a clarification is necessary: it was Lacey who requested to proceed to sentencing on her harassment conviction. The district court initially granted an indefinite continuance of this sentencing, pending retrial. *See* Order (10/29/19); App. 138 ("Sentencing on Count 3 of the Trial Information shall be continued from the 25th day of October, 2019 and shall not be reset until the conclusion of the re-trial on Counts 1, 2 and 4 of the Trial Information,"). Then, Lacey requested a hearing on her motion in arrest of judgment and motion for new trial, and she specifically requested that it occur before retrial on other counts. *See* Motion (11/27/19); App. 140. This made sense, because her motion included renewed challenges to evidentiary rulings, and because she sought a retrial on that harassment charge (so if relief was granted, it

could be joined with the remaining counts for the same retrial). *See* Motion for New Trial (10/20/19) at 2–3; App. 135. The court granted Lacey's motion for a hearing on her post-trial motions. *See* Order (12/2/19); App. 142. At the conclusion of that hearing, the court denied those motions. Then, this exchange occurred:

> **THE COURT**: . . .This being a misdemeanor, what is the Defense request regarding sentencing?
>
> **DEFENSE**: Well, it's not set for sentencing today.
>
> **THE COURT**: I don't think it is.
>
> **THE STATE**: It's not.
>
> **DEFENSE**: So I think —
>
> **THE COURT**: I'm gonna surprise you. I agree with you. Do you wish to have sentencing set?
>
> **DEFENSE**: Yeah. I would request a week at least.
>
> **THE COURT**: Does Defense request any kind of records check be made?
>
> **DEFENSE**: Request for a deferred docket search.
>
> **THE COURT**: The Defense request that this matter be set for sentencing is granted. The Court directs the parties to consult and consult with court administration and submit a proposed order setting sentencing.
>
> Is that acceptable to the parties?
>
> **THE STATE**: Yes, your Honor.
>
> **DEFENSE**: Yes, your Honor.

See Transcript (12/5/19) 51:23–53:21. A sentencing date was set. *See* Order for PSI (12/5/19); App. 145. Four days before that date, Lacey moved to continue sentencing. *See* Motion (12/29/19); App. 148.

Lacey argued that motion to continue sentencing at the start of the sentencing hearing, but she admitted that she made the request to proceed to sentencing that caused the court to schedule that hearing. *See* Sent.Tr. 4:8–15. The sentencing court did not need to hear from the State before it denied the motion to continue sentencing, and its explanation included this:

> I'm aware of the fact that it does create some difficulty in that the Defendant has been convicted on one count and stands to be separately tried on others. If the Defendant is acquitted or if there is a hung jury again and the State decides not to prosecute, of course, that entirely resolves the matter in favor of the Defendant.
>
> If there is a conviction on any of the charges or lesser-includeds, they can be separately appealed. I don't think it creates that much of a difficulty. It's a little awkward, but I don't think it's that much of a difficulty to separate the appeals based on the individual matters as if the Defendant had been separately charged for appeal purposes and convicted, assuming that that would occur because there is no appeal if there is no conviction, obviously. So the motion to continue is denied.

See Sent.Tr. 5:4–6:3. And at the end of the sentencing hearing (after hearing recommendations and argument, pronouncing sentence, and explaining the reasons for its sentencing decision) the court notified Lacey of her right of appeal from that conviction and sentence. *See* SentTr. 17:7–17; *accord* Iowa R. Crim. P. 2.23(3)(e).

The underlying facts of the case will be discussed when relevant.

ARGUMENT

I. Whether or not this is a "final judgment of sentence" under section 814.6(1)(a), the district court did not abuse its discretion by proceeding to sentencing.

Even if neither party raises the issue, an Iowa appellate court can "determine its own jurisdiction and to refuse, on its own motion, to entertain an appeal not authorized by rule." *See Jensen v. State*, 312 N.W.2d 581, 581 (Iowa 1981) (citing *Qualley v. Chrysler Credit Corp.*, 261 N.W.2d 466, 468 (Iowa 1978)); *cf. Crowell v. State Pub. Def.*, 845 N.W.2d 676, 681 (Iowa 2014) ("[A]n appellate court has responsibility sua sponte to police its own jurisdiction."). For the purposes of a notice of appeal that was filed by a criminal defendant, "Iowa Code section 814.6 contains the standards for subject-matter jurisdiction." *See State v. Propps*, 897 N.W.2d 91, 96 (Iowa 2017).

After filing her notice of appeal, Lacey filed a motion to stay the appeal pending retrial on the remaining counts—and mentioned that "[t]his Court will have to determine whether the judgment on Count 3 is a final judgment." *See* Motion to Stay Briefing (2/21/20) at 2; App. 159. Once alerted to that concern, this Court ordered both parties to file statements addressing whether it had jurisdiction over the appeal. *See* Order (3/26/20); App. 161. The State opined that this Court did

not have jurisdiction under section 814.6(1)(a), while noting that there was conflicting persuasive authority on the issue. *See* Response (4/23/20); App. 164. This Court ordered the jurisdictional issue to be submitted with the appeal. *See* Order (5/19/20); App. 175.

A. Lacey's jurisdictional arguments cannot show that it was an abuse of discretion to proceed with sentencing because, if she had no right of appeal, she could apply for interlocutory review instead.

Lacey discusses jurisdiction in order to make an argument that the sentencing court abused its discretion in denying her last-minute motion to continue sentencing, after she had affirmatively requested a sentencing date. *See* Def's Br. at 22–29. Lacey does not make any other argument; she only claims it was an abuse of discretion because this Court has no jurisdiction and cannot consider her challenges that allege error in rulings during trial and in the sentencing decision.

But if this is not a final judgment of sentence under section 814.6(1)(a), then it would be interlocutory, and Lacey would have been able to apply for interlocutory review. Consequently, this Court would be able to treat Lacey's notice of appeal as an application for interlocutory review, and grant it. *See* Iowa R. App. P. 6.108; *Sweeney v. City of Bettendorf*, 762 N.W.2d 873, 876–77 (Iowa 2009). If this Court does that, Lacey's sole assertion of prejudice evaporates.

