IN THE SUPREME COURT OF IOWA

STATE OF IOWA Plaintiff-Appellee, v. JORDAN M. CRAWFORD, Defendant-Appellant	Supreme Ct. No. 20-0280

APPEAL FROM THE IOWA DISTRICT COURT
FOR JEFFERSON COUNTY
HONORABLE LUCY J. GAMON, JUDGE

APPLICANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED SEPTEMBER 22, 2021

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CERTIFICATE OF SERVICE

On October 11, 2021, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Jordan Crawford, No. 6530477, Anamosa State Penitentiary, 406 N. High St., Anamosa, IA 52205.

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QUESTION PRESENTED FOR REVIEW

Whether there is insufficient evidence to convict the defendant of aiding and abetting robbery or ongoing criminal conduct?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

COMES NOW the Defendant-Appellant and, pursuant to Iowa Rule of Appellate Procedure 6.1103 (2019), hereby makes application for further review of the September 22, 2021, decision of the Iowa Court of Appeals in State of Iowa v. Jordan Crawford, Supreme Court number 20-0280. In support thereof, Appellant states

1. The Iowa Court of Appeals erred by affirming the defendant's convictions for Robbery in the First Degree and Ongoing Criminal Conduct in violation of Iowa Code sections 706A.2(1)(d), 706A.1(5), 711.1(1), 711.2, and 793.1 (2019). (Opinion).

2. The evidence was insufficient to convict the defendant of the robbery or the ongoing criminal conduct. The State challenged the preservation of error for the robbery conviction, but conceded, had error been preserved, there was insufficient evidence to convicted the defendant of robbery in the first degree. The Iowa Court of Appeals found error was not

preserved on the robbery charge. The court on its own found that error was not preserved on the ongoing criminal conduct charge, although it also found insufficient evidence presented at trial to convict the defendant. (Opinion). In sum, because of sloppy lawyering in the trial court, the defendant is unjustly serving additional time in prison than he should be.

3. Because the defendant was convicted after amended Iowa Code section 814.7 became effective on July 1, 2019, he is precluded from raising the issue under the ineffective assistance of counsel framework. In the guilty plea appeal of State v. Treptow, the Iowa Supreme Court upheld various constitutional challenges to Section 814.7 as amended. State v. Treptow, 960 N.W.2d 98 (Iowa 2021). The Court also declined to adopt plain error review. Id. at 109.

4. Crawford asks this Court to re-examine its holding in Treptow. His case does not involve a guilty plea, can be ruled upon based on the record already made and the findings of the Iowa Court of Appeals regarding the lack of

evidence. Normally such case would result in reversal on direct appeal because prejudice is presumed when there is insufficient evidence to convict a defendant. State v. Truesdell, 679 N.W.2d 611, 615-16 (Iowa 2004).

WHEREFORE, Crawford respectfully requests this Court grant further review of the Court of Appeals' decision in his case.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal from a conviction and sentence following a jury trial for aiding and abetting robbery in the first degree and ongoing criminal conduct in Jefferson County case number FECR004933.

Course of Proceedings: On July 3, 2019, the State charged the defendant, Jordan McKim Crawford, with aiding and abetting robbery in the first degree in violation of Iowa Code sections 711.1(1), 711.2, and 793.1 (2019), a class B felony. (Trial Information) (App. pp. 7-8). Crawford entered a not guilty plea on July 18, 2019. (Written Arraignment and Plea of Not Guilty) (App. p. 9). On September 4, 2019, the State filed an Amended Trial Information, which added the charge of Ongoing Criminal Conduct in violation of Iowa Code sections 706A.2(1)(d) and 706A.1(5) (2019), a class B felony. (Amended Trial Information) (App. pp. 10-12). The case was tried to a jury beginning October 22, 2019. (Trial tr. Day 1, p. 1, L. 1-25). On October 28, 2019, the jury convicted the

defendant of both charges. (Verdict Form – Count I, Verdict Form – Count II) (App. pp. 21-22). On February 3, 2020, the court sentenced the defendant to two prison terms not to exceed 25 years. The sentences were run concurrently with each other. (Judgment and Sentence) (App. pp. 25-30). On February 7, 2020, the defendant filed a notice of appeal. (Notice of Appeal) (App. pp. 31-32). On September 22, 2021, the Iowa Court of Appeals affirmed the defendant's convictions. (Opinion).

