IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-0950

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CEASAR DAVISON,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DES MOINES COUNTY
THE HONORABLE JOHN M. WRIGT, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

This case can be decided based on existing legal principles. Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

Ceasar Davison appeals the sentence and order of restitution following his convictions for assault causing serious injury and conspiracy to commit a forcible felony. The Honorable John M. Wright presided over the proceedings in Des Moines County, Iowa. The issues on appeal are whether the court correctly ordered Davison to pay $150,000 in restitution under Iowa Code section 910.3B and whether the court abused its discretion in not considering a sentence of probation.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

The Plan

On the evening of September 9, 2017, Demarcus Chew went to the Expose nightclub in Gulfport, Illinois, with several friends. Trial

Tr. Vol. III p. 40, lines 6-25, p. 54, line 13 through p. 57, line 4, p. 62, line 25 through p. 65, line 13. While at the bar, Chew and his friends were drinking, dancing, and having a good time. Trial Tr. Vol. III p. 65, lines 6-13.

Unbeknownst to Chew, several men at the bar were watching everything he was doing. Trial Tr. Vol. V, p. 96, line 10 through p. 100, line 25. This group consisted of Davison, Derrick Parker, Antoine Spann, Emmanuel Spann, and Andre Harris. Trial Tr. Vol. V p. 97, line 25 through p. 98, line 15. Davison, Andre Harris, and Emmanuel Spann lived in Chicago. Trial Tr. Vol. IV, p. 158, line 3 through p. 163, line 19. Harris was in Burlington to visit Antoine Spann and to buy drugs from him. Trial Tr. Vol. IV, p. 164, line 2 through p. 166, line 24.

Davison, Parker, Antoine and Emmanuel Spann, and Harris were watching Demarcus Chew for a specific reason. A.J. Smith, a friend of the men, was at odds with Demarcus Chew and his family. Trial Tr. Vol. IV, p. 179, line 4 through p. 180, line 23, Vol. V, p. 92, lines 13-25. Tim Chew, Demarcus's brother, shot at Smith in May of 2017. Trial Tr. Vol. V, p. 224, lines 3-24. After this incident, Smith placed a "bounty" on Demarcus Chew. Trial Tr. Vol. IV, p. 179, line 4

through p. 180, line 23, Vol. V p. 85, line 11 through p. 86, line 20, p. 139, line 13 through p. 140, line 16. He offered to pay $10,000 to $20,000 as a bounty on Demarcus Chew or any member of the Chew family. Trial Tr. Vol. IV, p. 179, line 4 through p. 180, line 23, Vol. V p. 139, line 13 through p. 140, line 16.

The Shooting

When the club closed in the early morning hours of September 10, 2017, Demarcus Chew got in a car with Shawn Myers, Dewayne Lenoir, Jr., and Matthew Banks. Tr. Vol. III, p. 90, line 10 through p. 91, line 17. Myers was driving the car, Lenoir was in the front passenger seat, Demarcus Chew was behind him in the rear passenger seat, and Matthew Banks was behind Myers in the rear driver's side seat. Tr. Vol. III p. 90, line 10 through p. 91, line 17.

Myers got on the freeway in Gulfport, crossed the bridge and drove into Burlington, Iowa. Tr. Vol. III, p. 92, lines 5-20. Myers was going to drop off Demarcus Chew first. Tr. Vol. III, p. 90, lines 10-16, p. 132, lines 1-5. Myers took the Central Street exit, took a right on Central Street, another right on Spring Street, and turned down either Fifth or Sixth Street before he pulled into an alley behind an apartment building. Tr. Vol. III p. 92, line 5 through p. 96, line 2. As

he was driving down the alley towards a parking area near the apartment, a barrage of gunfire shattered the rear back passenger window. Tr. Vol. III p. 95, line 2 through p. 96, line 2. When Matthew Banks heard the gunfire, he got out of the moving vehicle. Tr. Vol. III p. 113, line 3 through p. 4, line 114, line 17. Myers drove out of the alley to get away from the gunfire. Trial Tr. Vol. III p. 95, line 20 through p. 96, line 2. Once out of the alley, he parked the car. Tr. Vol. III p. 95, line 20 through p. 96, line 2, p. 137, lines 1-6. He did not see a shooter. Tr. Vol. III, p. 96, lines 3-5. He looked in the backseat and saw Demarcus Chew laying against the back seat and the rear passenger window was shattered. Tr. Vol. III p. 96, line 19 through p. 97, line 10.