As part of her argument about jurisdiction, Lacey points to "the pitfalls in judicial economy presented by subjecting the same case to successive appeals on separate counts." *See* Def's Br. at 28–29 (citing Motion to Stay Briefing (2/21/20) at 2; App. 159). Those could also be read as arguments *against* interlocutory review, because "the most significant consideration in the granting of interlocutory appeals is whether the interest of sound and efficient judicial administration can best be served by allowing certain rulings to be appealed in advance of final judgment." *See Hammer v. Branstad*, 463 N.W.2d 86, 89 (Iowa 1990) (citing *Banco Mortgage Co. v. Steil*, 351 N.W.2d 784, 787 (Iowa 1984)). But Lacey is not requesting dismissal of her appeal—instead, she is asking this Court to exercise its appellate jurisdiction to vacate the order that imposed her sentence, because it would be inefficient for this Court to exercise appellate jurisdiction in cases like this one. At best, Lacey's argument about judicial economy interests is a wash; she is not offering a way to save judicial resources by wiping this case off of the docket. And if this Court attempted to grant the relief that Lacey seeks, her sole allegation of prejudice would disappear (since that would prove that appellate review *is* available), and that lack of prejudice would foreclose any claim of an abuse of discretion. *See*

State v. Richards, 809 N.W.2d 80, 89 (Iowa 2012) (quoting *State v. Babers*, 514 N.W.2d 79, 82 (Iowa 1994) ("An abuse of discretion will not generally be found unless the party whose rights have been violated suffered prejudice."). Logically, there is no way for Lacey's argument to establish any entitlement to the relief she seeks.[1]

This Court could assume without deciding that this was not a final judgment of sentence under section 814.6(1)(a), treat Lacey's notice of appeal as an application for interlocutory review, grant it, and proceed onward the merits. Alternatively, this Court could reach the issue and decide whether this was a final judgment under section 814.6(1)(a). If it does, and if it finds that this is not a final judgment and not appealable as a matter of right, *then* this Court could decide to treat her notice of appeal as an application for interlocutory review, grant it, and reach the merits. Either way, the availability of that review forecloses Lacey's argument that she was prejudiced by the ruling that denied her eleventh-hour motion to stay sentencing, so she cannot prevail on her claim that the district court abused its discretion.

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[1] This Court should not permit Lacey to identify new reasons why she was prejudiced for the first time in her reply brief, after the State's last chance to respond to those arguments on their merits. *See, e.g.*, *Young v. Gregg*, 480 N.W.2d 75, 78 (Iowa 1992); *State v. Willet*, 305 N.W.2d 454, 458 (Iowa 1981).

B. District courts have broad discretion to decide whether to proceed to sentencing or to stay the pronouncement and imposition of sentence in unusual situations like this one.

Characterizing this as a final judgment of sentence would not *require* a district court to proceed with sentencing before retrial, whenever this situation arises again. Upon return of a verdict that finds a defendant guilty, the district court must set a sentencing date "within a reasonable time." *See* Iowa R. Crim. P. 2.23(1). Iowa courts are already cautioned not to tolerate "unnecessary delay between the verdict of guilty and the entry of judgment and sentence." *See State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). But there is no hard and fast rule that prohibits such a stay, so "[t]he decision to grant or deny a motion for continuance rests in the sound discretion of the trial judge." *See id.* at 530–31; *accord State v. Hawkeye Bail Bonds, Surety*, 565 N.W.2d 615, 617–18 (Iowa 1997) (identifying Iowa rules, precedent, and out-of-court authority that supported its conclusion that "a delay in the execution of a sentence is allowable when it is incident to the administration of justice"). Lacey seems to argue that it is an abuse of discretion to enter judgment of conviction and pronounce sentence in any case where a jury has returned a verdict of guilty on certain counts and deadlocked on other counts. No matter how this Court resolves

the jurisdictional issue, it should reaffirm that an Iowa district court that encounters this situation has broad discretion to decide whether to grant a stay of sentencing pending retrial, or to deny such a request and proceed onwards to enter a judgment of conviction and sentence.

There may be situations where it will be obvious to all parties and to the district court that a stay of sentencing would not be helpful. In any case involving a conviction on a non-bailable offense, a stay of sentencing would mean that detention in the local county jail would continue. *See* Iowa Code § 811.1(1). Such a defendant would continue to be held in a jail facility with fewer services than prison—and they would likely be billed to stay there. *See generally* Iowa Code § 356.7. And there may be other cases where it is clear that, for one reason or another, prompt sentencing and prompt execution of that sentence would *benefit* the defendant. *See, e.g.*, Iowa Code § 903A.2(1)(a)(2) ("[A]n inmate required to participate in a sex offender treatment program shall not be eligible for any reduction of sentence until the inmate participates in and completes [it]. . . ."); *State v. Iowa Dist. Ct. for Jones County*, 902 N.W.2d 811, 813 & n.3 (Iowa 2017) (noting that sex offender treatment program is primarily available at "the Newton Correctional Facility"). Conversely, there could be other situations

where delaying sentencing would be pragmatic. Nothing in this brief should be construed as an argument that Iowa district courts should not have broad discretion to decide whether to proceed to sentencing on counts where the jury returned a unanimous verdict that found the defendant guilty, while retrial on other counts is still pending.

C. This Court may find that this is a final judgment under section 814.6(1)(a), or it may find it is not.

Section 814.6(1)(a) states that defendants have a right of appeal from "[a] final judgment of sentence." *See* Iowa Code § 814.6(1)(a). It also vests Iowa's appellate courts with jurisdiction over those appeals, by creating a right of appeal for correction of errors at law. *See* Iowa Code § 602.4102(1); Iowa R. App. P. 6.907.

Here, judgment has been entered and sentence imposed on Lacey's harassment charge—but there are other counts set for retrial. Both Lacey's brief and the State's prior filing give an overview of the authority that would support a finding that this is *not* a final judgment of sentence, for the purposes of section 814.6(1)(a). This section will provide some additional arguments and highlight persuasive authority that would support a conclusion that it *is* a final judgment of sentence, with the intent of ensuring that this Court has the best arguments in favor of each competing interpretation if it decides to reach this issue.

Generally, "[f]inal judgment in a criminal case means sentence." *See Propps*, 897 N.W.2d at 96 (quoting *Daughenbaugh v. State*, 805 N.W.2d 591, 595 (Iowa 2011)). Iowa courts have said that this works both ways: "[i]n a criminal case, sentence constitutes final judgment." *See State v. Anderson*, 246 N.W.2d 277, 279 (Iowa 1976). Iowa courts generally hold that a judgment of conviction and sentence is final and appealable. But if sentencing is deferred, there is no right of appeal unless and until a sentence is subsequently pronounced and imposed. *See State v. Soppe*, 374 N.W.2d 649, 652 (Iowa 1985) ("Because no judgment is entered in these cases, defendant has no right of appeal and even the possibility of appeal is extinguished upon successful completion of the probation."); *accord State v. Farmer*, 234 N.W.2d 89, 92 (Iowa 1975) ("The adjudication of guilt and imposition of sentence are the elements of judgment in a criminal case.").

That rule of thumb is an application of the more generalizable principle that "[t]he judgment is final for the purpose of appeal when it terminates the litigation." *See State v. Loye*, 670 N.W.2d 141, 146 (Iowa 2003) (quoting *State v. Coughlin*, 200 N.W.2d 525, 526 (Iowa 1972)). Of course, there may be litigation on collateral issues. But on the central issues—determination of guilt on the charge and selection

of punishment from among available options—entering a judgment of conviction and imposing a sentence "terminates the litigation between the parties on the merits and leaves nothing to be done but to enforce by execution what has been determined.'" *See Propps*, 897 N.W.2d at 96 (quoting *State v. Aumann*, 236 N.W.2d 320, 321–22 (Iowa 1975)). Lacey is essentially arguing that those remaining charges—which are still pending and still set for retrial—effectively undercut the finality of the judgment that was entered and the sentence that was imposed on her harassment conviction, because litigation between the parties on the merits of these charges is continuing and there is still much to be done before the prosecution is finally over. But that is inconsistent with the way that Iowa appellate courts have treated other orders that end litigation on individual charges in multi-count prosecutions: they are generally treated as final orders whenever they terminate litigation between the parties on the merits *of any individual charge*.