Facts: On June 1, 2018, Ethan Spray robbed the Pilot Grove Savings Bank in Packwood, Iowa, at gunpoint. (Trial tr., Day 2, p. 7, L. 12-19; p. 10, L. 20 – p. 11, L. 3; Day 3, p. 15, L. 8-14). Following the robbery, he left the bank and got into his Buick, where Ross Thornton was waiting. They drove out of town where Thornton has left his truck. (Trial tr. Day 3, p. 20, L. 12-24). Thornton took $14,000 that Spray took from the bank. He also took Spray's clothing and left in the truck. Thornton burned the clothes. (Trial tr. Day 3, p. 19, L. 25 –

p. 20, L. 24). According to Spray, the defendant, Jordan Crawford, had given Spray a hat or mask that he wore during the robbery. He testified that Crawford was supposed to give him gloves as well, but he did not. (Trial tr. Day 3, p. 17, L. 10-16; p. 18, L. 3-8). After the robbery, Spray stated that he went to a residence where he, Thornton, and Crawford were present. He stated that they burned the bands that were around the money and that Crawford was in and out of the room and "barely" helped him burn the bands. (Trial tr. Day 3, p. 22, L. 3 – p. 23, L. 7). The three men thereafter left on a trip out west. (Trial tr. Day 3, p. 27, L. 16-23). According to Spray, the three men had previously attempted to break into an ATM machine at a different bank. (Trial tr. Day 3, p. 28, L. 2-15).

During the course of the investigation, police officers found money that was stolen from the bank at Thornton's residence. (Trial tr. Day 2, p. 151, L. 19-21). In August of 2018, Police found $470 in the defendant's possession;

however, none of that money was traced back to the bank in Packwood. (Trial tr. Day 2, p.40, L. 17- 25; p. 47, L. 9-12; p. 51, L. 24 – p. 52, L. 3). Spray testified that he was not sure if Crawford was ever given any money from the bank robbery. (Trial tr. Day 3, p. 44, L. 22-24). During this time, the defendant was employed and was paid $1262 by his employer on July 12, 2018. (Trial tr. Day 3, p. 116, L. 4-14; Defendant's Ex. E) (Conf. App. p. 141).

The police investigation connected Crawford to Thornton though cell phones and a truck. Crawford and Thornton had a cell phone registered to both of them. Crawford also had another cell phone registered to him. (Trail tr. Day 2, p. 89, L. 6-12; p. 107, L. 13 – p. 108, L. 4). Around the time of the robbery, four calls were made between these two cell phones. (Trial tr. Day 2, p. 99 – p. 100, L. 24). The truck that Thornton drove after the bank robbery was registered to Crawford and insured by Thornton. (Trial tr. Day 2, p. 42, L. 2-4; Day 3, p. 16, L. 20 – p. 17, L. 4). According to Spray,

Crawford and Thornton were living at the same residence at the time of the robbery. (Trial tr. Day 3, p. 18, L. 22 – p. 19, L. 5).

During the investigation, police obtained records of Crawford's Facebook messages. According to police, the conversations contained in those messages appeared to indicate that the defendant was trying to sell marijuana. (Trial tr. Day 2, p. 134, L. 5 – p. 136, L. 15; p. 139, L. 13-21).

Crawford was arrested and charged with aiding and abetting the bank in Packwood and for ongoing criminal conduct based on the Packwood robbery, the attempted ATM robbery and Crawford's attempt to sell marijuana. (Trial Information) (App. pp. 7-8).

Further relevant facts will be discussed below.

ARGUMENT

There is insufficient evidence to convict the defendant of aiding and abetting robbery or ongoing criminal conduct.