The Shooters

As Myers left the nightclub parking lot, two cars followed him. Tr. Vol. V p. 104, line 10 through p. 108, line 8. The first car had Derrick Parker in it. Tr. Vol. V p. 104, line 10 through p. 108, line 8. A second vehicle, a Jeep with Antoine and Emmanuel Spann, Andre Harris, and Davison in it followed Parker's vehicle as it drove into Burlington. Trial Tr. Vol. V, p. 104, line 10 through p. 109, line 1. Once in Burlington, the Jeep did not follow Parker's car but instead

followed directions Parker was relaying to Davison on the phone about where to go. Trial Tr. Vol. IV p. 196, line 3 through p. 198, line 4, Vol. V p. 109, line 24 through p. 111, line 9. The Jeep stopped and parked on residential street but Antoine Spann could see headlights in an alley through the buildings. Trial Tr. Vol. IV, p. 197, line 16 through p. 199, line 11, Vol. V p. 109, line 24 through p. 111, line 9. Davison and Emmanuel Spann got out of the car and returned moments later. Trial Tr. Vol. IV p. 199, line 12 through p. 201, line 2, Vol. V p. 111, line 10 through p. 113, line 23. While Davison and Emmanuel Spann were out of the car, Antoine Spann heard shots. Trial Tr. Vol. V, p. 111, line 10 through p. 112, line 17. When Davison got back in the car, he said, "he's gone" and told Antoine Spann to drive away. Trial Tr. Vol. IV, p. 200, line 23 through p. 201, line 19, Vol. V p. 137, line 24 through p. 138, line 10. Emmanuel Spann said he had to get rid of the gun. Trial Tr. Vol. V p. 114, line 11 through p. 116, line 6. The men drove around Burlington, headed towards Main Street, and pulled into an alley where Emmanuel Spann dropped the gun in some bushes. Trial Tr. Vol. V p. 114, line 11 through p. 118, line 3.

Demarcus Chew's death

Matthew Banks, who got out of the car when he heard shots, yelled for someone to call 911. Tr. Vol. III p. 113, line 5 through p. 114, line 7, p. 115, line 24 through p. 117, line 1. Burlington police officer Blake Cameron arrived within minutes and saw people gathered around a black car. Tr. Vol. III p. 155, line 9 through p. 157, line 3. He approached the group and looked into the car where he saw Demarcus Chew in the rear passenger seat of the vehicle. Trial Tr. Vol. III p. 157, lines 4-22. The officer removed Chew from the vehicle and tried to revive him. Trial Tr. Vol. III p. 157, line 23 through p. 158, line 1 through p. 159, line 3, Vol. IV p. 140, line 13 through p. 142, line 7. The fire department arrived and transported Chew to the hospital where he was pronounced dead. Tr. Vol. III, p. 158, line 1 through p. 159, line 3, Vol. IV p. 140, line 13 through p. 142, line 7. An autopsy showed that Chew had been shot seven times; once in the head, three times in the chest or abdomen, once in the pelvis, once in the left arm, and once in the left leg. Tr. Vol. V p. 9, line 4 through p. 10, line 2, p. 15, line 6 through p. 16, line 4. The medical examiner testified the gunshot wound to the head was "rapidly fatal" although the wounds to Chew's lungs and liver would also have been fatal. Tr.

Vol. V p. 16, line 5 through p. 34, line 23. Additional facts will be discussed below as relevant to the State's case.

ARGUMENT

I. The district court correctly denied the defendant's due process challenge to the imposition of restitution under Iowa Code section 910.3B.

Preservation of Error

The State does not contest error preservation as Davison raised the challenge during the sentencing hearing. Sent. Tr. p. 7, line 10 through p. 19, line 16.

Standard of Review

An appellate court reviews restitution orders for correction of errors at law. *State v. Hagen*, 840 N.W.2d 140, 144 (Iowa 2013) (citing *State v. Jenkins*, 788 N.W.2d 640, 642 (Iowa 2010)). In reviewing a restitution order, "we determine whether the court's findings lack substantial evidentiary support, or whether the court has not properly applied the law." *State v. Bonstetter*, 637 N.W.2d 161, 165 (Iowa 2001). To the extent that the defendant challenges the denial of a constitutional right, review is de novo. *State v. Izzolena*, 609 N.W.2d 541, 545 (Iowa 2000); *State v. Klawonn*, 609 N.W.2d 515, 518 (Iowa 2000).