In *State v. Lekin*, the State challenged demurrer on two counts that were dismissed before trial—but it did not file its appeal until final judgment of sentence was imposed on the remaining counts, following a jury trial and sentencing. *See State v. Lekin*, 271 N.W.2d 697, 699–700 (Iowa 1978). The Iowa Supreme Court held that was

too late, because the demurrer was a final order—even before the end of the prosecution on Lekin's remaining charges. *See id.* at 700. While *Lekin* noted that the general rule was that "to be final the judgment must dispose of the entire case," it said that general rule "does not apply when distinct causes of action are united in the same suit." *See id. (*citing *McGuire v. City of Cedar Rapids*, 189 N.W.2d 592, 596-597 (Iowa 1971)). Instead, it applied a different rule for assessing the finality (and appealability) of an order that puts an end to litigation on one particular charge, in a prosecution on multiple charges:

> If an order decides an issue merely as a step toward final disposition of a prosecution, it is interlocutory; however, if it disposes of a separable branch of the case, it is an appealable final judgment. . . .
>
> When separate charges are made in a single county attorney's information or indictment, an order disposing of one of them so effectively that no further prosecution can be maintained on that charge while the order stands is an appealable final judgment. . . . The order sustaining the demurrer to two of the five counts in the present case meets this standard. The charges are separable because they charge separate offenses upon which separate judgments may be rendered.

See id. That meant the State's time to appeal the order on demurrer started to run from when the order was entered, and its cross-appeal was untimely and had to be dismissed for lack of jurisdiction. *See id.* Trial on other counts did not affect the finality of the demurrer order.

Lekin applied that general rule to reach a specific holding about appealability of orders dismissing charges before trial. The legislature enacted section 814.5 around that time, so later cases did not need to cite *Lekin* for that holding. *See* Iowa Code § 814.5 (1978); *accord State v. Lundeen*, 297 N.W.2d 232, 234 (Iowa Ct. App. 1980). But *Lekin* is uniquely helpful in this case because its general rule helps to resolve this analogous jurisdictional issue: if this sentencing order "disposes of a separable branch of the case, it is an appealable final judgment." *See Lekin*, 271 N.W.2d at 700. Conversely, if it was issued "merely as a step toward final disposition" and additional action is still required before judgment "may be rendered" on the harassment charge, then it is not final and is not appealable under section 814.6(1)(a). *See id.*

Under *Lekin*, it is difficult to avoid the conclusion that this is a final judgment of sentence on a separable charge. Indeed, the other charges have effectively been severed from this charge, for retrial. *See* Order Following Jury Trial and Verdict (9/24/19); App. 132 (setting date for sentencing on Count 3); Order Following Jury Trial Without Verdict (9/23/19); App. 130 (scheduling a pre-trial conference for retrial on Counts 1, 2, and 4). The district court's order setting retrial on those remaining charges was necessarily an order severing them

from Count 3 and finding of good cause for that severance; otherwise, the State could not present a clean trial information at Lacey's retrial. *See* Iowa R. Crim. P. 2.6(1) (requiring joinder of related charges "in a single complaint, information, or indictment, unless, for good cause shown, the trial court in its discretion determines otherwise"). Since these charges *have been* separated in anticipation of retrial, it is hard to argue that they would not qualify as "separable" charges. And they pass *Lekin*'s formalistic test for identifying "separable charges" as well, because that revised trial information for Lacey's retrial will "charge separate offenses upon which separate judgments may be rendered." *See Lekin*, 271 N.W.2d at 700. And although that litigation between the State and Lacey on her *other* charges is still ongoing, there will be "no further prosecution" on this harassment charge; entry of judgment of conviction and sentence is the end of litigation on the merits of this particular charge "while the order [of judgment and sentence] stands." *See id*. Both this result and this reading of *Lekin* are consistent with Iowa cases that preceded *Lekin*, which typically found "*[e]very* final adjudication of the rights of the parties in an action is a judgment." *See State v. Talerico*, 290 N.W. 660, 661 (Iowa 1940) (quoting *State v. Blair*, 60 N.W. 486, 486 (Iowa 1894)) (emphasis added).

Lacey seems to imply that evidence at that retrial might affect the validity or enforceability of this conviction and sentence. *See* Def's Br. at 28–29. But that cannot be true—new facts at the retrial cannot impact the correctness or validity of evidentiary rulings on the record *as it stood* when the evidence was offered, or rulings on sufficiency or weight of the evidence that *was* presented, or the sentencing decision made on *that* record. Otherwise, Lacey's retrial would enable her to "fault the [prior] trial court for failing to rule correctly" on the basis of new facts that "it was never given the opportunity to consider"—which would be "fundamentally unfair." *See State v. Pickett*, 671 N.W.2d 866, 869 (Iowa 2003) (quoting *DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002)). Moreover, it would allow Lacey to circumvent the rules for newly discovered evidence, which ordinarily require a defendant who offers new evidence to challenge an already-rendered verdict to show that it could not "have been discovered before the conclusion of the trial in the exercise of due diligence." *See State v. Compiano*, 154 N.W.2d 845, 850 (Iowa 1967). For example, Lacey suggests that she could leverage testimony from Richardson at her retrial to call the verdict from *this* trial into question. *See* Def's Br. at 28. But Lacey would have been aware of all truthful testimony that Richardson could give about

this incident, from the outset. "[A] defendant is not entitled to a new trial on the basis of newly discovered evidence where the defendant was aware of the evidence prior to the verdict but made no affirmative attempt to obtain the evidence or offer the evidence into the record." *See State v. Uranga*, 950 N.W.2d 239, 244–45 (Iowa 2020). Indeed, even if this conviction and sentence is not a final judgment, Lacey still could not use retrial on other counts to launch that collateral attack on this verdict, which was already rendered in a separate trial.

Lacey's sentence on this harassment conviction is also final and enforceable, which supports the conclusion that it is a final judgment that gives rise to a right of appeal. Conviction on any remaining count would mean that a sentencing court would determine whether Lacey's new sentences should be set to run concurrently or consecutively with this sentence—but that is commonplace, and it does not undermine finality of judgments in other cases. *See generally* Iowa Code § 901.8. Note that section 903.2 gives Lacey an opportunity to request that the sentencing court reconsider its sentencing decision—but it specifies that this does not undermine the finality or the appealability of the original order that entered judgment and imposed the sentence. *See* Iowa Code § 903.2; *cf.* Iowa Code § 902.4 (for felony convictions).