Preservation of Error and Standard of Review: The court reviews sufficiency of the evidence challenges for corrections of errors at law. State v. Thomas, 561 N.W.2d 37, 39 (Iowa 1997). The defendant moved for a motion for judgment of acquittal at the end of the State's case. In addition, the defendant filed a written "Motion for Directed Verdict of Acquittal." (Trial tr. Day 3, p. 92, L. 19 – p. 95, L. 25; Motion for Directed Verdict of Acquittal) (App. pp. 13-15). Counsel for the defendant argued that the state failed to present credible proof that Crawford was involved in ongoing criminal activity, that the State failed to prove the specified indictable offenses on a continuing basis, and that the State failed to present sufficient proof that Crawford aided and abetted Spray's robbery. (Trial tr. Day 3, p. 92, L. 19 – p. 95, L. 25; Motion for Directed Verdict of Acquittal) (App. pp. 13-15). The Court denied the motion. (Trial tr. Day 3, p. 103, L. 10 – p.

104, L. 21). At the end of the evidence, counsel for the defendant renewed the motion and the court again denied it. (Trial tr. Day 4, p. 3, L. 12 – p. 4, L. 3). Error therefore was preserved. The court of appeals found error was not preserved on either charge because, it found, counsel's general motions for judgment of acquittal were inadequate. (Opinion).

If the court finds that error was not adequately preserved, counsel was ineffective in failing to do so and the court should consider the issues under the ineffective assistance of counsel framework. Counsel's failure to preserve error can constitute ineffective assistance of counsel, and, therefore, the Iowa Supreme Court allows an exception to error preservation rules in ineffective assistance of counsel claims. State v. Hrbek, 336 N.W.2d 431, 435-36 (Iowa 1983); State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982). Claims of ineffective assistance of counsel concern constitutional rights, and the standard of review is therefore de novo. State v. Osborn, 573 N.W.2d 917, 920 (Iowa 1998).

Discussion: In reviewing challenges to the sufficiency of evidence, the court considers all of the evidence viewed "in the light most favorable to the State, including all reasonable inferences that may be fairly drawn from the evidence." State v. Williams, 695 N.W.2d 23, 27-28 (Iowa 2005). A verdict will be upheld only if substantial evidence in the record supports it. State v. Nitcher, 720 N.W.2d 547, 556 (Iowa 2006). The court considers all the evidence presented, not only inculpatory evidence. State v. Keopasaeuth, 645 N.W.2d 637, 640 (Iowa 2002). Evidence is considered substantial if it can convince a rational jury that the defendant is guilty beyond a reasonable doubt. Williams, 695 N.W.2d at 27-28. In reviewing a challenge to the sufficiency of the evidence, the relevant question is whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See* State v. Turner, 345 N.W.2d 553, 555-556 (Iowa 1983); State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980). The evidence presented "must raise a fair inference of guilt

and do more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981).

A. Aiding and Abetting Robbery in the First Degree

The defendant was convicted of aiding and abetting the armed robbery of the Packwood bank. In its brief, the State agreed that the State failed to prove robbery in the first degree because the State did not produce sufficient evidence that the defendant knew or specifically intended that Spray would use a gun in the robbery. The State maintained that error was not preserved. (State's Br. p. 15). The State argued that there was sufficient evidence of robbery in the second degree. The Court of Appeals did not address the evidence, finding error was not preserved. (Opinion).

During the trial, the defendant did not contest the fact that Ethan Spray robbed the bank. The defense argued that the defendant did not aid and abet that robbery. The Iowa Code defines "Aiding and Abetting" as follows:

> All persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense or aid and abet its commission, shall be charged, tried and punished as principals. *The guilt of a person who aids and abets the commission of a crime must be determined upon the facts which show the part the person had in it, and does not depend upon the degree of another person's guilt.*