Merits

This appeal involves yet another challenge to Iowa Code section 910.3B. The issue in this case is whether the district court denied Davison due process when it ordered him to pay the $150,000 following his convictions for assault causing serious injury or conspiracy to commit a forcible felony. According to Davison, neither of these offenses include a finding that he caused the death of Demarcus Chew. The district court acted in accordance with the law and must be affirmed.

Section 910.3B requires causation

Iowa Code section 910.3B(1) provides in pertinent part:

> In all criminal cases in which the offender is convicted of a felony in which the act or acts committed by the offender caused the death of another person . . . the court shall also order the offender to pay at least one hundred fifty thousand dollars in restitution to the victim. . .

Iowa Code § 910.3B. For section 910.3B to be imposed, "the commission of the offense must have been the proximate cause of the victim's death." *Izzolena*, 609 N.W.2d at 553; *see also State v. Albertson,* 2004 WL 239828, at *1 (Iowa Ct. App. Feb. 11, 2004) (citing *Izzolena*, 609 N.W.2d at 553).

"Generally, causation exists in criminal law, often without much fanfare, as a doctrine justifying the imposition of criminal responsibility by requiring a 'sufficient causal relationship between the defendant's conduct and the proscribed harm.'" *State v. Tribble*, 790 N.W.2d 121, 126 (Iowa 2010)) (quoting *State v. Marti*, 290 N.W.2d 570, 584 (Iowa 1980). This court has observed that:

> [c]ausation has two components; "(1) the defendant's conduct in fact caused the plaintiff's damages (generally a factual inquiry) and (2) the policy of the law must require the defendant to be legally responsible for the injury (generally a legal question)."

Berte v. Bode, 692 N.W.2d 368, 372 (Iowa 2005) (quoting *Gerst v. Marshall*, 549 N.W.2d 810, 815 (Iowa 1996)); *see also State v. Watts*, 587 N.W.2d 750, 751 (Iowa 1998) ("We have said that section 910.1(3) 'connote[s] a requirement that the victim prove a prima facie case of liability premised on some civil theory such as fault or intentional tort. Proximate cause, of course, would be a necessary element of such a prima facie case.'" (quoting *State v. Starkey*, 437 N.W.2d 573, 574 (Iowa 1989)). Factual causation is determined through a "but for" test:

> [T]he defendant's conduct is a cause in fact of the plaintiff's harm if, but-for the defendant's conduct, that harm would not have occurred. The but-for test also implies a negative. If the plaintiff would have suffered the same harm had the defendant

> not acted negligently, the defendant's conduct is not a cause in fact of the harm.

Berte, 692 N.W.2d at 372 (quoting Dan B. Dobbs, *The Law of Torts* § 168, at 409 (2000)). Under a proximate cause theory, the defendant's conduct need not be the sole cause of the victim's injuries but he must be *a* cause. The existence of other causes does not sever the causal relationship.

Recently, in *State v. Roache*, 920 N.W.2d 93, 96, 102 (Iowa 2018), this court determined the risk standard for scope of liability in the Restatement (Third) of Torts applies in criminal restitution cases. Nearly a decade before *Roache* was decided, the court decided *Thompson v. Kaczinski*, 774 N.W.2d 829, 837–39 (Iowa 2009). In *Kacinzski*, this court adopted the Restatement (Third) of Torts risk standard for civil tort actions. 774 N.W.2d at 837–39. This standard "is intended to prevent the unjustified imposition of liability by 'confining liability's scope to the reasons for holding the actor liable in the first place.' " *Id.* at 838 (quoting Restatement (Third) of Torts § 29 cmt. *d*, at 496). "The scope-of-liability issue is fact-intensive as it requires consideration of the risks that made the actor's conduct tortious and a determination of whether the harm at issue is a result of any of those risks." *Id.* To determine whether:

> the plaintiff's harm is beyond the scope of liability as a matter of law, courts must initially consider all of the range of harms risked by the defendant's conduct that the jury *could* find as the basis for determining [the defendant's] conduct tortious. Then, the court can compare the plaintiff's harm with the range of harms risked by the defendant to determine whether a reasonable jury might find the former among the latter.