Section 903.2 gives Lacey a window of 30 days from when she starts serving the sentence to seek a reconsideration, and the district court may retain jurisdiction over the case "for the limited purposes" of reconsidering its sentencing decision "notwithstanding the timely filing of a notice of appeal." *See* Iowa Code § 903.2. But it goes on to clarify: "The other provisions of this section notwithstanding, for the purposes of appeal a judgment of conviction is a final judgment when pronounced." *See id.*; *accord* Iowa Code § 902.4 (providing a window of one year for reconsideration of sentence in a felony case, but stating that "for the purposes of appeal, a judgment of conviction of a felony is a final judgment when pronounced"). Because Lacey's judgment of conviction and sentence has been pronounced and imposed, it seems to be "a final judgment" under Iowa law "for the purposes of appeal," regardless of the potential availability of reconsideration later on. *See* Iowa Code § 903.2; *accord* Iowa Code § 902.4.

Another indication that this is a final judgment of sentence is that it became enforceable against Lacey upon pronouncement. *See* Iowa R. Crim. P. 2.26(1)(a); *cf. State v. Davis*, 944 N.W.2d 641, 646 (Iowa 2020) (noting restitution order "is not enforceable until the court enters a final order of restitution"). Lacey could have obtained a

stay of execution upon filing an appeal under Rule 2.26(2)(c), since she was placed on probation. But she could not obtain a stay in the absence of an appeal, simply by arguing that the sentence is not yet "final" after her judgment of sentence has been pronounced. And the next case that presents this issue might involve a non-stayable, non-bailable sentence of incarceration. It might be impractical and problematic to require a defendant to begin serving a sentence of incarceration while waiting for a right of appeal from that conviction to attach at some indefinite point in the future. Of course, even if that judgment of sentence did not count as a "final judgment," the Iowa Supreme Court would be able to treat any notice of appeal as an application for interlocutory appeal or discretionary review, and then grant it. *See* Iowa R. App. P. 6.108. But that would not solve the conceptual problem that would be created by requiring the defendant to begin serving a sentence of penal incarceration that is categorized as interlocutory in nature.

The State's prior filing referenced *State v. Craig*, 151 N.E.3d 574, 579–80 (Ohio 2020), as the most recent persuasive authority to find a similar judgment of sentence was not final and not appealable:

> Were we to hold that a judgment is final and appealable as soon as any count is resolved, we would be saying not only that a defendant may appeal at that time, but also that the defendant must appeal at that time. This

> could raise the very real likelihood of seriatim appeals involving the same fact pattern with each appeal addressing fewer than all the issues. Not only would such a rule be contrary to principles of sound judicial administration, it would likely create challenging law-of-the-case issues.

See Craig, 151 N.E.3d at 579. Those are valid concerns—but some of them are a wash. Any delayed appeal after an eventual retrial would involve sufficiency challenges to convictions that were obtained after *two different trials*, so the same appeal will contain two different sets of facts about the same events—and, as Lacey points out, she might decide to present new evidence or raise entirely different defenses at her retrial. *See* Def's Br. at 28. That would make it harder for parties to litigate sufficiency challenges and harder for an appellate court to resolve them. And nothing that Lacey could offer on retrial of those remaining counts can affect the validity of the harassment conviction that was returned after *this* trial (except by way of a separate action to raise and litigate new claims). *See generally* Iowa Code § 814.7. Thus, there is no danger of this appeal presenting "fewer than all the issues" that could affect the validity of *this* conviction. *See Craig*, 151 N.E.3d at 579. There does not appear to be a compelling need to delay this appeal pending retrial on other counts, when that retrial cannot impact the merits of any preserved challenge to this conviction.

Moreover, it is difficult to see why "law-of-the-case issues" would hinder ongoing proceedings in the district court on retrial of the additional counts, any more than they would hinder proceedings following remand from appeal in cases where some kind of trial error necessitates a retrial on one or more counts (like *State v. Huser*, 894 N.W.2d 472 (Iowa 2017)), or following an order to vacate a conviction on PCR where some sort of ineffective assistance requires a retrial on certain counts (like in *State v. Heard*, 934 N.W.2d 433 (Iowa 2019)). Appellate review of district court rulings will necessarily impact the district court's view of the relevant law in *every* case that it handles, and there is no reason to think that that would be uniquely difficult for district courts to manage in this context. Indeed, guidance on any thorny issues that are likely to recur at retrial is often welcome. *See, e.g.*, *State v. Einfeldt*, 914 N.W.2d 773, 783 (Iowa 2018), *overruled on other grounds by State v. Williams*, 929 N.W.2d 621, 635–37 (Iowa 2019) ("Because these [evidentiary] issues may reoccur on retrial, we address them."); *State v. Schlitter*, 881 N.W.2d 380, 392 (Iowa 2016) ("Because a new trial will be necessary, we will exercise our authority to promote efficiency and judicial economy by addressing those issues raised on appeal that will likely reoccur at the retrial."). When Lacey

asked the district court to hear her motion for new trial on this count *before* retrial on the other counts, she had similar concerns in mind: she wanted the district court to find that rulings from the prior trial that excluded her proffered evidence were incorrect and unfair, so that similar rulings would not be made at retrial (and so that, if she *did* establish that retrial was required on that count, it could be joined with the remaining counts for one single retrial). *See* Motion for New Trial (10/20/19) at 2–3; App. 135; Motion (11/27/19) at 2; App. 141. While there is no requirement that appellate review of those rulings must occur before retrial on the remaining counts, that seems like it would typically *advance* judicial economy interests, not hinder them.

Other purported judicial economy benefits also wash out, upon closer scrutiny. It is tempting to suggest that delaying an appeal would minimize the fallout from a potential reversal and remand for retrial, because all of those charges that were originally tried together could be joined for retrial. But if there are separate appeals, then retrial on remand can simply be stayed while those remaining appeals proceed (and if the issues raised in each challenge really *are* identical, then it should not take long to resolve any follow-on appeals by reference to the same principles and authorities). Moreover, any arguments for

staying entry of judgment and pronouncement of sentence will always require that the entirety of the retrial must occur before any appeal—so any reversal on appeal would invalidate *two* trials, not just one. If judicial economy is the chief concern, then the best solution is for the district court to enter judgment and sentence on the conviction, then stay retrial on the remaining counts while the appeal proceeds. If the appellate court finds reversible error, then the remanded count can be joined with the remaining counts for retrial; if not, then the trial court can proceed to retrial on those remaining counts, with that roadmap for avoiding reversible error in hand. *Accord Einfeldt*, 914 N.W.2d at 783; *Schlitter*, 881 N.W.2d at 392. Any other approach involves two separate trials, before an appellate court weighs in on either of them.

All of those considerations about the issues likely to arise on appeal from any convictions and on retrial of the remaining charges are appropriate things for a district court to consider when it decides whether to stay sentencing pending retrial (or whether to stay retrial, pending resolution of the appeal). They would also be appropriate things for this Court to consider on a case-by-case basis, whenever it rules on an application for interlocutory appeal. *See* Iowa R. App. P. 6.104(1)(d); Iowa R. App. P. 6.104(2). Again, this seems like a wash.

