ELECTRONICALLY FILED OCT 26, 2021 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-1647

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ERICA LYNE WEST VANGEN,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR LINN COUNTY
THE HONORABLE RUSSELL G. KEAST, JUDGE

APPELLEE'S BRIEF

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FINAL

TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES..... 3

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 9

ROUTING STATEMENT.....13

STATEMENT OF THE CASE.....14

ARGUMENT.....16

I. The Evidence was Sufficient on Both Theories Presented to the Jury. 16

II. West Vangen's Unpreserved Constitutional Challenges to Her Restitution Order Should Not be Considered. In the Alternative, the Challenges Should be Rejected...40

III. West Vangen has Failed to Affirmatively Show the Sentencing Court Relied on an Improper Factor..... 57

CONCLUSION..... 63

REQUEST FOR NONORAL SUBMISSION..... 63

CERTIFICATE OF COMPLIANCE 64

TABLE OF AUTHORITIES

Federal Cases

Bank Markazi v. Peterson, 136 S.Ct. 1310 (2016) 32, 34

Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) 51

Claassen v. United States, 142 U.S. 140 (1891) 39

Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) 49

Fuller v. Oregon, 417 U.S. 40 (1974) 47

Griffin v. United States, 502 U.S. 46 (1991) 36, 38

Higgs v. Neven, No. 3:10-cv-00050-RCJ-WGC, 2013 WL 5663127 (D. Nev. Oct. 16, 2013) 35

Joint Anti–Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) 51

Mathews v. Eldridge, 424 U.S. 319 (1976) 52

Morrissey v. Brewer, 408 U.S. 471 (1972) 52

Patchak v. Zinke, 138 S.Ct. 897 (2018) 34

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) 34

Reno v. Flores, 507 U.S. 292 (1993) 53, 54

Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992) 33

Stanley v. Illinois, 405 U.S. 645 (1972) 49

United States v. Klein, 80 U.S. 128 (1871) 32, 33

United States v. Schooner Peggy, 5 U.S. 103 (1801) 33

Vlandis v. Kline, 412 U.S. 441 (1973) 49

State Cases

Anderson v. State, 801 N.W.2d 1 (Iowa 2011) 34

Bridges v. Welzein, 300 N.W. 659 (Iowa 1941) 48

Exira Community Sch. Dist. v. State, 512 N.W.2d 787 (Iowa 1994) . 55

Farnsworth v. Hazelett, 197 Iowa 1367, 199 N.W. 410 (1924) 48

Frink v. Clark, 285 N.W. 681 (Iowa 1939) 30, 31

Holland v. State, 115 N.W.2d 161 (Iowa 1962) 34

Hrbek v. State, 958 N.W.2d 779 (Iowa 2021) 29

In re Det. of Morrow, 616 N.W.2d 544 (Iowa 2009) 21

In re Hagemeier's Estate, 58 N.W.2d 1 (Iowa 1953) 47

Knight v. Knight, 525 N.W.2d 841 (Iowa 1994) 51

LuGrain v. State, 479 N.W.2d 312 (Iowa 1991) 49

McDole v. State, 6 S.W.3d 74 (Ark. 1999) 35

Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002) 18, 20, 41

Moseley v. Ricks, 274 N.W. 23 (Iowa 1937) 31

Nguyen v. State, 878 N.W.2d 744 (Iowa 2016) 35

People v. Roundtree, 301 P.3d 150 (Cal. 2013) 36

Santi v. Santi, 633 N.W.2d 312 (Iowa 2001) 53, 54

State v. Albright, 925 N.W.2d 144 (Iowa 2019) 45

State v. Alspach, 554 N.W.2d 882 (Iowa 1996) 50

State v. Anderson, 517 N.W.2d 208 (Iowa 1994) 22

State v. Blair, 347 N.W.2d 416 (Iowa 1984) 26

State v. Bonstetter, 637 N.W.2d 161 (Iowa 2001) 52, 55

State v. Bruegger, 773 N.W.2d 862 (Iowa 2009)..... 17

State v. Button, 622 N.W.2d 480 (Iowa 2001)..... 20, 21, 29

State v. Ceaser, 585 N.W.2d 192 (Iowa 1998)..... 17

State v. Cooley, 587 N.W.2d 752 (Iowa 1998)..... 57

State v. Cronkhite, 613 N.W.2d 664 (Iowa 2000)..... 53

State v. Davis, 944 N.W.2d 641 (Iowa 2020)..... 45

State v. Davis, 951 N.W.2d 8 (Iowa 2020)..... 38

State v. DeLong, 943 N.W.2d 600 (Iowa 2020) 41

State v. Dudley, 766 N.W.2d 606 (Iowa 2009)..... 20, 21, 41

State v. Ernst, 954 N.W.2d 50 (Iowa 2021) 22

State v. Formaro, 638 N.W.2d 720 (Iowa 2002)..... 58

State v. Gonzalez, 582 N.W.2d 515 (Iowa 1998) 58

State v. Greene, 592 N.W.2d 24 (Iowa 1999)..... 17

State v. Gross, 935 N.W.2d 695 (Iowa 2019) 45

State v. Haines, 360 N.W.2d 791 (Iowa 1985) 46, 47, 50

State v. Hanes, 790 N.W.2d 545 (Iowa 2010)..... 38

State v. Hawk, 952 N.W.2d 314 (Iowa 2020) 44

State v. Hernandez-Lopez, 639 N.W.2d 226 (Iowa 2002)..... 36

State v. Hogrefe, 557 N.W.2d 871 (Iowa 1996) 37

State v. Hutchison, 721 N.W.2d 776 (Iowa 2006)..... 21

State v. Keopasaeuth, 645 N.W.2d 637 (Iowa 2002)..... 20, 22

State v. Klawonn, 609 N.W.2d 515 (Iowa 2000)..... 53, 54, 55, 56

State v. Kleusner, 389 N.W.2d 370 (Iowa 1986)..... 53

State v. Knight, 701 N.W.2d 83 (Iowa 2005) 59, 60, 62

State v. Lang, 954 N.E.2d 596 (Ohio 2011)..... 36

State v. Lovan, No. 12-0716, 2013 WL 541643
(Iowa Ct. App. Feb. 13, 2013)..... 60

State v. Loyd, 530 N.W.2d 708 (Iowa 1995) 58

State v. Martens, 569 N.W.2d 482 (Iowa 1997)..... 22

State v. Messer, 306 N.W.2d 731 (Iowa 1981)..... 58

State v. Miner, 331 N.W.2d 683 (Iowa 1983)..... 53

State v. Monk, 514 N.W.2d 448 (Iowa 1994) 22

State v. Neitzel, 801 N.W.2d 612 (Iowa Ct. App. 2011) 26

State v. Pappas, 337 N.W.2d 490 (Iowa 1983) 57, 58

State v. Sanford, 814 N.W.2d 611 (Iowa 2012) 20

State v. Shorter, 893 N.W.2d 65 (Iowa 2017) 37

State v. Shreves, 60 P.3d 991 (Mont. 2002)..... 62

State v. Sims, 608 A.2d 1149 (Vt. 1991)..... 59

State v. Sluyter, 763 N.W.2d 575 (Iowa 2009) 20

State v. Thomas, 547 N.W.2d 223 (Iowa 1996).....57

State v. Thompson, 954 N.W.2d 402 (Iowa 2021)..... 29, 30

State v. Thornton, 498 N.W.2d 670 (Iowa 1993)..... 26, 27

State v. Tipton, 897 N.W.2d 653 (Iowa 2017)..... 22

State v. Triplett, No. 19-1902, 2021 WL 3074475
(Iowa Ct. App. July 21, 2021).....18