Id. (alteration in original) (quoting Restatement (Third) of Torts § 29 cmt. *d*, at 496); *see also Spreitzer v. Hawkeye State Bank*, 779 N.W.2d 726, 741–45 (Iowa 2009) (applying scope-of-liability analysis to determine damages recoverable for fraud). Our law recognizes two separate acts can join to cause an injury, but the result does not alter criminal responsibility for an act. *State v. Tribble*, 790 N.W.2d 121, 129 (Iowa 2010).

Davison's involvement in the events which led to the death of Demarcus Chew establish his acts were a substantial factor in Chew's death. While Chew was with friends at a nightclub in Gulfport, Illinois, Davison, Antoine Spann, Andre Davis, Emmanuel Spann, and Derrick Parker hatched a plan to kill Chew for the "bounty" that A.J. Smith put on Chew's life. Trial Tr. Vol. IV p. 179, line 4 through p. 180, line 23, Vol. V. p. 92, lines 13-25, p. 139, line 13 through p. 140, line 16. After Chew left the club in Illinois, the men followed him in two cars as the Chew crossed the river into Burlington, Iowa. Trial

Tr. Vol. V p. 104, line 10 through p. 109, line 1. Once across the river, Derrick Parker, who was in the first car, directed Antoine Spann, Andre Davis, Emmanuel Spann, and Davison to an alley behind the apartment where Chew lived and where he was being dropped off. Trial Tr. Vol. IV p. 196, line 3 through p. 199, line 11, Vol. V p. 104, line 10 through p. 111, line 9. Antoine Spann stopped the Jeep and Davison and Emmanuel Spann got out. Trial Tr. Vol. IV p. 197, line 16 through p. 201, line 2, Vol. V p. 109, line 24 through p. 111, line 9. Before Chew could get out of the car, Davison or Spann shot seven rounds into the rear passenger seat where Chew was seated and killed him. Trial Tr. Vol. IV p. 199 line 12 through p. 201, line 19, Vol. V p. 111, line 10 through p. 113, line 23, p. 137, line 24 through p. 138, line 10. Davison and Emmanuel Spann returned to the Jeep and Davison said, "he's gone." Trial Tr. Vol. IV p. 200, line 23 through p. 201, line 19, Vol. V p. 137, line 24 through p. 138, line 10. The men hid the gun they used in the shooting and Antoine Spann called A.J. Smith to collect the bounty on Chew. Trial Tr. Vol V p. 114, line 11 through p. 118, line 3, p. 145, line 20 through p. 146, line 9. The men collected $1000 and a pound of methamphetamine for killing Demarcus Chew.

Trial Tr. Vol. V p. 121, line 23 through p. 122, line 7. Davison was aware of and participated in the events that led to Chew's death.

That is, he either acted as the principal or aided and abetted in the crimes for which the jury convicted him. He was in the bar when the plan to kill Demarcus Chew came together, he followed the car Chew was in when he left the bar, and he got out of the vehicle and ambushed Chew as he was driving down the alley. The evidence supports a finding that he participated in the crimes either as the principal in shooting Chew or going along with the plan and aided and abetted the crimes. *State v. Tyler*, 873 N.W.2d 741, 747 (Iowa 2016) (to convict a defendant on the theory of individual liability, the jury had to conclude the assault caused the death); *State v. Henderson*, 908 N.W.2d 868, 876 (Iowa 2018) (to sustain a conviction on the theory of aiding and abetting, the record must sustain substantial evidence the accused assented or lent countenance and approval to the criminal act either by active participation in it or by some manner encouraging it prior to or at the time of its commission).

Davison argues, however, that because he was not convicted of a crime that contains an element that he caused the death of another or

that the jury made a separate finding to that effect, he should not be required to pay the $150,000. Davison's analysis is incorrect.

The question is not whether the crime includes an element that a death occur. The question is whether his actions caused Demarcus Chew's death. As set out above, Davison's knowledge of the plan to kill Chew and his participation in that plan is sufficient to make him liable for the restitution award. *See generally State v. Rohm*, 609 N.W.2d 504, 514 (Iowa 2000) (regardless of whether defendant's conduct was passive or active, her conduct in providing alcohol to a fourteen-year old which resulted in the death of the minor was extremely serious under the circumstances of the case and defendant was ordered to pay $150,000).