Iowa Code § 703.1 (2017) (emphasis added). "To sustain a conviction under a theory of aiding and abetting, 'the record must contain substantial evidence the accused assented to or lent countenance and approval to the criminal act by either actively participating or encouraging it prior to or at the time of its commission.'" State v. Hearn, 797 N.W.2d 577, 580 (Iowa 2011) (quoting State v. Ramirez, 616 N.W.2d 587, 591-92 (Iowa 2000), *overruled on other grounds by* State v. Reeves, 636 N.W.2d 22, 25-26 (Iowa 2001)). "Knowledge is essential; however, neither knowledge nor presence at the scene of the crime is sufficient to prove aiding and abetting." State v. Barnes, 204 N.W.2d 827, 828 (Iowa 1972). In State v. Henderson, 908 N.W.2d 868, 876 Iowa 2018), this Court explained that "under a joint criminal conduct theory, the

question is whether the charged, later crime was foreseeable, regardless of whether the defendant had the specific intent to commit that crime or knowledge that his or her compatriot was committing the crime." However, "[t]he same is not true under the theory of aiding and abetting. There the defendant must have 'knowingly aided the principal' in committing the crime." Id. "[A]n aiding and abetting conviction requires not just an act facilitating one or another element, but also a state of mind extending to the entire crime." Rosemond v. United States, 572 U.S. 65, 75-76, 134 S. Ct. 1240, 1248 (2014).

"[I]n the context of a first-degree robbery prosecution under the dangerous weapon alternative, the State must prove the alleged aider and abettor had knowledge that a dangerous weapon would be or was being used." Henderson, 908 N.W.2d at 876. "Otherwise, the aider and abettor may have knowledge or intent to commit *a* robbery, but not *first-degree* robbery. Id. (emphasis in original). In this case, the State failed to prove the defendant aided and abetted in the robbery,

and the robbery in the first degree. The court instructed the jury on Robbery in the First Degree as follows:

> As to Count I, The State must prove all of the following elements of Aiding and Abetting Robbery in the First Degree:
> 1. On or about the 1st day of June, 2018, the defendant had the specific intent to commit a theft, either as principal or as aider and abettor.
> 2. To carry out his intention or to assist another to commit the theft or to escape from the scene, with or without the stolen property, the defendant aided and abetted another in the robbery of the Pilot Grove Savings Bank, during which time Darrell Hoehne was threatened with, or purposefully placed in immediate fear of serious injury.
> 3. The defendant aided and abetted another who was armed with a dangerous weapon.
>
> If the State has proved all of the elements, the defendant is guilty of Aiding and Abetting Robbery in the First Degree. . . .

(Jury Instruction No. 18) (App. p. 16).

The State produced evidence that the defendant supplied a hat or a facemask to Ethan Spray. (Trial tr. Day 3, p. 17, L. 10-16; p. 46, L. 14-23). The State did not present proof that the defendant supplied the hat or mask to Spray with the specific intent that it be used in the robbery. In fact, Spray's testimony that the defendant failed to supply gloves tends to

show that the defendant was not aware that he was supplying Spray with means to commit the robbery. (Trial tr. Day 3, p. 18, L. 3-8). Spray testified that the defendant was not part of the planning of the Packwood bank robbery. (Trial tr. Day 3, p. 46, L. 7-10). The State did not produce any evidence that the defendant had the specific intent to commit a robbery as an aider or an abettor. The State failed to prove the defendant aided and abetted this robbery.

Further the State failed prove he aided and abetted robbery in the first degree, because it produced no evidence that the defendant knew that Spray would be armed while he robbed the bank. According to Spray, the defendant had nothing to do with the gun he used in the robbery. (Trial tr. Day 3, p. 45, L. 7-16).

Spray failed to testify that the defendant knew, encouraged or lent countenance to the robbery. Knowledge of a crime is not enough. This conviction should be vacated and remanded for dismissal.

B. Ongoing Criminal Conduct

The State charged the defendant with violating Iowa Code section 706A.2(1)(d) (2019), which is the section that concerns specified unlawful activity influenced enterprises. Under subsection (d), it is "unlawful for any person to conspire or attempt to violate or to solicit or facilitate the violations of the provisions of paragraph 'a', 'b', or 'c'". Of paragraphs "a", "b", or "c", it appears the State prosecuted the defendant under paragraph "c", which provides that it is "unlawful for any person to knowingly conduct the affairs of any enterprise through specified unlawful activity or to knowingly participate, directly or indirectly, in any enterprise that the person knows is being conducted through specified unlawful activity." Iowa Code § 706A.2(1)(c) (2019). The State chose to prosecute the defendant under the "specified unlawful activity influenced enterprises" alternative rather than the "acts of specified unlawful activity" alternative. *See* State v. Olsen, 618 N.W.2d 346, 348-49 (Iowa 2000).