State v. Tucker, 959 N.W.2d 140 (Iowa 2021) 29

State v. Turner, No. 15-2130, 2017 WL 108304 (Iowa Ct. App. Jan. 11, 2017) 26

State v. Tyler, 873 N.W.2d 741 (Iowa 2016) 37

State v. Wickes, 910 N.W.2d 554 (Iowa 2018) 58, 63

State v. Williams, 695 N.W.2d 23 (Iowa 2005) 19, 22

State v. Wilson, No. 05-0595, 2006 WL 2265432 (Iowa Ct. App. Aug. 9, 2006) 60

State v. Witham, 583 N.W.2d 677 (Iowa 1998) 57

State v. Wright, 340 N.W.2d 590 (Iowa 1983) 57

State Statutes

2019 Iowa Acts ch. 140, § 33 (eff. July 1, 2019) 31

2020 Iowa Acts ch. 1074, § 72 42

2020 Iowa Acts ch. 1074, §§ 59–83 45

Iowa Code § 814.6A 30

Iowa Code § 814.28 28

Iowa Code § 815.9(1)(a) 41

Iowa Code § 815.9(3) 41

Iowa Code § 815.9(5) 42

Iowa Code § 910.2(1)(a) 42

Iowa Code § 910.2(1)(a)(2) 47

Iowa Code § 910.2A 44

Iowa Code § 910.2A(1) 45, 47

Iowa Code § 910.2A(2) 49

Iowa Code §§ 910.2A(2)(a)–(d) 46, 49, 52

Iowa Code §§ 910.2A(2)–(3) 40
Iowa Code § 910.2A(3)(a) 46, 50
Iowa Code §§ 910.2A(3)(a)–(b) 46
Iowa Code § 910.3B 56
Iowa Code § 910.7 50
Iowa Code §§ 910.7(4)–(5) 41
Iowa Const. art. V, § 4 30
Iowa Const. art. V, § 6 30
Iowa Const. art. V, § 14 30

Other Authorities

McCormick on Evidence § 342, at 804 (E. Cleary 2d ed. 1972) 48

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Authorities

Bank Markazi v. Peterson, 136 S.Ct. 1310 (2016)
Claassen v. United States, 142 U.S. 140 (1891)
Griffin v. United States, 502 U.S. 46 (1991)
Higgs v. Neven, No. 3:10-cv-00050-RCJ-WGC, 2013 WL 5663127 (D. Nev. Oct. 16, 2013)
Patchak v. Zinke, 138 S.Ct. 897 (2018)
Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995)
Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992)
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State v. Thornton, 498 N.W.2d 670 (Iowa 1993)
State v. Tipton, 897 N.W.2d 653 (Iowa 2017)
State v. Triplett, No. 19-1902, 2021 WL 3074475 (Iowa Ct. App. July 21, 2021)
State v. Tucker, 959 N.W.2d 140 (Iowa 2021)
State v. Turner, No. 15-2130, 2017 WL 108304 (Iowa Ct. App. Jan. 11, 2017)
State v. Tyler, 873 N.W.2d 741 (Iowa 2016)
State v. Williams, 695 N.W.2d 23 (Iowa 2005)
2019 Iowa Acts ch. 140, § 33 (eff. July 1, 2019)
Iowa Code § 814.6A
Iowa Code § 814.28
Iowa Const. art. V, § 4
Iowa Const. art. V, § 6
Iowa Const. art. V, § 14

II. West Vangen's Unpreserved Constitutional Challenges to Her Restitution Order Should Not be Considered. In the Alternative, the Challenges Should be Rejected.

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Fuller v. Oregon, 417 U.S. 40 (1974)
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Mathews v. Eldridge, 424 U.S. 319 (1976)
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Reno v. Flores, 507 U.S. 292 (1993)
Stanley v. Illinois, 405 U.S. 645 (1972)
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Bridges v. Welzein, 300 N.W. 659 (Iowa 1941)
Exira Community Sch. Dist. v. State, 512 N.W.2d 787 (Iowa 1994)
Farnsworth v. Hazelett, 197 Iowa 1367, 199 N.W. 410 (1924)
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LuGrain v. State, 479 N.W.2d 312 (Iowa 1991)
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State v. Davis, 944 N.W.2d 641 (Iowa 2020)
State v. DeLong, 943 N.W.2d 600 (Iowa 2020)
State v. Dudley, 766 N.W.2d 606 (Iowa 2009)
State v. Gross, 935 N.W.2d 695 (Iowa 2019)
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State v. Klawonn, 609 N.W.2d 515 (Iowa 2000)
State v. Kleusner, 389 N.W.2d 370 (Iowa 1986)
State v. Miner, 331 N.W.2d 683 (Iowa 1983)
2020 Iowa Acts ch. 1074, § 72
2020 Iowa Acts ch. 1074, §§ 59–83
Iowa Code § 815.9(1)(a)
Iowa Code § 815.9(3)
Iowa Code § 815.9(5)
Iowa Code § 910.2(1)(a)
Iowa Code § 910.2(1)(a)(2)
Iowa Code § 910.2A
Iowa Code § 910.2A(1)
Iowa Code § 910.2A(2)
Iowa Code §§ 910.2A(2)(a)–(d)
Iowa Code §§ 910.2A(2)–(3)
Iowa Code §§ 910.2A(2)(a)–(d)
Iowa Code § 910.2A(3)(a)
Iowa Code §§ 910.2A(3)(a)–(b)

Iowa Code § 910.3B
Iowa Code § 910.7
Iowa Code §§ 910.7(4)–(5)
McCormick on Evidence § 342, at 804 (E. Cleary 2d ed. 1972)

III. West Vangen has Failed to Affirmatively Show the Sentencing Court Relied on an Improper Factor.

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State v. Knight, 701 N.W.2d 83 (Iowa 2005)
State v. Lovan, No. 12-0716, 2013 WL 541643 (Iowa Ct. App. Feb. 13, 2013)
State v. Loyd, 530 N.W.2d 708 (Iowa 1995)
State v. Messer, 306 N.W.2d 731 (Iowa 1981)
State v. Pappas, 337 N.W.2d 490 (Iowa 1983)
State v. Shreves, 60 P.3d 991 (Mont. 2002)
State v. Sims, 608 A.2d 1149 (Vt. 1991)
State v. Thomas, 547 N.W.2d 223 (Iowa 1996)
State v. Wickes, 910 N.W.2d 554 (Iowa 2018)
State v. Wilson, No. 05-0595, 2006 WL 2265432 (Iowa Ct. App. Aug. 9, 2006)
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State v. Wright, 340 N.W.2d 590 (Iowa 1983)

ROUTING STATEMENT

The State disagrees that retention is appropriate. Although West Vangen claims this case presents issues of first impression, this Court is unlikely to reach those questions in this case. First, the question of the constitutionality of general verdicts in light of Iowa Code section 814.28 is unlikely to be reached because the evidence is sufficient on both theories presented to the jury. *See* Appellant's Br. at pp.34–36 (recognizing her constitutional challenges are implicated only in the event this court finds the evidence insufficient on one theory), p.49 n.2 (conceding a facial challenge to section 814.28's inclusion of complaint, information, or indictment "is not implicated in [this] case"). Second, her constitutional challenge to the newly enacted restitution scheme was not preserved and cannot be addressed in this direct appeal. The result is that at most all that may be necessary to dispose of this case is a routine analysis of (1) the sufficiency of the evidence and (2) the propriety of the factors the sentencing court considered. Because this case involves the application of existing legal principles, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Erica Lyne West Vangen proceeded to a jury trial and was found guilty of criminal mischief in the fourth degree, in violation of Iowa Code section 716.6(1)(a). Order Following Verdict; App. 26–27. The court sentenced her to 30 days in jail, all days suspended, with unsupervised probation and $315 fine. Sent. Order; App. 28–29. The court additionally ordered West Vangen to pay restitution in the amount of $50 per month, including for court costs and $60 in attorney fees. Sent. Order; App. 28–29.