Moreover, there is no other rule of law that relieves him of liability. In *State v. Albertson*, No. 02-1807, 2004 WL239828 (Iowa Ct. App. Feb. 11, 2004), a similar issue was raised. Albertson alleged she should not have to pay $150,000.00 in restitution because she was convicted only of delivery of a controlled substance and neither injury nor death were elements of the crime. *Id.* The Court of Appeals disagreed and found that "our appellate courts have not imposed this rule of law in restitution cases." *Id.* Relying on *State v.*

Starkey, 437 N.W.2d 573, 574 (Iowa 1989) and *State v. Mai*, 572 N.W.2d 168, 169 (Iowa Ct. App. 1997), the *Albertson* court found that harm to the victim does not have to be an element of the crime for the $150,000 award to be imposed. *Albertson*, No. 021807, 2004 WL 239828 (Iowa Ct. App. Feb. 11, 2004); *see also Rohm*, 609 N.W.2d at 514 (Iowa 2000).

Since Iowa Code section 910.3B was enacted, this court has upheld the award on numerous occasions for offenses that were not "homicide offenses." Although 910.3B applies to homicide offenses (*Izzolena*, 609 N.W.2d at 545 (vehicular homicide)); it also has been imposed in involuntary manslaughter cases (*Klawonn*, 609 N.W.2d at 517; *State v. Rohm*, 609 N.W.2d 504, 509-10 (Iowa 2000)), attempted murder and going armed with intent (*State v. Turner*, No. 15-2191, 2016 WL7393894, at *2 (Iowa Ct. App. Dec. 21, 2016); a robbery and willful injury case (*State v. Young*, No. 01-0421, 2002 WL1585650 (Iowa Ct. App. July 19, 2001), a delivery of a controlled substance case (*State v. Albertson*, No. 02-1807, 2004 WL239828 (Iowa Ct. App. Feb. 11, 2004), and a burglary case (*State v. McFarland*, No. 10-0936, 2011 WL1781740 (Iowa Ct. App. May 11, 2011). The plain language of section 910.3B does not limit the

applicability of the statute to felonies in "homicide offenses" alone. Iowa Code § 910.3B.

Due Process and Apprendi

Davison also argues that the imposition of the $150,000 violates due process because there has been no finding beyond a reasonable doubt that he was the "proximate cause" of the death of DeMarcus Chew. Def. Brief at 19. Davison contends that the prior challenges to section 910.3B did not address a Sixth Amendment or article I, section 9 wherein "the fact of causation must be proven beyond a reasonable doubt."

The Court of Appeals considered and rejected a similar claim in *State v. Turner*, No. 15-2191, 2016 WL 7393894, at * 2 (Iowa Ct. Dec. 21. 2016). In *Turner*, the defendant argued that section 910.3B violates the Sixth Amendment to the United States Constitution by allowing mandatory restitution to be set without a jury finding or a plea of guilty to an offense, which includes as one of its elements that his act was the proximate cause of the victim's death. *Id.* at *2. The Court of Appeals determined:

> Under our statutory scheme, ordering restitution is a part of the sentencing procedure. Iowa Code § 910.2. The issue of causation under section 910.3B is a matter for the court to decide. *See Izzolena*, 609 N.W.2d at 553. Turner primarily

> relies on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), for his claim that causation is a jury question under the Sixth Amendment. *Apprendi* involved a New Jersey state that allowed the length of a sentence to be increased beyond the maximum permitted by the applicable statute. 530 U.S. at 490. Under the statute, the extension of the sentence was permitted by court action and without jury involvement. *Id.* The statute was declared unconstitutional as a violation of the Sixth Amendment. *Id.* at 491. The restitution order against Turner was the minimum amount mandated by the legislature and the statute contains no maximum.

Turner, at *3.

> The Court of Appeals continued:
>
> Even if *Apprendi* covers all forms of punishment, restitution is not "clearly" punishment. . .
>
> ...Restitution carries with it no statutory maximum; it's pegged to the amount of the victim's loss. A judge can't exceed the non-existent statutory maximum for restitution not matter what facts he finds, so *Apprendi's* not implicated.

Turner, at *3 (citing *United States v. Green*, 722 F.3d 1146, 1150 (9th Cir. 2013).