The purported benefits of Ohio's approach seem relatively minor (at best). On the other side of the scale, Ohio's approach means that a defendant may be required to serve their sentence indefinitely, before acquiring any right of appeal. For one defendant, that took decades:

> In short, McIntyre was ostensibly ordered on September 9, 1991, to serve an aggregate prison sentence of 22 to 46 years and was presumably delivered into the custody of the designated state correctional institution at that time . . . . But McIntyre did not have a final, appealable order to contest his convictions and sentence until February 3, 2016, over 24 years later.

McIntyre v. Hooks, No. 2019–0042, 2020 WL 3579809, at *3–4 (Ohio July 2, 2020) (J. Donnelly, dissenting). This does not serve anyone's interests. Convicted defendants generally stand to benefit from prompt adjudication of their challenges to the convictions that require them to serve sentences. And if there will be a right to appeal at some point, then the State would also prefer a prompt appeal so that it could retry the case if necessary, before any critical evidence becomes stale. *See Davis v. State*, 443 N.W.2d 707, 710 (Iowa 1989) ("One of the goals of our criminal justice system is to afford both the accused and the state fair and prompt trials, appeals and further proceedings to correct error. A legitimate concern is that the process also end within reasonable time limits."); *see also State v. Carter*, 158

N.W.2d 651, 655 (Iowa 1968) (quoting *United States v. Johnson*, 327 U.S. 106, 112 (1946)) ("Determination of guilt or innocence as a result of a fair trial, and prompt enforcement of sentences in the event of conviction, are objectives of criminal law."). Of course, defendants in Iowa can apply for interlocutory review, so nobody would face that *McIntyre* situation without *any* opportunity for appellate review of their convictions. But the window for that filing is "30 days after entry of the challenged ruling or order." *See* Iowa R. App. P. 6.104(1)(b)(2). If some intractable problem arises more than 30 days after sentencing and delays retrial on the remaining counts, then an Iowa defendant could conceivably end up in a position that resembles *McIntyre*.

There is a split among state courts on this issue. That included a notable split among Missouri's appellate courts, before the Missouri Supreme Court resolved the split and reached the same result as Ohio. *See State v. Waters*, 597 S.W.3d 185 (Mo. 2020). Other state courts have reached the opposite result and concluded that their state statutes create a right of appeal in similar situations. *See, e.g.*, *State v. McCave*, 805 N.W.2d 290, 301–04 (Neb. 2011); *State v. Catt*, 435 P.3d 1255, 1267 (N.M. Ct. App. 2018). A similar split exists among federal courts, but all of the leading federal cases that support Ohio's approach are

premised upon a stay of execution of sentence. The State's prior filing cited to *United States v. Leichter*, where the First Circuit held that it did not have appellate jurisdiction until a disposition had been entered on each count joined in the indictment—but it also offered this caveat:

> It is important to note that the district has stayed the execution of appellants' sentences for the Count One conviction. "The insistence on final disposition of all counts ... is reasonable unless an attempt is made to enforce the sentence on the counts that have been finally resolved."

United States v. Leichter, 160 F.3d 33, 37 (1st Cir. 1998) (quoting 15B Wright, Miller, & Cooper, *Federal Practice and Procedure* § 3918.7, at 537 (2d ed. 1992)). The Seventh Circuit included a similar caveat in its opinion in *United States v. Kaufmann*, which is the other leading federal case that would support Ohio's approach. *See United States v. Kaufmann*, 951 F.2d 793, 795 (7th Cir. 1992) ("A judgment which lacks finality cannot authorize the imprisonment of a defendant."). As such, that persuasive authority seems to lose much of its persuasive force in contexts where a district court has already pronounced a judgment of sentence and has set execution in motion (especially considering that a stay of execution after that point might *require* an appeal). *See* Iowa Code § 814.13; Iowa R. Crim. P. 2.26(2)(c); *see also State v. Sullivan*, 326 N.W.2d 361, 363–64 (Iowa 1982) ("[I]n the absence of special

statutes so providing, a sentencing court loses its power to suspend the execution of any part of a sentence and impose in lieu thereof probation once the judgment of confinement has been executed in whole or in part.”). Even under *Leichter* or *Kaufmann*, this judgment would likely be appealable because the court did not stay execution.

The foundational case for the majority approach is *United States v. Powell*, 24 F.3d 28 (9th Cir. 1994). In *Powell*, the Ninth Circuit considered a corollary issue: whether the district court had jurisdiction to proceed to trial on the remaining counts, while an appeal from the convictions obtained on some other counts was pending. *See Powell*, 24 F.3d at 30. Along the way, it considered and rejected an argument that Powell’s appeal would have “run afoul of the final judgment rule in criminal cases” unless it was an appeal from a final judgment on *all* counts charged in the indictment. *See id.* And instead, *Powell* held:

> Final judgment in a criminal case means sentence. The sentence is the judgment. . . . [T]he judgment is final for the purposes of appeal when it terminates the litigation on the merits and leaves nothing to be done but to enforce by execution what has been determined.
>
> When sentence was imposed on the severed counts, Powell was entitled to appeal because there was nothing left to be done but to enforce the sentence. The fact that he had not yet been tried on the remaining count did not preclude him from appealing the convictions after the first trial.

See id. at 31 (quoting *Berman v. United States*, 302 U.S. 211, 212–13 (1937)). The lack of formal severance did not make a difference in the subsequent case of *United States v. King*, where a guilty plea to some of the charges "in effect severed the indictment into two parts and made him ready for sentencing on the charges related to the [plea]." *See United States v. King*, 257 F.3d 1013, 1020 (9th Cir. 2001). *King* applied *Powell*, distinguished *Leichter* and *Kaufmann*, and reiterated its prior holding that "the court's interest in ensuring a defendant has the right to appeal a sentence when he begins serving it outweighs the government's concerns about piecemeal appellate review." *See id.* at 1020–21. Most courts would concur with that balancing of interests. *See, e.g.*, *McCave*, 805 N.W.2d at 301–04; *Catt*, 435 P.3d at 1267.

The Second Circuit also considered this issue on similar facts in *United States v. Abrams* and found that it had appellate jurisdiction:

> Without discussing jurisdiction, we have from time to time decided an appeal from a conviction and sentence on less than all counts of an indictment when other counts tried in the same trial remained unresolved after a mistrial. . . . This approach is faithful to the articulation by Congress and the Supreme Court as to the nature of a final judgment in criminal proceedings. . . . Although the litigation as framed in the indictment may not yet have run its course, the counts of conviction have been resolved and the sentence is ready for execution. The unresolved counts have in effect been severed, and will be resolved another time in a separate judgment. . . .