Now on appeal, West Vangen argues: (1) the evidence was insufficient on both theories presented to the jury, and to the extent only one theory was sufficient, her conviction was the result of an unlawful general verdict; (2) recent legislation modifying the mechanism for assessing restitution in criminal cases is unconstitutional; and (3) her sentence was improperly based on the exercise of her trial rights. The State disagrees with all of West Vangen's claims. This Court should affirm her conviction and sentence.

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

West Vangen was in a dispute with Monick Williams and her husband Alex Williams. *See* T.Tr. Vol.I 17:15–18:17 (describing the issues as arising from a "love triangle"), 22:17–:23. The dispute had resulted in past confrontations, including West Vangen pulling out a "big knife." *See* T.Tr. Vol.I 34:10–36:10.

At 5:39 a.m. on March 30, 2020, West Vangen drove her car to the Williams' residence, and she stopped alongside the vehicle she believed belonged to Alex or Monick. *See* T.Tr. Vol.I 82:16–84:24; State's Ex. 13 (recording of surveillance video). The car actually belonged to Monick's daughter, Jonnae Cole. T.Tr. Vol.I 11:4–:24. When West Vangen stopped her car, a passenger exited and stabbed a tire on Cole's vehicle. State's Ex. 13 (recording of surveillance video).

Meanwhile, one of two alternative events occurred, both of which were presented to the jury as possibilities. In the first version of events, West Vangen herself exited the driver's seat of her car, took a short metal baseball bat, and smashed Cole's vehicle. *See* T.Tr. Vol.I

46:7–52:8, 56:7–57:7; State's Ex. 13 (recording of surveillance video). In the second version of events, a third passenger of West Vangen's vehicle—only known by the nickname "Yayo"—exited the car from the rear driver's side, took the bat, and smashed Cole's vehicle. *See* T.Tr. Vol.I 84:22–85:13. In either event, the damage from the bat included two broken windows and a broken side mirror. T.Tr. Vol.I 11:20–:24; State's Ex. 1 (photo of damage to vehicle); App. 16.

ARGUMENT

I. The Evidence was Sufficient on Both Theories Presented to the Jury.

Preservation of Error

The State contests error preservation. On appeal, West Vangen argues (1) the evidence was insufficient to establish she acted as a principal by actively damaging the victim's car and (2) the evidence was insufficient to establish West Vangen aided and abetted others because she lacked the knowledge that others were going to damage the victim's car when she provided them with transportation. *See* Appellant's Br. at pp.30–34. But her motion for judgment of acquittal below was more limited and did not include this second argument. Thus, the State submits West Vangen's challenge to the sufficiency of

the evidence as to the aiding and abetting theory is not preserved and should not be considered.

A general motion for judgment of acquittal is inadequate to permit appellate review for the sufficiency of the evidence. *See State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999). Instead, a particularized motion identifying the "specific elements of the charge that were insufficiently supported by the evidence" is required. *Id.* (citing *State v. Ceaser*, 585 N.W.2d 192, 195 (Iowa 1998), *overruled on other grounds by State v. Bruegger*, 773 N.W.2d 862, 870–71 (Iowa 2009)). West Vangen's motion failed to include the particular challenge now made on appeal as it relates to the State's aiding and abetting theory:

> Because the State has rested their case, we move for judgment of acquittal at this time. The—the evidence in this case, even in the light most favorable to the State, I believe, is an indication that we have video evidence; frankly, that I do not believe that the driver of the vehicle got out—got out of the vehicle, despite the insistence upon that by Officer Richardson; that there is no physical evidence, no fingerprints or anything along those lines, that would tie Ms. Vangen to the event.

T.Tr. Vol.I 73:25–74:9; *see* T.Tr. Vol.II 38:22–:25 (renewing the motion without elaboration).

Accordingly, because West Vangen's motion below only addressed the sufficiency of the evidence on the theory that she acted as a principal, this Court should decline to consider her unpreserved argument on the aiding and abetting theory. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). Additionally, because West Vangen only preserved error on a single theory presented to the jury, her "[f]ailure to challenge one of the alternatives is tantamount to conceding substantial evidence supports that theory." *State v. Triplett*, No. 19-1902, 2021 WL 3074475, at *1 (Iowa Ct. App. July 21, 2021). And because Iowa Code section 814.28 requires this Court to affirm the conviction on the basis that the aiding and abetting theory was unchallenged, it "would be futile" to consider her preserved challenge that the evidence was insufficient to establish she was a principal. *Id.* Thus, this Court should decline to address the merits of the sufficiency challenge.

Recognizing her failure to preserve error on her sufficiency challenge, West Vangen attempts to request this Court excuse her failure because the "fighting issue at trial" was obvious and it was

thus understood what the target of her motion was. *See* Appellant's Br. at p.28. This Court should decline her invitation to excuse her failure to preserve error. West Vangen's motion for judgment of acquittal was specific in that it directly challenged the lack of physical evidence tying her to the actual commission of the criminal mischief, thus directly challenging the State's theory that she acted as a principal. *See* T.Tr. Vol.I 73:25–74:9. Unlike in the case West Vangen cites, *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005), there were multiple "fighting issues" at play here involving two different theories of the crime, and her motion was clearly targeted at only one of those issues, not all of them. It would be improper to conclude that it was obvious to all that West Vangen was actually challenging her knowledge that she was aiding and abetting others when her motion was entirely unrelated to that issue. She specifically chose to challenge the theory that she acted as a principal, and she cannot now change the record to expand her claim.

The State also challenges error preservation on West Vangen's constitutional challenges to section 814.28, which permits general verdicts. *See* Appellant's Br. at pp.36–50. This issue was not raised or decided below, and this Court should decline to consider it. *See*

Meier, 641 N.W.2d at 537. However, the State submits that if this Court were inclined to consider her unpreserved constitutional challenge, under the doctrine of constitutional avoidance it would be more appropriate to first consider whether there was sufficient evidence on both theories presented to the jury. *See, e.g.*, *State v. Button*, 622 N.W.2d 480, 485 (Iowa 2001) ("Ordinarily we will not pass upon constitutional arguments if there are other grounds on which to resolve the case."). And because, as explained below, the evidence was sufficient on both theories, it is unnecessary to determine whether the legislative amendment is constitutional. The question should be left for a controversy where it may affect the outcome.

Standard of Review

"Sufficiency of evidence claims are reviewed for a correction of errors at law." *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012) (citing *State v. Keopasaeuth*, 645 N.W.2d 637, 639–40 (Iowa 2002)).

"To the extent we are required to engage in statutory construction, our review is for correction of errors at law." *State v. Dudley*, 766 N.W.2d 606, 612 (Iowa 2009) (citing *State v. Sluyter*, 763 N.W.2d 575, 579 (Iowa 2009)). Constitutional claims are

reviewed de novo. *Id.* (citing *In re Det. of Morrow*, 616 N.W.2d 544, 547 (Iowa 2009)).