The court instructed the jury on this charge as follows on the charge of Ongoing Criminal Conduct:

> As to Count II, the State must prove that the defendant committed all of the following elements of Commission of Specified Unlawful Activity Influenced Enterprises, Ongoing Criminal Conduct:
>
> 1. During the time period from May 29, 2018, through June 15, 2018, the defendant participated, directly or indirectly, in an enterprise.
>
> 2. The defendant knew the enterprise was being conducted through specified unlawful activity on a continuing basis, to wit: a) the theft of money from the Brighton, Iowa ATM; and/or b) the robber of the Pilot Grove Savings in Packwood, Iowa Bank; and/or c) the distribution either attempted to completed, or marijuana.
>
> If the State has proved both of the above elements, the Defendant is guilty of Commission of Specified Unlawful Activity Influenced Enterprises, Ongoing Criminal Conduct. . . .

(Jury Instruction No. 25) (App. p. 19).[1] The court instructed the jury that "[s]pecified unlawful activity is defined as any act, including any preparatory or completed offense, committed for financial gain on a continuing basis, that is punishable as an indictable offense under the laws of the state in which it

[1] Although the State charged the defendant with conspiring, attempting or soliciting a violation of subsection "c", the court instructed the jury not under conspiracy, but as a principal. *See* Iowa Code §§ 706A.1(c), (d) (2017).

occurred and under the laws of this state." (Jury Instruction No. 27) (App. p. 20). This instruction tracks the language defining "specified unlawful activity" in Iowa Code section 706A.1(5) (2019).

The State failed to produce substantial evidence that the defendant participated in specified unlawful activity on a continuing basis. The Court of Appeals found that there was "scant evidence for continuing criminal activity." (Opinion, p.10). The court stated that "there was no evidence of other future criminal acts established under the substantial evidence standard. In sum, the threat of continued criminal activity cannot be extracted from this record." However, the court declined to grant relief, finding on its own that counsel failing to make an adequate motion for judgment of acquittal. (Opinion, p. 11).

Continuity can be established in two ways. The State can show continuity over closed period by proving series of related predicates extending over a substantial period of time.

State v. Reed, 618 N.W.2d 327, 335 (Iowa 2000). Second, "a continuing basis may be found, even where predicate acts occur over a short period of time, if there is a demonstrated relationship between the predicate acts and a threat of continuing criminal activity." State v. Banes, 910 N.W.2d 634, 640-41 (Iowa Ct. App. 2018). The State must prove the unlawful activities are related and they pose a threat of continued activity. Midwest Heritage Bank, FSB v. Northway, 576 N.W. 2d 588, 591 (Iowa 1998).

Assuming the State established a relationship between the alleged attempted sale of marijuana on Facebook, the ATM theft, and the robbery, it did not establish continuity. These acts occurred three days apart. Therefore, the State has not established a closed period where the acts extended over a substantial period of time. *See* Banes, 910 N.W.2d at 641 (finding that a series of burglaries over a period of a few days was not a "series of related predicates over 'a substantial period of time'") (citations omitted); Reed, 618 N.W.2d at 336

(stating that predicate acts over a few weeks or months with no threat of future criminal conduct does not satisfy this requirement).

Just as in Banes, the State was unable to produce any evidence that there was a threat of future criminal conduct. Although the State may have proven two crimes over 3 days, there was nothing to indicate these men intended to continue robbing and stealing. Similarly, as the Court of Appeals found, the marijuana sale allegations occurred merely days or weeks following the robbery. (Opinion, p. 11). The State therefore failed to produce substantial evidence of ongoing criminal conduct and the charge should be dismissed.

