ELECTRONICALLY FILED MAR 08, 2021 CLERK OF SUPREME COURT

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 REPLY BRIEF

Kent A. Simmons
P.O. Box 594
Bettendorf, Iowa 52722
(563) 322-7784
ttswlaw@gmail.com

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/s/ Kent A. Simmons

KENT A. SIMMONS

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ROUTING STATEMENT

It appears the State agrees that this Court should retain the appeal, but designate it as a discretionary review. The only option for acceptance under discretionary review in the instant case is in subsection 814.6(e). The statute allows review of "An order raising a question of law important to the judiciary and the profession." As an issue of first impression, the question certainly should not be transferred to the Court of Appeals. Ms. Lacey agrees this Court should retain and decide the jurisdiction issue, but whether it is designated a discretionary review or appeal on final judgment depends on the Court's decision on the merits of Argument 1.

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

The State makes excellent points as to future possible applications of a new rule in a situation where a defendant has been sentenced to imprisonment on a count where bail is unavailable or unattainable on appeal, and a retrial or severed trial is pending on other counts. Without taking a position, however, the State does finally suggest that nothing should discourage the Court from taking the majority position followed in other jurisdictions that would hold the sentence in the instant action is now a final judgment. (St. Br. 42)

The instant issue was preserved on the Defendant's motion to continue or stay sentencing that the district court denied. The effects of a hard and fast rule would not necessarily serve justice, and the question of a stay of sentencing should remain discretionary with the district court, upon a motion from the parties or on its own motion. If the district court thereafter proceeds to sentencing on a count or counts while other counts are still pending for trial, then the right of appeal from final judgment should be in force. Under that procedure, the instant appeal should be retained as an appeal from a final judgment for decision on the jurisdictional issue, and thereafter, the Court should find the district court abused its discretion in denying the stay under the circumstances of this particular case. Ms Lacey is not incarcerated and has posted appeal bond. The sentence should be set aside for a

district court stay as a sentencing decision on Count 3 may be affected by facts developed in the upcoming trial. Ms. Lacey can address all the remaining issues at a later date, if necessary.

II.

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

Twice in her opening brief, Ms. Lacey pointed out that the key State's witness, Mark McDonnell, never testified that he heard Ms. Lacey say anything to the effect of: "I'm gonna beat you". (Open. Br. 37, 40-41) The State does not address this circumstance. McDonnell remembered Latrice muttering to Richardson about his breaking into her garage and stealing things from her. He remembered Latrice saying something to him about his mother. He did not relate that he heard Ms. Lacey say anything along the line of communicating "a threat to commit bodily injury." (Tr. 184-186, L. 3-3)

McDonnell was the State's star witness for two reasons. One was because he was present for almost the entire incident, and the other reason is because

Richardson failed to appear to testify. In ruling on the Motion for Acquittal, the judge said that McDonnell "was apparently within about 5 feet of the entire event". (Tr. 197, L. 7-22, pp. 219-221, L. 14-18) (Tr. 378, L. 10-20) The State also has no reply to Ms. Lacey's argument that McDonnell was not asked specifically what it was Latrice's friend, Evelyn Nelson, said when she was telling Richardson she was going to use her baseball bat on him if she had to. That is certainly the type of question where the words "beat you" are likely to come up. McDonnell testified Clyde was angry at this time, and McDonnell was unsuccessfully attempting to get Clyde to go back into the office. (Open Br. 36-37, 40-41) (Tr. 195-197, L. 6-16; pp. 223-227, L. 2-20)

The only argument the State has as to the likelihood of Evelyn using those words "beat you" is that Evelyn "had no axe to grind" with Richardson. That argument ignores the facts of the situation. (St. Br. 47) It was McDonnell, as well as Latrice, who testified that Evelyn produced the bat after Clyde started going after Latrice as the two women were retreating to Evelyn's car. There was no dispute that Evelyn brandished the bat in an attempt to protect Latrice. Emotions were high. There was no dispute that Clyde then confronted Evelyn as to whether she would actually use the bat against him. This is not a question of any history or

reason for “axe-grinding” between Evelyn and Clyde. It was a question of Clyde being angry and Evelyn trying to protect her friend from him. (Tr. 195-197, L. 6-16; pp. 223-227, L. 2-20) (Tr. 512-513, L. 10-25)