Merits

West Vangen argues there was insufficient evidence supporting either of the State's theories: that West Vangen acted as a principal or by aiding and abetting others. *See* Appellant's Br. at pp.30–34. She further submits that even if the evidence was sufficient on only one theory, her conviction should be overturned because recently enacted legislation permitting general verdicts is unconstitutional. *See* Appellant's Br. at pp.36–50. The State disagrees and submits the evidence was sufficient on both theories, and thus, consideration of the constitutional questions is unnecessary. *See, e.g.*, *Button*, 622 N.W.2d at 485. In the alternative, the constitutional challenge to the legislation is without merit.

A challenge to the sufficiency of the evidence does not allow a reviewing court to weigh evidence or determine that the jury weighed the evidence incorrectly. "In determining the correctness of a ruling on a motion for judgment of acquittal, we do not resolve conflicts in the evidence, pass upon the credibility of witnesses, or weigh the evidence." *State v. Hutchison*, 721 N.W.2d 776, 780 (Iowa 2006)

(citing *Williams*, 695 N.W.2d at 28). Instead, "review on questions of sufficiency of the evidence is to determine if there is substantial evidence to support the verdict of the jury." *State v. Martens*, 569 N.W.2d 482, 484 (Iowa 1997) (citing *State v. Monk*, 514 N.W.2d 448, 451 (Iowa 1994)). This occurs when "a rational trier of fact could have found that the elements of the crime were established beyond a reasonable doubt." *Keopasaeuth*, 645 N.W.2d at 640 (citing *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994)). In conducting its analysis, this Court should "consider all evidence, not just the evidence supporting the conviction, and view the evidence in the light most favorable to the State, 'including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence.' " *State v. Ernst*, 954 N.W.2d 50, 54 (Iowa 2021) (quoting *State v. Tipton*, 897 N.W.2d 653, 692 (Iowa 2017)).

First, West Vangen challenges the sufficiency of the evidence under the theory that she acted as principal. *See* Appellant's Br. at pp.30–32. Specifically, she argues there was insufficient evidence that she exited her car and damaged the victim's vehicle. *Id.* The State submits West Vangen's analysis of the evidence is flawed and should be rejected.

West Vangen made admissions that directly inculpated her as a principal. She admitted both in her interview with the police and at trial that she drove her car to the victim's house. T.Tr. Vol.I 56:7–57:7, 82:16–84:24; *see* State's Ex. 14 (body camera video) at 8:10–:20 ("No. I was driving my car, but I didn't get out of the car. But I don't know the person's name . . . ."), 13:25–:35. And in her interview, West Vangen was adamant there was only one other person with her when she drove there. T.Tr. Vol.I 55:19–57:7, Vol.II 28:10–:22; State's Ex. 14 (body camera video) at 13:25–:35 ("Q. You just drove there? A. Yep. Q. Okay. A. One hundred percent. Q. And it was you and 'Kosher'? A. Yep. Q. No one else? A. Nope.").

Officer Tyler Richardson located and reviewed a neighbor's security camera video that captured the vandalism to the victim's car. T.Tr. Vol. I 46:7–:22. He was unable to directly download the video file, so he recorded the video from a digital camera as it played on the screen which resulted in a somewhat reduced quality video for the trial exhibit. *See* T.Tr. Vol.I 47:6–:16. The video showed West Vangen's car pulling directly alongside the victim's car, a male passenger getting out of the passenger side and stabbing a tire, while a person gets out of the driver's side and hits the car with what

appears to be a bat. *See* T.Tr. Vol.I 48:11–50:4: State's Ex. 13 (recording of surveillance video) at 0:00–0:30. Richardson testified that when he reviewed the video in person on the security camera's recording device, he could clearly see the person exiting West Vangen's car on the driver's side was the driver:

> I remember, when I watched it, I was able to much more easily see the driver get out, and you can see them swinging an object at the car. I had a harder time seeing that today.
>
> . . .
>
> And when I watched the original video, you could see the person. You could that person there clear. Not clearly [enough] to see their face, but you can clearly tell it was an individual. I was able to tell that that was the driver of the vehicle.

T.Tr. Vol.I 46:1–:7, 71:24–72:11. And when he compared West Vangen's car in person to the car on the video, the vehicles were consistent. T.Tr. Vol.I 50:5–51:13. Additionally, Richardson located a small metal bat behind the driver's seat, and the bat had damage that he explained was consistent with the bat having been used to cause the damage to the car. T.Tr. Vol.I 51:14–52:8.

The evidence in the light most favorable to the State shows West Vangen was the person who got out of the car to commit the criminal mischief. She admitted that she was the driver, and

Richardson could see it was the driver who exited her vehicle and hit the victim's car with a bat. And even if there was skepticism about whether it was the driver who exited or not, West Vangen was adamant that it was only her and one other person in the car, and the video unambiguously showed two people from the car committed the damage. Thus, by her own admissions, West Vangen was necessarily the person who exited the car and used the bat. It was a reasonable inference to conclude she committed the criminal mischief, and the evidence was sufficient to establish her culpability as principal.

On appeal, West Vangen attempts to undermine the evidence by noting the car's brake lights remained illuminated during the damage, "meaning the driver must have remained seated with her foot depressing the brake pedal throughout the incident." *See* Appellant's Br. at p.31. But this speculative assertion is at odds with the record actually introduced at trial. Richardson was directly confronted with this question, and he explained the lights may have remained illuminated from the use of a parking brake or an emergency brake. T.Tr. Vol.II 15:6–:10 ("Q. To your knowledge, is there any way that a brake light is going to be on if there's not an individual pressing the brakes? A. Yes, if there was some sort of parking brake or emergency

brake applied."). Thus, if the jury found Richardson's explanation credible, they could conclude West Vangen—the admitted driver—acted as a principal. *See State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993) ("The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive."); *State v. Blair*, 347 N.W.2d 416, 420 (Iowa 1984) ("The very function of the jury is to sort out the evidence presented and place credibility where it belongs."); *State v. Turner*, No. 15-2130, 2017 WL 108304, at *4 (Iowa Ct. App. Jan. 11, 2017) (citing *State v. Neitzel*, 801 N.W.2d 612, 624 (Iowa Ct. App. 2011)) ("We will not interfere with such credibility determinations absent 'those rare circumstances where the testimony is absurd, impossible, or self-contradictory.' "). The evidence was sufficient to conclude West Vangen acted as a principal.

Second, West Vangen argues the evidence was insufficient to find she aided and abetted others. *See* Appellant's Br. at pp.32–34. Although West Vangen admitted that she drove the vehicle, thus necessarily providing transportation to the passenger—or passengers if her trial testimony was to be believed—that unquestionably committed the criminal mischief, she argues on appeal this was

insufficient to prove she aided and abetted them because she did not knowingly approve and agree to the commission of the crime. Appellant's Br. at pp.32–33. Instead, she argues she thought she was driving to the victim's house in the dark at 5:29 in the morning to collect money she was owed. Appellant's Br. at p.33. But West Vangen's argument can be easily discarded because she is only relying on the credibility of her own self-serving testimony which the jury was free to reject. *E.g.*, *Thornton*, 498 N.W.2d at 673. The jury was under no obligation to believe her testimony, especially when her story kept changing, and when she appeared to admit she had difficulty remembering and that she had "mental problems." *Compare* State's Ex. 14 (first claiming she was not in the car, then claiming her husband was not in the car and that it was only her and "Kosher" in the vehicle but nobody else), *with* T.Tr. Vol.I 82:16–85:13, 94:20–97:24 (now claiming there were two other people in the car, and admitting that "Kosher" was in fact her husband's nickname); *see also* T.Tr. Vol.I 96:16–:23, Vol.II 9:23–12:6. Because West Vangen admitted she drove the perpetrators to the victim's house in the dark, early morning hours, drove on the wrong side of the road in order to stop her vehicle directly alongside the victim's

car, and immediately drove off after the damage was done without any attempt to collect money, the jury could reasonably infer she knew this was the plan all along. The evidence in the light most favorable to the State was sufficient to establish West Vangen's culpability as an aider and abettor. Her conviction should be affirmed.