The Court of Appeals took issue with the jury instruction, finding that, based on the instructions, the jury did its job. The court noted that the court instructed the jury that it only had to find one specified unlawful activity and was not instructed on the continuing basis requirement. (Opinion, pp. 8-9). However, the jury had not been instructed when

counsel argued that the State failed in its proof. The court still found that there was not sufficient evidence of the continuing criminal activity, but affirmed because of counsel's lack of specificity in the motion for judgment of acquittal. (Opinion).

C. State v. Treptow

The Court of Appeals did not reach this result, however, because it determined it could not rule upon Crawford's claims pursuant to newly amended Iowa Code section 814.7 and State v. Treptow. (Opinion, pp. 12-14). Iowa Code § 814.7 (2019); State v. Treptow, 960 N.W.2d 98 (Iowa 2021). It is true that Treptow upheld various constitutional challenges to application of Section 814.7 to a guilty plea appeal. Id. at 102. Treptow did not, however, address whether the same result would apply to convictions from jury trials.

Treptow found the "practice of requiring claims of ineffective assistance of counsel to be resolved in the first

instance in postconviction-relief proceedings is supported by a variety of legitimate interests. Among others:

> Considering a claim of ineffective assistance of counsel on direct appeal (1) deprives the State, in responding to the defendant's arguments, of the benefit of an evidentiary hearing, including trial counsel's testimony; (2) places [the appellate courts] in the role of factfinder with respect to evaluating counsel's performance; ... and (4) constitutes a significant drain on [appellate court] resources in responding to such claims.

State v. Treptow, 960 N.W.2d 98, 108 (Iowa 2021) (quoting State v. Nichols, 698 A.2d 521, 522 (Me. 1997), holding modified by Petgrave v. State, 208 A.3d 371 (Me. 2019)).

These interests do not apply with the same force to convictions from jury trials as they might to conviction from guilty pleas. With respect to guilty pleas, an inadequate factual basis may not always result in reversal of the conviction because it is possible the State may have additional evidence it could present to support a factual basis. State v. Schminkey, 597 N.W.2d 785, 792 (Iowa 1999). In a jury trial, the evidence in the trial record is the only evidence that can be

used to support the conviction – the State is not permitted to offer additional evidence it did not present in the first instance. Burks v. United States, 437 U.S. 1, 11 (1978) ("The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.")

With a guilty plea, an evidentiary hearing may be, and often is, necessary to place on the record the conversations between defendant and his or her counsel, and the strategic considerations behind the plea. State v. Straw, 709 N.W.2d 128, 138 (Iowa 2006). With a jury trial, there is no need for an evidentiary hearing requiring trial counsel's testimony if the evidence presented at trial is clearly insufficient. The trial record itself establishes the error. State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004).

There is no factfinding the appellate courts need to do in reviewing a jury verdict for insufficient evidence – the evidence either establishes the elements of the offense or it does not.

Nor is it a drain on appellate court resources to correct an error that is so plain on its face. Likewise there is no further evidence that could be developed in a post-conviction proceeding that would shed light on the fact that the defendant was convicted of two crimes for which the State and the Court of Appeals say there is not sufficient evidence. Justice demands that a defendant such as Crawford be allowed to be vindicated expeditiously rather than waste months, if not years, of his life waiting for the post-conviction process to play out.

Without conceding the constitutional challenges he raised on appeal, Crawford respectfully asks this Court to adopt plain error review for sufficiency-of-the-evidence challenges to convictions based upon jury verdicts. Plain error review has been recognized by federal courts since 1896. In Wiborg v. United States, the United States Supreme Court was confronted with a claim of insufficient evidence that had not been raised during the jury trial. Wiborg v. United States,

163 U.S. 632, 658, 16 S. Ct. 1127, 1137 (1896). The Court ruled on the merits of the claim and articulated the foundation for the plain error rule, holding "although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it." Id. The Court would later hold:

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.

United States v. Atkinson, 297 U.S. 157, 160, 56 S.Ct. 391, 392 (1936).