> . . . If we were to adopt the view of the Seventh Circuit, Abrams would be serving his sentence without acquiring the right to appeal it. The Seventh Circuit in *Kaufmann* undertook to mitigate that unacceptable ramification of its analysis by approving the district court's stay of the execution of the defendant's sentence pending the appeal. *See Kaufmann*, 951 F.2d at 795. But we think that the Seventh Circuit's approach would substantially delay the execution of a valid conviction and sentence, force trials that may never be needed, and impose expense and burden on the prosecution and the defense—undesirable results that are not mandated by the jurisdictional statute.

United States v. Abrams, 137 F.3d 704, 706–07 (2d Cir. 1998). Here, Lacey is in a similar position: she was sentenced, and there is no order staying execution of her sentence. Treating her judgment of conviction and sentence as "final" under section 814.6(1)(a) makes sense because there was nothing left to do on that particular charge but to carry out that sentence or docket a timely appeal—neither of which could be affected by Lacey's retrial on any of her remaining charges, which were effectively severed by post-trial orders before sentencing.

The State wanted this Court to have briefs that explored the best possible arguments in favor of each approach that it could take, if it decides to resolve this question. Upon examining the issue, the State submits that it has no reason to discourage this Court from following the majority approach and finding that Lacey's judgment of sentence qualifies as a final judgment of sentence under section 814.6(1)(a).

II. The evidence was sufficient to support conviction for second-degree harassment.

Preservation of Error

The trial court considered and rejected this challenge in ruling on Lacey's motion for judgment of acquittal, so that ruling preserved error for this sufficiency challenge. *See* TrialTr. 371:15–20; TrialTr. 374:7–375:20; TrialTr. 377:10–379:5; *accord Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review

Review of a ruling on sufficiency of the evidence to support a conviction is for correction of errors at law. *See Huser*, 894 N.W.2d at 490 (citing *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012)).

Merits

On a challenge to sufficiency of the evidence, an appellate court reviews the evidence in the trial record "in the light most favorable to the State, including all reasonable inferences that may be fairly drawn from the evidence." *See id.* (quoting *Sanford*, 814 N.W.2d at 615). The only evidence that matters is what is contained in *this* trial record; the State's case-in-chief must contain enough evidence to prove up each element of the crime charged, beyond a reasonable doubt (if believed). It does not matter what happened or will happen at any other trial.

The marshalling instruction for this offense, submitted without objection, is law of the case for the purpose of a sufficiency challenge. *See* TrialTr. 606:25–607:22; *State v. Banes*, 910 N.W.2d 634, 640 (Iowa Ct. App. 2018). As such, the State needed to prove:

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 Instr. 14; App. 108. For the purpose of that second element, the threat does not need to be communicated verbally—a threat can also be communicated through gestures and actions. *See, e.g.*, *State v. Evans*, 671 N.W.2d 720, 725 (Iowa 2003) (finding sufficient evidence for harassment from Evans's sudden and uninvited appearance at Arnold's door, which "would easily cause Arnold to feel frightened, disturbed, or in danger" in context of their prior interactions, and explaining that a reasonable jury could find that reaction would be "the natural consequence of Evans' acts, from which the requisite intent for harassment may be inferred"). Here, the evidence in the State's case-in-chief was sufficient to establish each of those elements, and Lacey cannot show otherwise.

The evidence showed that, on the morning of April 30, 2018, Lacey and her friend (Evelyn) went to McDonnell & Associates to confront Clyde Richardson over Lacey's belief that Richardson was the person who broke into her garage and vandalized her vehicles. The confrontation was recorded by a video camera that was positioned across the street (but it was far away, and the video's low resolution makes it unclear, even when zoomed in). *See* State's Ex. 13 & 13A.

Mark McDonnell saw Lacey as he was arriving for work (before the business opened), and he entered the building just as Richardson stepped outside to talk to them. *See* TrialTr. 177:5–182:15. After he went inside, he "heard a thud on the glass" and turned around to see "[Richardson] was being pushed up against the glass by Ms. Lacey." *See* TrialTr. 181:8–184:3. While Lacey was pushing on "[h]is chest," Lacey was saying "something about him breaking into her garage and stealing her stuff," and she was also asking Richardson if this was "the reaction [he was] looking for" using a tone of voice that was "loud and kind of yelling at him." *See* TrialTr. 183:5–184:13. Richardson said he did not know what she was talking about. McDonnell saw Lacey "raise up her knee like she was trying to knee [Richardson] in the groin," and "[s]he struck him a few times with her arms [and] hands." *See* TrialTr.

184:14–185:8. Richardson "put his arms up" in a way that looked like "he was trying to protect himself"—and as Richardson did that, Lacey "continued to keep swinging at him [and] yelling at him." *See* TrialTr. 185:9–21; *accord* TrialTr. 192:6–194:1; State's Ex. 13A, at 1:00–1:20. At one point, Evelyn went to the trunk of Lacey's car and got out a baseball bat, which caused Richardson to turn his attention to her and ask what she was going to do with it—but Richardson never did anything to attack, threaten, or attempt to disarm Evelyn. *See* TrialTr. 195:6–196:13. At that point, Lacey ducked into the passenger seat of the vehicle, emerged with a sledgehammer, and charged Richardson:

> She struck Clyde in the arm. And then she swang at him again, and at that point, he had grabbed hold of the sledgehammer and the two of them were, like, trying to control where it was going. Clyde had ended up pulling it out of her hands, and he threw it down on the ground.

See TrialTr. 196:14–200:19; *accord* State's Ex. 13A, at 2:32–3:00.

Emily Gordon heard "a lot of loud yelling" and saw a group of people in what was "clearly some sort of dispute," and she called 911. Gordon did not "stick around to see what was happening," but she did hear a woman's voice—it was yelling, swearing, and making threats:

> I remember it was a woman's voice that was yelling really loudly, and I remember lots of swearing, because, again, it was 8 in the morning. You're walking to your car, and instantly it's, like, really loud.

> [. . .]
>
> 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.

TrialTr. 260:2–264:13. McDonnell had testified that he had heard Lacey using a tone of voice that was "loud and kind of yelling," and that her yelling included "something about [Richardson's] mother" and "something along the lines of her being a cock-sucking whore." *See* TrialTr. 184:7–186:3. There was no evidence of Evelyn saying anything, other than her response to Richardson that she would use the baseball bat if she had to; aside from that, she "[j]ust stood there holding the bat." *See* TrialTr. 195:18–196:13.

Lacey argues that this evidence is not sufficient to support her conviction for second-degree harassment because "[i]t is most likely that [Gordon] in all the distance and haste of her actions heard Evelyn yelling at Richardson," rather than Lacey herself. *See* Def's Br. at 41. But Evelyn had no axe to grind—and the evidence showed Lacey did, for a number of reasons. Moreover, McDonnell testified that Lacey was "yelling" at Richardson; he did not testify that Evelyn yelled at all. *See* TrialTr. 184:7–185:21. The jury could infer that the person who was yelling was the person who yelled the things that Gordon heard.