West Vangen argues that if this Court finds the evidence was sufficient on only one of the two theories, this Court should find recently enacted legislation permitting general verdicts to be unconstitutional. *See* Appellant's Br. at pp.36–50. Specifically, West Vangen challenges recently enacted Iowa Code section 814.28, which provides:

> When the prosecution relies on multiple or alternative theories to prove the commission of a public offense, a jury may return a general verdict. If the jury returns a general verdict, an appellate court shall not set aside or reverse such a verdict on the basis of a defective or insufficient theory if one or more of the theories presented and described in the complaint, information, indictment, or jury instruction is sufficient to sustain the verdict on at least one count.

Iowa Code § 814.28. She asserts this provision violates the Iowa Constitution by violating: (1) separation of powers, (2) equal

protection, and (3) due process. Appellant's Br. at p.39. The State submits that because the evidence was sufficient on both theories, this Court should decline to consider the constitutional question. *See, e.g.*, *Button*, 622 N.W.2d at 485. The State nevertheless briefly addresses West Vangen's contentions below because they have no merit.

First, West Vangen argues section 814.28 violates the separation-of-powers doctrine. *See* Appellant's Br. at pp.40–45. The Iowa Supreme Court recently rejected multiple separation-of-powers arguments raised against other provisions of the same legislation that enacted section 814.28. *E.g.*, *State v. Tucker*, 959 N.W.2d 140, 148–53 (Iowa 2021) (concluding amended section 814.6 and 814.7 do not violate separation of powers); *Hrbek v. State*, 958 N.W.2d 779, 784–85 (Iowa 2021) (concluding newly enacted section 822.3A did not violate separation of powers); *State v. Thompson*, 954 N.W.2d 402, 409–18 (Iowa 2021) (concluding newly enacted section 814.6A did not violate separation of powers). West Vangen makes no mention of these recently decided cases, and she does not distinguish them from her present challenge. The State submits the same conclusions reached in these recent cases should also be reached here.

In *State v. Thompson*, the Iowa Supreme Court rejected a separation-of-powers challenge to section 814.6A, which prohibits represented defendants from filing pro se briefs in Iowa's appellate courts. *See* Iowa Code § 814.6A. *Thompson* noted that the text of the Iowa Constitution "reserves to the legislative department [the] authority to regulate the practice and procedure in all Iowa courts, including Iowa's appellate courts." *Thompson*, 954 N.W.2d at 411 (citing Iowa Const. art. V, §§ 4, 6, & 14). West Vangen argues that section 814.28 unconstitutionally prevents the Iowa Supreme Court from "exercis[ing] supervisory and administrative control over all inferior judicial tribunals throughout the state." Appellant's Br. at p.41 (quoting Iowa Const. art. V, § 4). But section 814.28 is not about supervisory or administrative control; rather, it is about "correction of errors at law," which is subject to "such restrictions as the general assembly may, by law, prescribe." Iowa Const. art. V, § 4.

West Vangen's discussion of *Frink v. Clark* is inapposite, because the legislation at issue in *Frink* purported to authorize service of process on non-residents who were "in good faith attending at the trial of a case pending in this state." *Frink v. Clark*, 285 N.W. 681, 683 (Iowa 1939). The problem with that statute (aside from its

attempt to confer personal jurisdiction through retroactive application) was that the Iowa Supreme Court had held that the "immunity extended to a non-resident litigant while in attendance at the trial of a case in which he was a defendant" was "a judicial function." *Id.* at 685. That was the critical point: abrogating that immunity would deter non-residents from appearing in Iowa courts, sabotaging the judicial function. *See id.* at 684 (quoting *Moseley v. Ricks*, 274 N.W. 23, 24 (Iowa 1937)) ("This principle seems so conducive to the proper administration of justice that we are not disposed to overrule it."). And *Frink*'s concern about legislation "dictat[ing] to the courts what the decision should be in cases pending before the statute was enacted" is inapplicable here. *Id.* at 685. Section 814.28 took effect on July 1, 2019, which was many months before the date of West Vangen's 2020 offense. *See* 2019 Iowa Acts ch. 140, § 33 (eff. July 1, 2019). This case involves neither problem that compelled the *Frink* court to find that statute unconstitutional.

Here, although evaluating a claim challenging the sufficiency of the evidence is always a judicial function, requiring affirmance when a court makes a finding of sufficiency on at least one alternative presented to the jury does not impede performance of that judicial

function. The appellate courts still make an independent evaluation and considers whether there existed sufficient evidence such that the fact-finder could find the defendant guilty of the crime charged. West Vangen's argument would extend far enough to allow courts to reject legislative definitions of criminal offenses or legislatively mandated punishments, under the guise of rejecting any "rule for the decision of a cause in a particular way." *See* Appellant's Br. at p.44 (quoting *United States v. Klein*, 80 U.S. 128, 146 (1871)). *Klein* was about legislation that divested federal courts of jurisdiction over cases involving post-Civil-War pardons, upon issuance of a decision that was "adverse to the government and favorable to the suitor." *Klein*, 80 U.S. at 146–47. That legislation also defined the effect of the pardons: none, except as conclusive proof of disloyalty. *See id.* at 143–48. Both the jurisdiction-stripping measure and the attempt to strip pardons of their effect through legislation were constitutionally problematic—so *Klein*'s mention of "rules of decision" was not essential to the holding.

Recently, the United States Supreme Court recognized that commentators had called *Klein* "baffling" and "deeply puzzling." *Bank Markazi v. Peterson*, 136 S.Ct. 1310, 1323 & n.18 (2016) (citations omitted). It took the opportunity to clarify what *Klein* really meant:

[T]he statute in *Klein* infringed the judicial power, not because it left too little for courts to do, but because it attempted to direct the result without altering the legal standards governing the effect of a pardon—standards Congress was powerless to prescribe. . . .

. . . The Bank points to a statement in the *Klein* opinion questioning whether "the legislature may prescribe rules of decision to the Judicial Department. . . in cases pending before it." [*Klein*, 80 U.S. at 146]. One cannot take this language from *Klein* "at face value," however, "for congressional power to make valid statutes retroactively applicable to pending cases has often been recognized.". . .

. . .

In any event, a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts. . . . In [*United States v. Schooner Peggy*, 5 U.S. 103 (1801)], for example, this Court applied a newly ratified treaty that, by requiring the return of captured property, effectively permitted only one possible outcome. And in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992)], a statute replaced governing environmental-law restraints on timber harvesting with new legislation that permitted harvesting in all but certain designated areas. . . . [W]e upheld the legislation because it left for judicial determination whether any particular actions violated the new prescription. . . .

. . .

Applying laws implementing Congress' policy judgments, with fidelity to those judgments, is commonplace for the Judiciary.

Bank Markazi, 136 S.Ct. at 1324–26; *accord Patchak v. Zinke*, 138 S.Ct. 897, 905 (2018) (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995)) (explaining that Congress violates Article III when it compels findings or results in specific cases under old law, but "does not violate Article III when it 'changes the law.' "). Here, section 814.28 changes the applicable law that Iowa courts should apply on a prospective basis, which is entirely permissible.