The last delicate effort the State makes at finding substantial evidence of a communicated threat is to say: “Moreover, it is not actually necessary to find that Lacey made a verbal threat—her actions communicated a clear nonverbal threat of bodily injury.” (St. Br. 48) First of all, the case the State cites in support of this proposition raised a question on the use of the word “alarm” in the statutory definition of Harassment. There was no assault or threat of bodily injury in that scenario, and the question was sufficiency of the evidence for a simple Harassment under the “alarm” theory. *State v. Evans,* 671 N.W.2d 720, 724 (Iowa 2003) Secondly, the strained interpretation of “communicated” that the State advances would automatically make every assault involving a bodily injury also Harassment in the Second Degree. That clearly was not the legislature’s intent.

In the end, the State hangs its hat on Emily Gordon’s testimony:

> 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). (St. Br. 48)

Ms Lacey must close here as she did in her opening brief:

> 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. (Open. Br. 41)

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 State conceded Ms. Lacey preserved error in regard to the trial court's exclusion of text messages and testimony regarding those messages offered in Defendant's Exhibit Q-1. (St. Br. 49)

The State claims Ms Lacey did not preserve error on the question of her knowledge of the pattern of behavior of domestic abuse violators. The argument is

that "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". The State cites two cases as support for this contention. (St. Br. 50) (emphasis supplied) In *State v. Windsor,* 316 N.W.2d 684, 688 (Iowa 1982), the Court simply stated: "When evidence is admissible only for a limited purpose, it is the duty of the proponent to alert the trial court to his theory of admissibility." The *Windsor* Court made a catch-all conclusory statement that six assignments of error concerning evidentiary rulings on relevancy were not properly preserved, but the Court did not specify any of the facts involved or arguments made in the district court. Argument below clearly shows the defense attorney explained to the judge the limited purpose for introducing the Defendant's knowledge as to the behavior pattern of a domestic abuser.

The other case the State cites at page 50 of its brief for "accord" to *Windsor* is *State v. Leedom,* 938 N.W.2d 177, 191–92 (Iowa 2020). The *Leedom* case does not provide a sufficient procedural similarity to the instant case for any guidance. In that case, the trial court had preliminarily granted pretrial motions to quash subpoenas on the basis of privilege for two witnesses and preliminarily granted a State's Motion in Limine in regard to two other proposed defense witnesses. The

trial judge told defense counsel he would be willing to revisit the rulings upon defense offers of proof after the trial got under way. The defense then failed to make any subsequent challenge or offer of proof as to the ruling on the motions to quash. The defense also failed to attempt to call the excluded defense witnesses or make any offer of proof on the rulings in limine. This Court treated the preliminary rulings on the motions to quash as rulings in limine and determined that the pretrial rulings on all four witnesses were not final rulings that would preserve error. The defense failures to revisit the issues waived any errors as they were not properly preserved. 938 N.W.2d at 191–92

The instant issue on domestic abuse behavior did not involve a Motion in Limine. The State merely objected in the course of Ms. Lacey's direct examination. There was no lack of understanding among the parties or the trial judge as to the subject matter or the purpose of the testimony Ms. Lacey was attempting to introduce. A formal offer of proof was not necessary to allow the trial judge to evaluate the facts material to his ruling.

Ms. Lacey showed the preservation of error in detail in her opening brief. (Open. Br. 48-50) A more complete explanation of that preservation may best start

with a look at the questions and answers that went before the jury leading up to the State's objection. This testimony was never stricken:

> **Q.** After [Richardson] actually met Charlie in January, did the text messages change in tone at all?
>
> **A.** Yes.
>
> **Q.** And how was the tone changed?
>
> **A.** They became more, I guess, violent.
>
> **Q.** You're a lawyer. Have you ever studied anything about the nature of domestic relationships? Whether it might be abuse?
>
> **A.** Yes.
>
> **Q.** What have you studied about them?
>
> **A.** We do trainings in our office about sexual harassment abuse --
>
> **Q.** I want to focus on domestic abuse.
>
> **A.** How domestic abuse affects both the perpetrator and the person who is receiving it.
>
> **Q.** Are there patterns -- Are you trained about patterns that are seen in domestic abuse relationships?
>
> **A.** Yes.
>
> **Q.** Were there patterns about how the abuser

behaves?