Moreover, it is not actually necessary to find that Lacey made a *verbal* threat—her actions communicated a clear *nonverbal* threat of bodily injury. *See Evans*, 671 N.W.2d at 725. McDonnell's testimony established that Lacey pushed Richardson "up against the glass" of the storefront while she was "loud and kind of yelling at him" about her accusation that he had wronged her. *See* TrialTr. 182:16–185:1. And as Lacey struck at him, Richardson "put his arms up . . . like he was trying to protect himself"—which would establish that Lacey had successfully communicated her threat to inflict bodily injury. *See* TrialTr. 185:2–21. A similar inference could be drawn from the video showing how Richardson ducked out of the way, as Lacey swung her sledgehammer at him. *See* State's Ex. 13A, at 2:30–2:38.

Lacey is incorrect that this evidence was insufficient to establish that she was the person who was yelling (as McDonnell described) and that the things she was yelling included threats to inflict bodily injury (as Gordon described). Even if Lacey could defeat that proof of her verbal threats, McDonnell's testimony and the video establish that Lacey also communicated *nonverbal* threats to inflict bodily injury on Richardson, throughout the encounter. Therefore, Lacey's challenge to the sufficiency of the evidence on that element must fail.

III. The trial court did not abuse its discretion in excluding text messages with prejudicial content or in excluding evidence about cycles of domestic abuse.

Preservation of Error

Lacey made an offer of proof on the excluded text messages. Exhibit Q1 includes the excluded messages; Exhibit Q is the version that was admitted into evidence, which does not include them. *See* Def's Ex. Q; App. 19;[2] Def's Ex. Q1; App. 68; TrialTr. 527:6–24. The trial court specifically allowed admission of any text message that could reasonably be construed as a threat by Richardson to commit violence against Lacey. *See* TrialTr. 127:15–131:2. But for the ones with overtly sexual content and racial animus, the trial court ruled that those messages were not relevant in a way that outweighed their prejudicial impact, so it excluded them. *See* TrialTr. 233:1–239:21; TrialTr. 352:3–354:10; TrialTr. 457:12–458:25. That ruling preserves error for arguments about the same rationales for admission that it considered and rejected. *See Lamasters*, 821 N.W.2d at 864.

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[2] The 49-page version of Exhibit Q is the redacted version that was admitted into evidence. *See* TrialTr. 482:14–23. EDMS also lists a different version of Exhibit Q (comprising 76 pages). That one was the original offer, including the messages that were later redacted. *See* TrialTr. 352:20–354:9. Only the 49-page version was admitted. All of the State's citations to Exhibit Q are referring to the 49-page version. For the excluded messages, the State will cite Exhibit Q-1.

Lacey's attempt to testify about patterns of domestic abuse drew a timely objection from the State. *See* TrialTr. 456:6–457:5. The court ruled that evidence about cycles of domestic abuse was not relevant to prove Lacey's justification defense, in this particular case. *See* TrialTr. 459:4–462:6; *see also* TrialTr. 348:11–355:6. But Lacey did not make an offer of proof to establish what her testimony *would have been*, so it is impossible to gauge the impact of the alleged error. *See State v. Windsor*, 316 N.W.2d 684, 688 (Iowa 1982) ("[P]rejudice will not be presumed or found when the answer to the question was not obvious and the proponent made no offer of proof."); *accord State v. Leedom*, 938 N.W.2d 177, 191–92 (Iowa 2020) (finding error was not preserved on challenges to evidentiary rulings when no offer of proof was made). Thus, error is not preserved for this portion of Lacey's challenge.

Standard of Review

Rulings concerning the probative value, prejudicial impact, and admissibility of evidence are reviewed for abuse of discretion. *See, e.g.*, *Einfeldt*, 914 N.W.2d at 784.

Merits

Lacey argues that evidence of Richardson's obscene and profane text messages and evidence of Lacey's generalized knowledge about

cycles of domestic abuse were both relevant, for the same reason that prior acts of domestic abuse were relevant in *State v. Taylor*: as circumstantial evidence on the contested element of the defendant's state of mind. *See* Def's Br. at 50–54 (citing *State v. Taylor*, 689 N.W.2d 116 (Iowa 2004)). Specifically, Lacey argues that they were relevant to show "whether [she] initiated the in-person contact with a 'legitimate purpose' of nonviolent conflict resolution in her mind." *See* Def's Br. at 53. This is a bad argument for four reasons.

First, it does not matter why Lacey *initiated* the interaction. What matters is whether Lacey had "legitimate purpose" for the personal contact that satisfied the other elements. If she arrived with the best of intentions, but flew off the handle and shouted threats of bodily injury with a specific intent to threaten, intimidate, or alarm, then that would still be second-degree harassment *unless* everything Lacey said with that specific intent was said with "legitimate purpose." *See State v. Evans*, 672 N.W.2d 328, 331 (Iowa 2003) ("Because there must be a specific intent to threaten, intimidate, or alarm, the only legitimate purpose that will avoid the criminal status . . . would be a legitimate purpose to threaten, intimidate, or alarm."); *accord State v. Happe*, No. 19–0144, 2020 WL 4497428, at *3–4 & n.4 (Iowa Ct.

App. Aug. 5, 2020). Most of Lacey's argument is a red herring, because Lacey's original intent in seeking out Richardson is not something that jurors needed to determine—it cannot anchor a theory of relevance.

Second, Lacey was permitted to introduce more than half of the proffered text messages, including a threat referencing O.J. Simpson. *See* Def's Ex. Q; App. 19; *see also* TrialTr. 466:12–468:13; TrialTr. 482:25–494:3. Lacey also testified (and offered testimony from other witnesses from her family) that Richardson allegedly strangled her. *See* TrialTr. 470:11–482:5; *see also* TrialTr. 386:17–393:14; TrialTr. 415:9–423:12. Because other evidence that served the same purpose as the excluded evidence was admitted, Lacey cannot establish any abuse of discretion or any prejudicial error from exclusion of that cumulative material—especially when the excluded messages were kept out because they contained extraneous inflammatory material. "Weighing probative value against prejudicial effect is not an exact science," and appellate courts "give a great deal of leeway to the trial judge who must make this judgment call." *See State v. Putman*, 848 N.W.2d 1, 10 (Iowa 2014) (quoting *State v. Newell*, 710 N.W.2d 6, 20–21 (Iowa 2006)). The trial court did not abuse its wide discretion by excluding text messages that were similar to the admitted messages,

but with racial animus and sexual obscenities that were not relevant to any claim or defense at issue, and were really offered to imply that that Richardson was a bad person who deserved any injury he got.

Third, and relatedly, Lacey's argument that providing this evidence would have *helped* her defense is illogical. More shocking text messages would have only undermined Lacey's claim that she expected a reasonable conversation. Lacey argues she was "entitled to show the jury the depth of Richardson's racial hatred and his crude, offensive, assaultive way of intimidating her." *See* Def's Br. at 55–56. But that could not help Lacey argue that she went to confront him with some expectation of civil dialogue. Instead, it would only make it *more* reasonable to infer that Lacey went to confront Richardson with some other intent that would establish the crimes charged: either to threaten or intimidate him into changing his behavior (which would help prove harassment) or to act on her anger and exact vengeance (which would prove the specific intent required for assault charges).