West Vangen's argument, in its purest form, is that Iowa courts are not constrained by legislative enactments in making "the appellate court's *own assessment* of whether such error may have prejudiced the litigant. . . ." Appellant's Br. at pp.44–45 (emphasis added). This is untethered from anything that resembles a separation-of-powers principle. The role of a court is to interpret and apply the law—not decide what it wants the law to be. If section 814.28 is otherwise constitutional (based on how this Court interprets and applies the relevant constitutional provisions), then this Court cannot simply disregard that change to the applicable law—when exercising appellate review to correct errors at law, it must *apply* the law. *See, e.g.*, *Anderson v. State*, 801 N.W.2d 1, 1–2 (Iowa 2011) (quoting *Holland v. State*, 115 N.W.2d 161, 164 (Iowa 1962)) ("It is our duty to

accept the law as the legislative body enacts it."). West Vangen's argument is anathema to separation of powers, and it cannot prevail.

Second, West Vangen argues section 814.28 violates equal protection. *See* Appellant's Br. at pp.45–48. But her argument fails to proceed past the threshold inquiry necessary for an equal protection claim. *See Nguyen v. State*, 878 N.W.2d 744, 758 (Iowa 2016) ("The first step in our equal protection analysis under the Iowa Constitution is to determine whether there is a distinction made between similarly situated individuals."). The entire premise of West Vangen's equal protection claim is that "[c]riminal and civil litigants are similarly situated. . . ." Appellant's Br. at p.47. This contention is fatally flawed and should be rejected without further consideration because civil and criminal litigants simply are not similarly situated. *E.g.*, *Higgs v. Neven*, No. 3:10-cv-00050-RCJ-WGC, 2013 WL 5663127, at *16 (D. Nev. Oct. 16, 2013) ("A civil litigant and a criminal defendant are not 'similarly situated' and therefore they are not entitled to identical treatment. Because Petitioner, a criminal defendant, is not similarly situated to a civil litigant, the fact that different state rules exist in criminal and civil contexts provides no basis for an equal protection claim." (citation omitted)); *McDole v. State*, 6 S.W.3d 74, 81 (Ark.

1999) ("While both criminal and civil defendants may be called litigants, they are far from similarly situated."); *People v. Roundtree*, 301 P.3d 150, 180 (Cal. 2013) ("Criminal defendants are also not situated similarly to civil litigants."); *State v. Lang*, 954 N.E.2d 596, 617 (Ohio 2011) ("Lang's equal protection argument can be rejected because criminal defendants and civil litigants have vastly different stakes and concerns and are not similarly situated.").

Third, West Vangen argues section 814.28 violates due process.[1] *See* Appellant's Br. at pp.48–50. She argues the provision does not allow "for any judicial evaluation of whether the trial record reveals a danger that jurors may have relied on [an] unsupported alternative." Appellant's Br. at p.49. The State disagrees that section 814.28 violates due process under the Iowa Constitution.

It is important to begin by noting the Iowa Supreme Court's disfavor of general verdicts—and rejection of the *Griffin*[2] approach—

[1] West Vangen makes mention of a potential facial due process challenge to section 814.28 in a footnote. Appellant's Br. at p.49 n.2. However, she also concedes the purported facial challenge has no application to her case, thus the claim should not be considered. *See State v. Hernandez-Lopez*, 639 N.W.2d 226, 235 (Iowa 2002) ("[A] defendant lacks standing to make a facial challenge to a statute when the statute is not unconstitutional as applied to the defendant.").

[2] *Griffin v. United States*, 502 U.S. 46, 56 (1991).

was not constitutionally based. The Court in *State v. Tyler*, 873 N.W.2d 741, 754 (Iowa 2016), explained that *Griffin*'s holding described a "federal due process minimum." But the Court nevertheless rejected the permissibility of general verdicts under an Iowa common-law approach recognizing that "[w]ith a general verdict of guilty, we have no way of determining which theory the jury accepted." *Tyler*, 873 N.W.2d at 754 (quoting *State v. Hogrefe*, 557 N.W.2d 871, 881 (Iowa 1996)); *accord State v. Shorter*, 893 N.W.2d 65, 75–76 (Iowa 2017) (refusing to adopt the *Griffin* approach).

The legislature has now spoken on the issue by declining to acquiesce to the court's continued application of this common-law rejection of general verdicts and has instead effectively adopted the *Griffin* approach. The State submits *Griffin*—and its effective codification through section 814.28—comports with due process under the Iowa Constitution.

In *Griffin*, the United States Supreme Court held that a general verdict need not be reversed "because one of the possible bases of conviction was. . . unsupported by sufficient evidence." The Court explained its reasoning for distinguishing general verdicts based upon

insufficient evidence and those based upon legal or constitutional error:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence.

Griffin, 502 U.S. at 59.

The Court's conclusion in *Griffin* that juries will be able to sort out which theories have adequate evidence, and which do not, makes sense and is consistent with Iowa law. It is soundly accepted that our juries are presumed to follow their instructions unless evidence to the contrary is shown. *E.g.*, *State v. Davis*, 951 N.W.2d 8, 17 (Iowa 2020) (quoting *State v. Hanes*, 790 N.W.2d 545, 552 (Iowa 2010)). It follows that when the evidence is sufficient on at least one theory of a crime, but not another, we should similarly presume the jury appropriately followed their instructions to find the evidence

sufficient on the valid theory. Thus, West Vangen's theory that her due process right to a unanimous verdict would be violated simply by the mere existence of a general verdict runs afoul of our presumption of regularity and it makes little sense to distrust the competence and diligence of our juries solely in this one area of the law. *See* Jury Instr. No. 10 (requiring the jury to find "the defendant did an act *or* aided and abetted another in committing an act" (emphasis added)); App. 21. And importantly for purposes of due process, even after section 814.28 our district and appellate courts still retain the authority to confirm the evidence was indeed sufficient on at least one theory presented to the jury, which confirms the jury acted appropriately and that substantial evidence supported their finding of guilt on the substantive crime.

Further, general verdicts have long been recognized as valid. The United States Supreme Court in *Griffin* recognized the rule permitting general verdicts was deeply rooted in the common-law under the theory that " 'in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only.' " *Griffin*, 502 U.S. at 49–50 (quoting *Claassen v. United States*, 142 U.S. 140, 146 (1891)). As it

relates to alternative theories of committing the same crime, the common-law recognized the same principle, permitting general verdicts when the evidence supported a finding that a defendant was guilty of at least one alternative of the substantive crime. *Id.* at 51–52. Thus, looking beyond Iowa's relatively recent prohibition of general verdicts, historically speaking, general verdicts have been permitted by the common-law long before the State of Iowa even existed. *Id.* Iowa Code section 814.28 does not violate due process under the Iowa Constitution.

West Vangen's constitutional challenges to section 814.28 should be rejected. Even if the evidence was only sufficient on one theory presented to the jury, this Court should affirm.

II. West Vangen's Unpreserved Constitutional Challenges to Her Restitution Order Should Not be Considered. In the Alternative, the Challenges Should be Rejected.