A. Yes.

Q. Tell us about those patterns.

[The Prosecutor]: I'm gonna object as to relevance.

(Tr. 456, L. 1-23)

The prosecutor's objection was then taken up in proceedings outside the presence of the jury. (Tr. 459-462, L. 4-21) The State's position on appeal that Ms. Lacey did not make an offer of proof is clearly shown to be incorrect by the record. In her opening brief, Defendant set out the parts of the trial transcript showing the offer of proof was made. (Open. Br. 48-50) Ms. Lacey will summarize that showing here. The testimony before the jury set out above shows Defendant Lacey testified she was taught that there are patterns of behavior that perpetrators of domestic abuse follow. In explaining his objection in chambers, it was the prosecutor who first explained the pattern of abuse he expected to hear in the testimony: "She started talking about, I think, the cycle of domestic abuse, how domestic abusers behave. I assume she's going into that they abuse then apologize, whatever." The prosecutor said the pattern evidence was not relevant

because Richardson was not charged with domestic assault and it would be improper character evidence against Richardson. (Tr. 459-460, L. 17-10) The defense verified the prosecutor's understanding of the testimony that was proposed to show the pattern of abuse, then apology, then more abuse, then apology, etc. The defense attorney explained how the Defendant's knowledge of the pattern of domestic abusers would add to her belief that the ongoing threats and assaults were never going to end until she convinced Richardson to break the cycle. The defense attorney argued: "Your Honor, our position is that it is all a part of the ongoing harassment, harassment both verbally and physically. We have the choking. We have the apologies. We have anger. We have apologies." (Tr. 460, L. 17-20) Defense counsel continued:

> It's not a question of whether -- It's not a question that we're trying to convict him of it. It's a question we're trying to establish her state of mind. 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. Tr. 460-461, L. 17-6)
>
> * * * *
>
> 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)

The judge was clearly informed that the reason for the testimony was to show Ms. Lacey's fear of Richardson and to show that her reason for approaching him at his place of employment was a legitimate reason. That evidence was critical to negating element 1 of the Harassment charge, which requires proof beyond a reasonable doubt that Ms. Lacey contacted Richardson "without legitimate reason". (Jury Inst. 14; App. 108) Her intent was to break the cycle of his ongoing harassment and to approach him in a place where there would be video surveillance and witnesses. The judge incorrectly concluded the defense was attempting to introduce improper expert testimony and granted the State's motion to exclude the testimony. (Tr. 461-462, L. 12-6)

The Merits

The evidence concerning the text messaging and concerning Ms. Lacey's knowledge of domestic abuse patterns of behavior was also all critical to negating element 1 of the Harassment charge. The State attempted to downplay the importance of the evidence to that element 1. The argument begins: "First, it does

not matter why Lacey initiated the interaction." Of course, it *does* matter why Ms. Lacey initiated the interaction. If she did not initiate the interaction with a legitimate purpose, she could not negate element 1. From there, the State argued:

> 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." (St. Br. 51)

The State's assertion that then summarizes this point of its argument is just puzzling. The State says: "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." The State posits that there could have been a change in Ms Lacey's purpose or intent sometime after she arrived at McDonnell and Associates. That does not mean Ms. Lacey would not have a necessity and there would not be relevance in showing that her reason for going to the scene was the legitimate purpose of trying to defuse the ongoing abuse she was taking from Richardson. It was quite important to show her

purpose and intent in going there in the first place and when she arrived. In fact, the State spent a great deal of time and energy in its first closing argument at trial on that very first element of Harrassment. In eight to nine pages of the trial transcript, the State's lengthy argument to convince the jury Ms. Lacey did not go to McDonell and Associates with a legitimate purpose also includes extensive arguments outside the presence of the jury on a defense objection. But the State then resumes its same argument to the jury. (Tr. 626-634, L. 4-7) The prosecutor concludes that portion of the argument by telling the jury this:

> She knows he has just damaged their property,
> and so now is the time that she goes to meet him in
> person? Not text. Not call. She goes to him in person.
> Is that how --
> Is that reasonable, common sense, that a person
> you're terrified of, that you're gonna go meet with
> them at 8 o'clock in the morning at their place of
> business? You're gonna pick that time?
> Or does it make more sense with the other
> evidence you've heard that her purpose for going there
> was to confront him? She was fed up. She was angry.
> That's understandable. But you don't bring a hammer
> to go confront somebody, and she was not there with
> legitimate purpose. She was there to attack Clyde.
> You'll see that in the video. (Tr. 633, L. 3-18)
>
> * * * *
>
> So that if you were to find that she did

> go down there without legitimate purpose
> but she did not communicate a threat to
> commit bodily injury -- which means, I
> guess, you would disregard the testimony of
> Emily Gordon -- you could find that she did
> those two, and that, then, is harassment in the
> third degree. (Tr. 634, L. 2-7)

The State's theory for a verdict of guilt on Harassment was built solely upon the argument that Ms. Lacey did not go to Richardson's place of employment "with a legitimate purpose. She was there to attack Clyde".

Text Messages

The Court must keep in mind that the trial judge failed to employ the proper balancing test when deciding the racial and sexual messages were more prejudicial than probative. The question under Rules 403 and 404(b) is not whether evidence is more prejudicial than probative, but whether there is a substantial danger of "unfair" prejudice. "The relevant inquiry is not whether the evidence is prejudicial or inherently prejudicial but whether the evidence is unfairly prejudicial. Unfairly prejudicial means the 'evidence has an undue tendency to suggest a decision on an improper basis.'" *State v. Thompson,* ____ N.W. ___ (Iowa, February 5, 2021, No. 19-1259) 2021 WL 401071, at 4. Ms. Lacey made this same point in her opening

brief and quoted *State v. Taylor,* 689 N.W.2d 116, 124 (Iowa 2004) for the further explanation that the "improper basis" might be in creating "sympathy for one party or a desire to punish a party". (Open Br. 50-52) The State has not disputed the fact that the trial court employed an improper balancing test on this question in the instant case. The State's arguments on appeal in reference to the prejudice resulting from the exclusion of twenty-nine pages of text messages with racial animus and sexual obscenities are not supported by any rules of law or logic.

The State's arguments are these:

1) Because the judge admitted more than half of all text messages, the ones he excluded were cumulative.

2) The text messages showing racial animus and obscenities were not "relevant to 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".

3) Evidence of the offensive text messages would not have helped the defense, and in fact would have undermined it. (St. Br. 50-53)

First, the Court must focus on the fact that there is no rule of law that allowed the judge to exclude certain messages because he did not like hearing

details showing racial hatred or sexual jealousy. Ms. Lacey argued in her opening brief:

> 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. (Open. Br. 55)

The State has not responded with any rule of law that authorized the judge's censoring or sanitizing of the text messages. The State simply decided somehow that the judge allowed into evidence a sufficient number of the messages.

Second, the State ignores all of the arguments Ms. Lacey made in the district court and on appeal in order to say the excluded text messages were not relevant to any defense or claim and that the racial and obscene messages "were really offered to imply that Richardson was a bad person who deserved any injury he got". (St. Br. 53) This would seem to be a circuitous attempt to suggest that the jury would

reach a verdict on an improper basis, i.e. that the offensive texts provided improper character evidence showing Richardson was a bad person. The State was arguing at trial that it was improper character evidence. (Tr. 130, L. 16-22)

Generally, an alleged victim of a charged offense is entitled to protection from Rule 404(b) types of evidence of his or her prior bad acts. The question is decisively different, however, when the victim's prior bad acts relate to defendant's claim of self-defense:

> All persons, independently of their character or reputation, are under the equal protection of the law. A homicide victim's prior violent or turbulent character or reputation is ordinarily immaterial and furnishes another no excuse to become his or her private executioner. Thus where the accused denies the killing or asserts it was unintentional, evidence of the deceased's character is inadmissible. But an exception to this general rule applies where the accused asserts he or she acted in self-defense and the slightest supporting evidence is introduced. Then the violent, quarrelsome, dangerous or turbulent character of the deceased may be shown, both by evidence of his or her reputation in that respect and by witnesses who can testify from an actual knowledge of the victim's character.
>
> *State v. Begey,* 672 N.W.2d 747, 752 (2003); *State v. Jacoby,* 260 N.W.2d 828, 837 (Iowa 1977)

In *State v. Williams,* 929 N.W. 2d 621, 636 (Iowa 2019), the Court modified the *Jacoby / Begey* rule in one respect, but not in a way that would affect the instant case. The modification only prohibited evidence of the complainant's character from incidents that were not known to the defendant: "Thus, we hold that a defendant asserting self-defense or justification may not prove the victim's aggressive or violent character by specific conduct of the victim *unless* the conduct was previously known to the defendant." (emphasis supplied) Evidence of incidents involving the complainant's "quarrelsome, dangerous or turbulent character" is still admissible if the defendant had prior knowledge of those incidents.

In *Begey,* the question was whether Ms. Begey could offer evidence of her knowledge of an incident where the victim had committed an act of violence against Begey's mother. The prior acts were quite similar to the facts in Ms. Begey's trial in that the stepfather had jumped onto Begey's mother's car and grabbed her mother by the neck. Ms Begey was charged with Murder in the Second Degree and Homicide by Vehicle. Begey was driving a car that was the subject of a property dispute in her mother's divorce from the stepfather. The stepfather had jumped onto the hood to attempt to frighten Begey from taking the

car. The trial judge excluded evidence of a prior incident where Ms. Begey had seen the stepfather jump onto the car and strangle her mother while her mother was driving. This Court noted: "Here, the State and the court observed that Begey did not expressly testify that she was afraid of [the stepfather]. However, a jury could conclude that from her testimony. The prosecution argued at length about why the jury should not find justification. Yet, the defendant was not allowed to introduce evidence to support such a defense." *Begey,* 672 N.W.2d at 751-753

It is important that in *Taylor, Begey,* and the instant case the prior bad acts evidence was material to the defendant's state of mind. In *Taylor,* it was the defendant's specific intent required for proof of a burglary charge. In *Begey,* it was the defendant's state of mind material to the justification defense. In the instant case, the prior bad acts were material for Ms. Lacey's state of mind as to justification on the assault charges. But, Richardson's prior bad acts were just as material and important to her legitimate purpose in attempting to defuse or calm Richardson's escalating violent and threatening behavior. Ms Lacey was entitled to show *all of the text messages* from Richardson in order to show her knowledge of his "quarrelsome, dangerous or turbulent character". That went directly to negating an element of Harrassment.

Ms. Lacey specifically explained her legitimate purpose to the jury:

> **Q.** Why are you stopping to see him then?
>
> **A.** Because none of the other remedial actions that I've taken to get him to stop have worked, so the only thing that I think I can do is do what he said to do, is stop and talk to him. (Tr. 499, L. 13-17)

At that point, Ms. Lacey had already explained to the jury that she had immediately called police on the night Richardson strangled her inside the back door of her house. She told the officer everything that happened in the incident, told the officer her teenage daughter had witnessed it and provided the officer with full identification information on Richardson, including the addresses where he lived and worked. The police did nothing about the strangulation. The officer was preoccupied and amazed that Ms. Lacey owned her home. (Tr. 474-482, L. 12-5)

"Certainly a fact finder, whether judge or jury, would have a tendency to conclude from [Richardson'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 (Open. Br. 55-56)

Third, The State's position that Clyde Richardson's vile text messages would have been more prejudicial than helpful to Ms. Lacey's case is also developed from a short-sighted view of the record. The State surmises:

> 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).
>
> (St. Br. 53)