The Court of Appeals correctly reached this result as prior cases have stated that restitution cannot be construed to be a fine only. *State v. Mayberry*, 415 N.W.2d 644, 646 (Iowa 1987) (it is not always clear whether restitution constitutes a fine, a civil claim, or some hybrid). Since the restitution chapter was adopted, this court has found that the purpose of restitution is two-fold. It not only serves to

protect the public by compensating victims for criminal activities, but it also serves to rehabilitate the defendant. *State v. Kluesner*, 389 N.W.2d 370, 372 (Iowa 1986). Restitution goes beyond revenue recovery and is designed to instill responsibility in criminal offenders. *State v. Haines*, 360 N.W.2d 791, 795 (Iowa 1985). The provisions of section 910.3B are unique in that the $150,000 is to be paid to the victim's estate or heirs at law and not to the government. Iowa Code § 910.3B. It is improper to classify the $150,000 award as a "fine" when its purpose goes beyond the government's ability to punish.

Additionally, most federal authorities reject the requirement of a jury trial for criminal restitution. *United States v. Green,* 722 F.3d 1146, 1150–51 (9th Cir.2013) (*Apprendi* inapplicable to restitution); *United States v. Wolfe,* 701 F.3d 1206, 1215–18 (7th Cir.2012) (same), *cert. denied* ––– U.S. ––––, 133 S.Ct. 2797, 186 L.Ed.2d 860 (2013); *United States v. Milkiewicz,* 470 F.3d 390, 402–04 (1st Cir.2006) (same); *United States v. Reifler,* 446 F.3d 65, 114, 118–20 (2d Cir.2006) (same); *Dohrmann v. United States,* 442 F.3d 1279, 1281 (11th Cir.2006) (same); *United States v. Leahy,* 438 F.3d 328, 336–38 (3d Cir.2006) (same); *United States v. Garza,* 429 F.3d 165, 170 (5th Cir.2005) (same); *United States v. Sosebee,* 419 F.3d 451, 454,

461–62 (6th Cir.) (same), *cert. denied* 546 U.S. 1082, 126 S.Ct. 843, 163 L.Ed.2d 718 (2005); *United States v. Carruth,* 418 F.3d 900, 902–04 (8th Cir.2005) (same); *United States v. Wooten,* 377 F.3d 1134, 1144–45 n. 1 (10th Cir. 2004) (same). Restitution to the victim in the amount of the victim's losses is required upon a guilty verdict under the federal restitution statute and because there is no prescribed statutory maximum for restitution, restitution is not subject to *Apprendi*. *Wolfe*, 701 F.3d at 1216-18 (because there is no statutory maximum for restitution, the Sixth Amendment right to a jury trial does not apply to restitution); *State v. Jenkins*, 788 N.W.2d 640, 643 (Iowa 2010) (citing Melanie D. Wilson, *In Booker's Shadow: Restitution Forces a Second Debate on Honesty in Sentencing*, 39, Ind. L.Rev. 379, 402 (2006).

Several states that have addressed the issue have followed the federal circuits. *State v. Leon*, 381 P.3d 286, 289-90 (Ariz. Ct. App. 2016); *State v. Deslaurier*, 371 P.3d 505, 509 (Or. Ct. App. 2016); *People v. Wasbotten*, 169 Cal. Rptr. 3d 878, 879-80 (2014); *State v. Huff*, 336 P.3d 897, 902 (Kan. 2014) (restitution is based upon the victim's damages to the extent the offense caused such damages, all of which vary from case to case; there are generally no limits as to what

such restitution amounts can be so *Apprendi* is not implicated); *People v. Smith,* 181 P.3d 324, 326–27 (Colo.App.2007) (statute does not prescribe maximum restitution amount so *Apprendi* inapplicable); *Smith v. State,* 990 N.E.2d 517, 521–22 (Ind.App.2013) (same); *Commonwealth v. Denehy,* 466 Mass. 723, 736–38, 2 N.E.3d 161 (2014) (same); *State v. Maxwell,* 802 N.W.2d 849, 851–52 (Minn.App.2011) (same); *State v. Clapper,* 273 Neb. 750, 732 N.W.2d 657 (2007) (same); *State v. Martinez,* 392 N.J.Super. 307, 315–18, 920 A.2d 715 (2007) (same); *State v. Webster,* 220 Or.App. 531, 534–35, 188 P.3d 329 (2008) (same); *State v. Kinneman,* 155 Wash.2d 272, 280–82, 119 P.3d 350 (2005) (same); *People v. Horne*, 767 N.E.2d 132, 139 (N.Y. 2002). Because *Apprendi* and its progeny do not apply to restitution, the district court committed no error when it ordered Davison to pay $150,000 in restitution.