The United States Supreme Court created a three-part standard for plain error in United States v. Olano. United States v. Olano, 507 U.S. 725, 732-34, 113 S. Ct. 1770, 1777-78 (1993). First, there must be an error, such as a deviation from a legal rule, which has not been affirmatively waived. Id. at 732-33, 113 S. Ct. at 1777. Second, the error must be

plain, meaning clear or obvious. Id. at 734, 113 S. Ct. at 1777. Third, the error must affect substantial rights, meaning the defendant has the burden of proving the error was prejudicial in that it affected the outcome of the district court proceedings. Id. 113 S. Ct. at 1777-78.

The Iowa Supreme Court has repeatedly declined to recognize plain error review. State v. Treptow, 960 N.W.2d 98, 109 (Iowa 2021); State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999); State v. McCright, 569 N.W.2d 605, 607 (Iowa 1997). At the same time, Justice Mansfield has recognized that Iowa's appellate courts have generally substituted ineffective assistance analysis for plain error:

> Although we have not said so as a court, I think the reality is that our court has an expansive view of ineffective assistance of counsel. See State v. Clay, 824 N.W.2d 488, 504 (Iowa 2012) (Mansfield, J., concurring specially). In some respects, we are using ineffective assistance as a substitute for a plain error rule, which we do not have in Iowa. See State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999) ("We do not subscribe to the plain error rule in Iowa, have been persistent and resolute in rejecting it, and are not at all inclined to yield on the point."). One of those areas is guilty pleas, where we vacate a

> plea whenever the record does not contain a factual basis for each element of the crime, seemingly without regard to counsel's actual competence. See State v. Gines, 844 N.W.2d 437, 441 (Iowa 2014).

Rhoades v. State, 848 N.W.2d 22, 33-34 (Iowa 2014) (Mansfield, J., concurring specially).

There is a basis for plain error review in Iowa law. Iowa Code section 814.20 gives the appellate courts broad authority to affirm, modify, or reverse a judgment, order a new trial, or reduce a defendant's punishment. Iowa Code § 814.20 (2017). It was this provision the Iowa Supreme Court relied upon when it corrected an illegal sentence without the benefit of a motion to do so in the district court. See State v. Young, 292 N.W.2d 432, 435 (Iowa 1980).

As a practical matter, there is fairly little difference in the analysis for plain error versus an ineffective assistance of counsel claim. For plain error, the defendant must establish an obvious error occurred in the district court proceedings. United States v. Olano, 507 U.S. 725, 732-34, 113 S. Ct. 1770, 1777 (1993). For ineffective assistance, the defendant

must establish that counsel breached an essential duty. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Counsel must essentially commit error so serious it cannot be said he or she was functioning "as the 'counsel' guaranteed … by the Sixth Amendment." Id. For plain error, the defendant must establish that his substantial rights were violated, meaning that the error impacted the outcome of the proceedings. United States v. Olano, 507 U.S. at 733-34, 113 S.Ct. at 1777-78. For ineffective assistance, the defendant must establish that but for the error the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. at 694, 104 S. Ct. at 2068. The two concepts are different in name only, at least for violations of established law.

In this particular case, there is no basis for differentiating between plain error and ineffective assistance of counsel. Crawford claims that his attorney failed to properly challenge the sufficiency of the evidence to support his

convictions. It is the sort of claim that, if established, would warrant a reversal for ineffective assistance. State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004). It is the same challenge raised in Wiborg, in which the United States Supreme Court first articulated the plain error rule to provide a remedy to the defendant. Wiborg v. United States, 163 U.S. 632, 658, 16 S. Ct. 1127, 1137 (1896). The Court should apply plain error to this case and reverse Crawford's conviction. What is justice where, as here, the State concedes insufficient evidence for one charge, and the court of appeals finds insufficient evidence for the other charge, yet the defendant must serve the entirety of both sentences (unless and until he is successful after a lengthy post-conviction process) for which he should legally be found not guilty because his trial counsel did not sufficiently articulate the basis for his motion? Justice delayed is justice denied.

CONCLUSION

For the foregoing reasons, the Appellant requests the Court vacate the convictions and remand the case for dismissal.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $4.49, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 5,262 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Maria Ruhtenberg Dated: 10/11/21

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