Preservation of Error

The imposition of restitution is not an illegal sentence that can be challenged at any time. Rather, the new provisions of chapter 910 require an offender to preserve error on the claim before being able to directly appeal a restitution order. Iowa Code §§ 910.2A(2)–(3). As she readily concedes, West Vangen did not challenge the imposition

of restitution, nor did she raise her constitutional challenges below or obtain a ruling on them. Appellant's Br. at p.51; *see Meier*, 641 N.W.2d at 537. She also did not seek additional review under section 910.7 or file a petition for certiorari. Iowa Code §§ 910.7(4)–(5). This claim cannot be considered.

Standard of Review

Appellate review of a restitution order is for legal error. *State v. DeLong*, 943 N.W.2d 600, 604 (Iowa 2020). To the extent West Vangen's claim raises constitutional questions, review is de novo. *Dudley*, 766 N.W.2d at 612.

Merits

Iowa Code section 910.2A, which presumes a defendant has the reasonable ability to pay category B restitution, is constitutional. This change in the statute does not impact due process or West Vangen's right to counsel. Her constitutional challenges must fail.

Iowa Code section 815.9 provides for the appointment of counsel at State expense for indigent defendants. Iowa Code § 815.9(1)(a). It also imposes a repayment obligation on indigent defendants for the cost of legal assistance provided by the State. *Id.* at § 815.9(3). The court shall order the payment of legal assistance as

restitution, to the extent that the person is reasonably able to pay, or order the performance of community service in accordance with chapter 910. *Id.* at § 815.9(5).

Section 910.2 is the vehicle by which a court orders the repayment of those costs. Section 910.2 provides:

> In all criminal cases in which there is a plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction is rendered the sentencing court shall order that pecuniary damages be paid to each offender to the victims of the offender's criminal activities, and that all other restitution be paid to the clerk of court subject to the following:
>
> (1) Pecuniary damages and category "A" restitution shall be ordered without regard to an offender's reasonable ability to make payments.
>
> (2) Category "B" restitution shall be ordered subject to an offender's reasonable ability to make payments pursuant to section 910.2A.

Id. at § 910.2(1)(a). In June of 2020, the legislature added a new section, 910.2A, that deals specifically with the reasonable ability to pay category "B" restitution. 2020 Iowa Acts ch. 1074, § 72 (now codified at Iowa Code § 910.2A). This new section provides in full:

> 1. An offender is presumed to have the reasonable ability to make restitution payments for the full amount of category "B" restitution.

2. If an offender requests that the court determine the amount of category "B" restitution payments the offender is reasonably able to make toward paying the full amount of such restitution, the court shall hold a hearing and make such a determination, subject to the following provisions:

a. To obtain relief at such a hearing, the offender must affirmatively prove by a preponderance of the evidence that the offender is unable to reasonably make payments toward the full amount of category "B" restitution.

b. The offender must furnish the prosecuting attorney and sentence court with a completed financial affidavit. Failure to furnish a completed financial affidavit waives any claim regarding the offender's reasonable ability to pay.

c. The prosecuting attorney, the attorney for the defendant, and the court shall be permitted to question the offender regarding the offender's reasonable ability to pay.

d. Based on the evidence offered at the hearing, including but not limited to the financial affidavit, the court shall determine the amount of category "B" restitution the offender is reasonably able to make payments toward, and order the offender to make payments toward that amount.

3. a. If an offender does not make a request as provided in subsection 2 at the time of sentencing or within thirty days after the court issues a permanent restitution order, the court shall order the offender to pay the full amount of category "B" restitution.

> b. An offender's failure to request a determination pursuant to this section waives all future claims regarding the offender's reasonable ability to pay, except as provided by section 910.7.
>
> 4. If an offender requests that the court make a determination pursuant to subsection 2, the offender's financial affidavit shall be filed of record in all criminal cases for which the offender owes restitution and the affidavit shall be accessible by a prosecuting attorney or attorney for the offender without court order or appearance.
>
> 5. A court that makes a determination under this section is presumed to have properly exercised its discretion. A court is not required to state its reasons for making a determination.

Iowa Code § 910.2A (2021). The enactment of section 910.2A changed the procedure by which a defendant's ability to pay category "B" restitution is determined, including shifting presumptions, imposing statutory waivers, and requiring financial affidavits. *State v. Hawk*, 952 N.W.2d 314, 316 (Iowa 2020).

The changes to chapter 910 are designed to streamline the procedure for ordering and challenging restitution. Prior to the enactment of 2020 Iowa Acts chapter 1074, sections 59–83, this court issued several decisions dealing with restitution covering topics that ranged from temporary to permanent orders, the reasonable ability to pay, the exhaustion of remedies, and the nature of a restitution order

as civil or criminal. *State v. Davis*, 944 N.W.2d 641, 646 (Iowa 2020); *State v. Gross*, 935 N.W.2d 695, 703–05 (Iowa 2019);[3] *State v. Albright*, 925 N.W.2d 144, 159–60 (Iowa 2019). The legislature responded to these changes by setting out the procedure it deemed appropriate to challenge a restitution order and do not offend any constitutional protections. 2020 Iowa Acts ch. 1074, §§ 59–83.

Specifically, section 910.2A discusses the procedures an offender is required to go through to challenge the imposition of restitution. An offender is now presumed to have the reasonable ability to pay category "B" restitution. Iowa Code § 910.2A(1). If an offender wants the court to determine the amount of category "B" restitution the offender is reasonably able to pay, the court shall hold a hearing, but the offender must prove by a preponderance of the evidence they do not have the reasonable ability to pay, must furnish a completed financial affidavit, be subject to questions by the

[3] *Gross* recognized that even when the claim is filed in the criminal case, and not in a separate civil action, the award of jail fees are civil judgments not subject to constitutional constraints previously applied to criminal restitution. 935 N.W.2d at 704–05. The State questions whether under the new chapter 910 scheme whether category "B" restitution orders should now also be considered civil in nature, thus removing the constraints previously applied by this Court and rendering moot the constitutional questions raised by West Vangen.

prosecuting attorney and the court before the court makes its determination. *Id.* at §§ 910.2A(2)(a)–(d). If the offender does not request the determination be made either at the time of sentencing or within 30 days of the court entering a permanent restitution order, the claim is waived except as provided in section 910.7. *Id.* at §§ 910.2A(3)(a)–(b). These provisions have changed the procedure by which an offender may challenge restitution. A change in the procedure does not mean the new statutory provisions are unconstitutional.

This court addressed the constitutionality of recoupment of court costs and attorney fees in *State v. Haines*, 360 N.W.2d 791, 794 (Iowa 1985). In *Haines,* the district court sentenced the defendant to probation and, as a condition of his probation, ordered him reimburse the count for the cost of his court-appointed attorney fees either in cash or by community service. *Id.* at 792. Haines appealed and argued that the recoupment of court-appointed counsel costs and fees violated due process, his right to counsel, and equal protection. *Id.* at 793.

The *Haines* court found there was no infringement on the right to counsel. *Id.* at 793–94. The court held that "a statute allowing

recoupment of court costs and court-appointed attorney's fees does not violate per se the right to counsel guaranteed in the Iowa Constitution." *Id.* at 794. Likewise, the court found that the recoupment provision did not violate the Sixth Amendment. *Id.* at 794. Relying on *Fuller v. Oregon*, 417 U.S. 40, 54 (1974), the court held that the statutes at issue in *Fuller* and *Haines* authorize the court to order the offender to make restitution of court-appointed attorney's fee "to the extent that the offender is reasonably able to do so." *Id.* at 794. That is still the case. Category "B" restitution is still limited by the extent an offender is reasonably able to afford it just as was the case under the prior statutory scheme: "Category 'B' restitution shall be ordered *subject to an offender's reasonable ability to make payments* pursuant to section 910.2A." Iowa Code § 910.2(1)(a)(2) (emphasis added). Although section 910.2A now presumes an offender has the reasonable ability to pay category "B" restitution, that presumption is rebuttable and constitutional. Iowa Code § 910.2A(1); *see In re Hagemeier's Estate*, 58 N.W.2d 1, 3 (Iowa 1953) ("A presumption is rebutted when facts to the contrary are established.").