The first thing that jumps out from the foregoing assertion is that the State changed its tune about the importance of Latrice's state of mind when she arrived at Richardson's place of employment. At this point, the State now admits it was important for Ms. Lacey to establish that she did not go there with the intent or purpose to threaten or intimidate Richardson. Indeed, the knowledge and memory of all of Richardson's racially-charged and sexually crude texts may have lessened Latrice's expectation of having a civil conversation, but the State chooses to ignore her testimony that she thought it would be a safe place to talk to Richardson in person. She believed the video surveillance cameras on the outside of the McDonnell building were working and Richardson would know that. She also believed there would be witnesses to the conversation at McDonnell. She was wrong about the McDonnell video cameras working, but there were indeed co-employees of Richardson at the business. (Tr. 289-290, L. 7-3; pp. 498-500, L. 12-8; pp. 507-508, L. 15-15; p. 514, L. 5-8; p. 656, L. 3-11)

Domestic Violence Patterns

Again, Ms. Lacey's knowledge of domestic abuse behavior was not proposed as elaborate testimony relating to expert opinions or psycho-social

theories. The prosecutor correctly foresaw the intended testimony when explaining his objection to the judge outside the presence of the jury: "She started talking about, I think, the cycle of domestic abuse, how domestic abusers behave. I assume she's going into that they abuse then apologize, whatever." (Tr. 459-460, L. 17-10) The defense attorney confirmed the prosecutor's understanding and clarified it a little for the judge: "Your Honor, our position is that it is all a part of the ongoing harassment, harassment both verbally and physically. We have the choking. We have the apologies. We have anger. We have apologies." (Tr. 460, L. 17-20) Ms. Lacey repeats this statement of her intended testimony about the knowledge of domestic abuse here because the State attempts to analyze the logic behind the testimony much too broadly on appeal.

The State proposes: "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. (St. Br. 54)" The State overthinks the testimony in the same way the trial judge did. The defense was not proposing to present Ms. Lacey as an expert on domestic violence patterns or battered women's syndrome. The State's reference to that type of expert testimony in *State v. Rodriguez*, 636 N.W.2d 234,

246 (Iowa 2001) takes analysis of the instant evidentiary question too far afield. There is some lack of clarity in the logic of analysis the State embarks upon to conclude: "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." (St. Br. 54) It appears the State is assuming Ms. Lacey was planning to fully explain all the nuances of domestic violence behavior with the jury. The State points to *Rodriguez* and claims: "It is called a 'cycle' because reconciliation does not end the abuse—it just ensnares the other partner and restarts the cycle. [In *Rodriguez,*] expert testimony helped to put reconciliation and "good times" into proper context as part of a 'cycle of violence'". (St. 54) It seems the State is saying that if Latrice knew anything about domestic violence and battered women's syndrome, she would know that a reconciliation and a restoration of "good times" with Richardson would not end the cycle of apologies and abuse.

It seems like the State goes down this rabbit hole upon the mistaken belief that Ms. Lacey would say she was suffering from battered women's syndrome, and she went to see Richardson to gain an apology, a reconciliation and a restoration of "good times". The Court need only look at the evidence that was admitted for the jury to see Ms. Lacey would have said no such thing. Latrice was not suffering

from battered women's syndrome. She did not want an apology or a reconciliation from Richardson. She had moved him out of *her* house over a year previously. She was living there with her future husband, Charley. She did not want to restore "good times" with Clyde. Latrice went to McDonnell and Assosciates to tell Clyde the madness had to stop. He needed to stop showing up at her house, stop assaulting her, stop sending her threatening and vulgar text messages, stop stealing things from her, and stop damaging Charley's car. The perpetrator of the damage that had been done to the garage and Charley's car on the morning in question was shown only by circumstantial evidence. (Ex's E - I; App. 14-17) Neither Charley, nor Latrice, had seen Clyde burglarize the garage or inflict the extensive car damage. At the same time, all the evidence showed they had every reason to believe Clyde was the culprit. At the same time, they had every reason to believe the police would not have enough evidence to arrest him. As stated above, Latrice decided to go talk to Clyde, as *he* had requested, because other remedial measures she had taken had not worked. (Tr. 498-499, L. 23-17) She explained her purpose to the jury:

Q. Okay. What happened when Clyde came out of the

inside?