Similarly, testimony from Lacey that she understood patterns and cycles of domestic abuse would have made it obvious that, if her purpose had *really* been to convince Richardson not to contact her (and not to exact some sort of vengeance), then she would have gone

straight to the police instead of seeking an unmediated confrontation with someone who she believed was attempting to ensnare her in a cycle of abuse and reconciliation. Generalized knowledge about cycles of domestic abuse would make her *less* likely to harbor "the belief that Richardson's abuse was not going to have any chance to end unless she granted his request to talk to her." *See* Def's Br. at 56. It is called a "cycle" because reconciliation does not end the abuse—it just ensnares the other partner and restarts the cycle. *See State v. Rodriquez*, 636 N.W.2d 234, 246 (Iowa 2001) (noting BWS expert testimony helped to put reconciliation and "good times" into proper context as part of a "cycle of violence"). And generalized knowledge about domestic abuse would make it much more damning that Lacey lied to the police and claimed that she never had an intimate relationship with Richardson, and it would demolish her explanation that she lied to police because Richardson told her to. *See* TrialTr. 555:10–556:4; *cf*. State's Ex. 4.

To summarize this third point: Lacey's explanations for her actions would be *less* credible if the jury saw the unredacted messages or if she had testified to familiarity with dynamics of domestic abuse. Lacey cannot establish that she was prejudiced by exclusion of any of this evidence; it only would have helped the State to prove her guilt.

Fourth, any error is harmless because the video showed what it showed, and McDonnell and Gordon heard Lacey shouting threats of violence that would be unaffected by testimony about text messages or generalized patterns in cycles of domestic abuse. *See* TrialTr. 183:5–185:21; TrialTr. 192:6–194:1; TrialTr. 260:2–264:13; State's Ex. 13A, at 1:00–1:20 and at 2:30–2:38. Harmless error is also established because Lacey's testimony about her knowledge of domestic abuse would only matter if jurors believed Lacey—and the State presented video evidence that contradicted and disproved Lacey's testimony on non-collateral matters, in ways that made it impossible to credit any of her testimony. Lacey admitted that she had lied to the police about whether she had ever had an intimate relationship with Richardson (which was relevant and non-collateral on the "domestic" element of domestic abuse assault charges). *See* TrialTr. 555:10–556:4; *see also* State's Ex. 4 & State's Ex. 9; TrialTr. 532:21–535:21. Lacey also lied to the police about what happened, and she lied about what she told them in her testimony. *See* TrialTr. 324:9–333:2; TrialTr. 536:7–538:15; TrialTr. 543:3–546:7. She lied when she denied sending text messages that she had obviously sent to Richardson. *See* TrialTr. 524:5–526:21; TrialTr. 532:7–20; TrialTr. 560:19–563:22. Lacey could not even be

honest about things that were observable from the video footage, as blurry as it was. *See* TrialTr. 507:12–509:21; TrialTr. 547:24–550:18. Exclusion of evidence with any conditional relevance that depended on Lacey's credibility would be harmless, because it would have been clear to jurors that they could not believe anything she said.

The trial court summarized Lacey's relevance theory as an attempt to admit this evidence to show that "she is now a victim and therefore justified in attacking somebody who she feels attacked her." *See* TrialTr. 461:12–462:6. The trial court was correct to find that all of the excluded evidence was not admissible because it did not logically tend to prove or disprove any element or claim that was at issue, and any minimal probative value would be outweighed by the clear risk of unfair prejudice. Therefore, Lacey's challenges fail.

IV. The sentencing court did not abuse its discretion.

Preservation of Error

Generally applicable rules of error preservation do not apply to this claim. Lacey may challenge the sentencing decision for the first time on appeal. *See State v. Ayers*, 590 N.W.2d 25, 27 (Iowa 1999).

Standard of Review

"Appellate review of the district court's sentencing decision is for an abuse of discretion." *Evans*, 672 N.W.2d at 331–32 (citing *State v. Laffey*, 600 N.W.2d 57, 62 (Iowa 1999)).

Merits

A sentencing court's decisions "are cloaked with a strong presumption in their favor." *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996) (citing *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995)). District courts are given authority to exercise discretion in order to "give the necessary latitude to the decision-making process," and that "inherent latitude in the process properly limits [appellate] review." *State v. Formaro*, 638 N.W.2d 720, 724–25 (Iowa 2002). Even when an appellate court disagrees with the sentencing decision, that alone does not provide sufficient reason to remand for resentencing. *See id.*; *see also State v. Hopkins*, 860 N.W.2d 550, 553 (Iowa 2015) (noting that review for abuse of discretion means that "[o]n our review, we do not decide the sentence we would have imposed").

Lacey's first challenge is that the sentencing court relied on unproven conduct. *See* Def's Br. at 63–67. But the sentencing court specifically said that it was *not* considering any acts that were charged

but not proven. *See* Sent.Tr. 11:1–7. Instead, the sentencing court only considered that Lacey "threatened [Richardson] with physical harm" and "displayed a hammer or a sledge." *See* Sent.Tr. 11:13–24. The jury found that she made that threat; it found her guilty of second-degree harassment. *See* Jury Instr. 14; App. 108. And the evidence at trial, including Lacey's own testimony, established that she was carrying a hammer during that confrontation. *See* TrialTr. 513:3–15; TrialTr. 196:14–200:19. The only issue is "the sufficiency of the record to establish the matters relied on" in the sentencing decision. *See State v. Longo*, 608 N.W.2d 471, 474 (Iowa 2000). The sentencing court did not rely on any fact that was not proven by the evidence at trial.

Lacey argues this is still impermissible because "the jury made no findings on the hammer" and "deadlocked" on three counts, which means they could not agree whether Lacey "even committed a simple assault." *See* Def's Br. at 65–66. But this is not a finding that Lacey did not display the hammer (or even that they could not agree if she displayed the hammer)—as Lacey notes, that deadlock only shows that they could not agree on whether Lacey committed an assault, as defined in section 708.1(2)(a) or (2)(b). *See* Jury Instr. 12–13, 16; App. 106–07, 110. That did not preclude the sentencing court from

considering other pertinent facts from the trial record in making its sentencing decision—including the fact that Lacey armed herself with that hammer during the same encounter where she made the threats that constituted this offense. *See* Sent.Tr. 11:13–24.

Lacey also argues that the sentencing court only considered one factor in making this sentencing decision. *See* Def's Br. at 66–67. Her argument is partially right: the only *aggravating* factor that the court considered was her conduct. It considered other factors that it found were *mitigating*, which led it to impose a suspended sentence. *See* Sent.Tr. 8:8–10; Sent.Tr. 12:5–18. This is not the "fixed policy" that Lacey claims that it is, and her challenge is meritless.

CONCLUSION

The State respectfully requests that this Court find that it has jurisdiction (one way or another), reach the merits of Lacey's claims, reject them, and affirm her conviction and sentence.

REQUEST FOR NONORAL SUBMISSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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