II. The district court acted properly in considering all relevant sentencing options before imposing a sentence of incarceration for assault causing serious injury.

Preservation of Error

The State does not contest error preservation.

Standard of Review

We review the imposition of a sentence for an abuse of discretion. *State v. Barnes,* 791 N.W.2d 817, 827 (Iowa 2010). "The decision of the district court to impose a particular sentence within the statutory limits is cloaked with a strong presumption in its favor." *State v. Formaro,* 638 N.W.2d 720, 724 (Iowa 2002) (citing *State v. Pappas,* 337 N.W.2d 490, 494 (Iowa 1983)). A sentence will be vacated when we are able to discern the district court's sentencing "decision was exercised on grounds or for reasons that were clearly untenable or unreasonable." *Id.* (citing *State v. Loyd,* 530 N.W.2d 708, 713 (Iowa 1995)).

Merits

Davison contends that defense counsel led the district court astray when counsel incorrectly told the court that Davison had been convicted of a forcible felony and was ineligible for probation. Although counsel was incorrect, the record at sentencing does not support his claim that the court abused its discretion. Rather, the record demonstrates that the court did not consider defense counsel's misstatement. The court was aware that probation was an option but

elected not to impose that sentence. Davison's claim must be rejected.

The jury convicted Davison of assault causing serious injury, a violation of Iowa Code section 708.2(4), punishable as a class D felony, and conspiracy to commit a forcible felony (murder) a violation of Iowa Code sections 706.1 and 706.3(1), and punishable as a class C felony. Verdicts (2/20/20), Sent. Tr. p. 2, line 21 through p. 3, line 6; App. 14-15. At sentencing, defense counsel informed the court that Davison's conviction on count I (assault causing serious injury) was a forcible felony and as such, he was ineligible for probation. Sent. Tr. p. 6, lines 8-11. Defense counsel was incorrect.

Although Iowa Code section 702.11(1) defines a "forcible felony" as any felonious assault, an assault in violation of Iowa Code section 708.2(4), assault causing serious injury, is specifically excluded from the definition of a forcible felony. Iowa Code § 702.11(2)(*f*) (the following offenses are not forcible felonies . . assault in violation of Iowa Code § 708.2(4)). Despite defense counsel's erroneous statement, the district court was not led astray.

Before imposing the sentence, the district court informed Davison of the reasons it selected a sentence of incarceration. Sent.

Tr. p. 14, line 14 through p. 19, line 16. The court considered the presentence investigation report, his age, his prior convictions, and the fact he had "no family in the area who can assist you if you were on probation." Sent. Tr. p. 15, lines 12-22. This statement is noteworthy because it demonstrates that the court considered and rejected a sentence of probation. There would be no basis for this statement except that the court was aware it could impose probation and decided not to do so. The court would not have made this comment if the court thought that Davison was ineligible for parole. Sent. Tr. p. 15, lines 12-22. Given that the court's sentencing decision "is cloaked with a strong presumption in its favor," Davison's claim must be rejected. *State v. Formaro,* 638 N.W.2d 720, 724 (Iowa 2002).

It is also important to note that the district court never affirmatively stated that it could not impose probation because Davison had been convicted of a forcible felony. Sent. Tr. p. 14, line 14 through p. 19, line 16. Davison alleges, however, that "the sentencing court seemed to be under the belief that the defendant had been convicted of a forcible felony. . . because the court determined he was not eligible for bond on appeal. . . " Def. Brief at 23. While

the court deemed he was not eligible for bail under Iowa Code section 811.1(2) and that section prohibits persons convicted of a forcible felony from being admitted to bail, the court's error as to bail does not necessarily impact the sentence. Sent. Tr. p. 22, line 22 through p. 23, line 18. The error as to bond occurred after the court imposed the sentence. Sent. Tr. p. 14, line 14 through p. 23, line 18. Though the sentence and the bail discussion occurred shortly after one another, the fact that the court mentioned probation is sufficient to establish that the court did not abuse its discretion. Whatever error the court may have made regarding Davison's bond eligibility is different from whether the court deemed him ineligible for probation. The court's sentence must be affirmed.

CONCLUSION

The district court's sentencing order must be affirmed.

REQUEST FOR NONORAL SUBMISSION

This case involves routine challenges to the district court's restitution order and sentence. Oral argument is not necessary to resolve these claims. In the event argument is scheduled, the State requests 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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