A. So I'm standing there. I'm yelling at him, obviously, because I'm tired of him coming to my house, and so I said, what are you looking for? What kind of reaction are you looking for? Leave me alone. Stop breaking out the car windows. Nobody can afford this. And so I'm cussing at him and hand movements. And so he says, I don't know what you're talking about, and he pushes me and said, I told you you're not exempt.

(Tr. 500-501, L. 25-9)

The knowledge Latrice had that Richardson's ongoing cycle of abuse and apology was not going to end was material to her purpose in going to talk to him. She was attempting to persuade him to end his campaign of terror against her. In the end, Latrice was right. Going to see him in person did end the cycle of abuse he had perpetrated upon her. Ironically, the cycle was ended when Richardson went to police to file a complaint on the instant charges against Latrice. Looking at

all the evidence of his ongoing abuse and crimes against her, it is no wonder he failed to appear to testify in both trials.

Prejudice

As stated, there is no rule of law that allows a trial judge to sanitize evidence of communications according to what he believes are the sensitivities of jurors as to sexual and racial content. Ms Lacey's substantial rights were clearly violated. There was no danger of unfair prejudice flowing from the text messages the judge excluded. There was a multitude of other evidence showing Richardson's bad acts. He does not get a pass on that behavior. Similarly, the judge plainly erred in evaluating evidence of Ms. Lacey's knowledge of domestic violence behavior, and concluding it was an offer of expert testimony. These rulings both went to the central and fighting issue of Latrice's state of mind when she decided to make personal contact with Richardson on the morning in question. The prejudice of the rulings is undeniable.

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

STANDARD OF REVIEW: The gist of the State's argument is that regardless of the fact two juries could not reach a verdict on the question of whether Ms. Lacey committed an assault, the judge could still use evidence developed in trial to conclude she displayed the hammer in the course of events material to Harassment. In finding facts for employing a proper factor in sentencing, the judge's findings are subject to review for a preponderance of the evidence. *State v. Grandberry,* 619 NW 2d 399, 401-402 (Iowa 2000) 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)

The Merits

This issue is quite similar to the issue above regarding the sufficiency of the evidence to support the conviction. Both issues are affected by the defense of

justification, and the display of the hammer is all wrapped up in the justification defense. Again, the State makes a summary conclusion and states it as a fact.

> [T]he 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.
>
> (St. Br. 58)

The flaw in the foregoing statement is that the marshaling instruction for Harrassment did not require that the jury make any finding in regard to the hammer. (Inst. 14; App. 108) Display of a weapon is not part of the guilty verdict. The witness Emily Gordon did not, and could not, connect what she heard to any particular part of the whole incident. The jury may have found that Latrice made a threat, but they could not connect it in a time frame relevant to the display of the weapon. They did not need to make that temporal connection for the Harassment verdict, however. The deadlock on all three of the assault charges indicates the jury contemplated that the hammer was only connected to justified acts. They were deadlocked on whether the admitted and undisputed fact that Latrice displayed the hammer was only connected to her justified acts in protecting her

friend, Evelyn, and herself. That is fully supported by the testimony of State's witness Mark McDonnell and that of Latrice herself. (Tr. 195-197, L. 6-16; pp. 223-227, L. 2-20) (Tr. 512-513, L. 10-25)

If the display of the hammer was legal as justification at some point after the verbal threat, the use of the hammer was not properly considered as an aggravating factor at sentencing. Under the state of the record available to Judge Werling, his use of those facts as an aggravating factor was impermissible. There was no evidence of a temporal connection between the verbal threat and the display of the hammer. There was no evidence for determining a preponderance of evidence. The judge's decision was based on suspicion or speculation. The judge used unproven conduct. Any use of an impermissible factor is error for an automatic reversal, as this Court will not speculate on the impact the factor made on the sentencing decision by weighing it with other factors. *State v. Gordon,* 921 N.W.2d 19, 25-26 (Iowa 2018); *Grandberry,* 619 NW 2d at 402.

LATRICE L. LACEY

s/ Kent A. Simmons

Kent A. Simmons
PO Box 594
Bettendorf, IA 52722
(563) 322-7784
ttswlaw@gmail.com