The Iowa Supreme Court has explained the difference between a rebuttable presumption and an irrebuttable presumption:

> A presumption is a deduction that the law expressly directs to be made from particular facts. *Bridges v. Welzein*, 300 N.W. 659, 662 (Iowa 1941). One treatise writer distinguishes between a rebuttable and an irrebuttable presumption this way:
>
> > The term presumption as used above always denotes a rebuttable presumption, i.e., *the party against whom the presumption operates can always introduce proof in contradiction.* In the case of what is commonly called a conclusive or irrebuttable presumption, when fact B is proven, fact A must be taken as true, and *the adversary is not allowed to dispute this at all.* For example, if it is proven that a child is under seven years of age, the courts have stated that it is conclusively presumed that he could not have committed a felony. *In so doing, the courts are not stating a presumption at all, but simply expressing the rule of law that someone under seven years old cannot legally be convicted of a felony*.
>
> *McCormick on Evidence* § 342, at 804 (E. Cleary 2d ed. 1972) (emphasis added); *accord Farnsworth v. Hazelett,* 197 Iowa 1367, 1370–71, 199 N.W. 410, 411–12 (1924). The italicized language says three things. First, in the case of

> a rebuttable presumption, the party against whom the presumption operates can always introduce evidence to rebut the presumption. Second, in the case of an irrebuttable presumption, no such evidence is permitted. Third, an irrebuttable presumption is not a rule of evidence at all; it is a substantive rule of law.

LuGrain v. State, 479 N.W.2d 312, 315 (Iowa 1991). Further, as the Court went on to note, "The United States Supreme Court has 'uniformly condemned irrebuttable presumptions' as violations of federal due process." *Id.* (citing *Cleveland Bd. of Educ. v. LaFleur,* 414 U.S. 632, 647–48 (1974); *Vlandis v. Kline,* 412 U.S. 441, 446, (1973)*; Stanley v. Illinois,* 405 U.S. 645, 654–58 (1972)).

The presumption at issue here is a *rebuttable* presumption. The statute allows an offender to ask the court to make a reasonable ability to pay determination. Iowa Code § 910.2A(2). And the offender then bears the burden of establishing they do not have the reasonable ability to pay through the presentation of evidence in the form of testimony and financial affidavits. *Id.* at §§ 910.2A(2)(a)–(d). Section 910.2A does not create an irrebuttable presumption, but instead it provides the mechanism through which an offender may challenge their ability to pay category "B" restitution. And if they provide sufficient evidence rebutting the presumption, section 910.2(1)(a)(2)

restricts the court from imposing restitution greater than the offender would be able to pay. This procedure is constitutional.

West Vangen argues section 910.2A "chills" her right to counsel under the Iowa and federal constitutions. She continues that "knowledge that a defendant will be obligated to repay the expenses of her legal representation unless she can prove by a preponderance of the evidence may impel her to decline the services of an appointed attorney." Appellant's Br. at p.67. This claim was raised and rejected in *Haines*. As discussed above, the fact that a defendant may still seek to have the district court make a reasonable ability to pay determination satisfies the Constitution. *Haines*, 360 N.W.2d at 794. In addition, a defendant may also seek modification under Iowa Code section 910.7. *Id.*; Iowa Code § 910.7. There can be no "chilling" of the right to counsel when an offender is given the opportunity to challenge the reasonable ability to pay. In addition, the fact that an offender must seek a reasonable ability to pay determination either at sentencing or within thirty days provides an offender with the right to counsel as a critical stage in the proceeding. Iowa Code § 910.2A(3)(a); *State v. Alspach*, 554 N.W.2d 882, 883–84 (Iowa 1996) (concluding a defendant is entitled to court-appointed counsel

when restitution is imposed as part of the original sentencing order or supplemental order). The new statutory scheme does not violate West Vangen's constitutional right to counsel.

West Vangen next contends that Iowa Code section 910.2A violates the right to due process guaranteed by the Fifth and Fourteenth Amendments to the federal Constitution and Article I, section 9 of the Iowa Constitution because it is "fundamentally unfair." *See* Appellant's Br. at pp.69–74. While she does not specify whether she is alleging a denial of procedural due process or substantive due process, she cannot demonstrate a denial of either and her claim must fail.

Procedural due process.

Procedural due process requires notice and the opportunity to be heard prior to depriving one of life, liberty, or property. *Knight v. Knight,* 525 N.W.2d 841, 843 (Iowa 1994). However, "due process 'is not a technical conception with fixed content unrelated to time, place and circumstances.' " *Cafeteria & Restaurant Workers Union v. McElroy,* 367 U.S. 886, 895 (1961) (quoting *Joint Anti–Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring)). Rather, it is "flexible and calls for such procedural

protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972).

In *Mathews v. Eldridge,* 424 U.S. 319 (1976), the United States Supreme Court identified relevant criteria to look for in determining what process is due prior to depriving one of a property interest. The Court said a procedural due process analysis must balance (1) the private interest affected, (2) the risk of erroneous deprivation and probable value, if any, of additional or substitute procedural safeguards, and (3) the government's interest. *Id.* at 335.

Applying this test to these facts, the private interest here is the property interest in the offender's assets and financial future. The risk of erroneous deprivations is small given that an offender may seek a hearing either under sections 910.2A or 910.7 on their reasonable ability to pay category "B" restitution and may offer evidence to support their claim that they do not have that ability. Iowa Code §§ 910.2A(2)(a)–(d). The government has a legitimate interest in recovering the costs of the prosecution as well as the cost of attorney fees for indigent defense. This court has long recognized that requiring an offender to pay for these costs instills responsibility in the offender for their actions. *State v. Bonstetter*, 637 N.W.2d 161,

165 (Iowa 2001) (citing *State v. Kleusner*, 389 N.W.2d 370,372-73 (Iowa 1986)). There is no denial of procedural due process under section 910.2A.

Substantive due process.

Under the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution, the State is forbidden from infringing on certain fundamental liberty interests, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. *Reno v. Flores,* 507 U.S. 292, 302 (1993). Article I, section 9 of the Iowa Constitution provides the same due process protections found in the Fourteenth Amendment to the United States Constitution. Because West Vangen does not allege the that the federal right to due process and her right under the Iowa Constitution should be analyzed differently, there should be no separate analysis. *State v. Miner,* 331 N.W.2d 683, 688 (Iowa 1983).

The first step in analyzing a substantive due process challenge is to identify the nature of the individual right involved. *Reno,* 507 U.S. at 302; *Santi v. Santi,* 633 N.W.2d 312, 317 (Iowa 2001); *State v. Cronkhite,* 613 N.W.2d 664, 667 (Iowa 2000); *State v. Klawonn,* 609 N.W.2d 515, 519 (Iowa 2000). If the asserted right is fundamental, we

apply strict scrutiny analysis. *Flores,* 507 U.S. at 305; *Klawonn,* 609 N.W.2d at 519. We must then determine whether the government action infringing the fundamental right is narrowly tailored to serve a compelling government interest. *Santi,* 633 N.W.2d at 318; *Klawonn,* 609 N.W.2d at 519. Alternatively, if we find the asserted right is not fundamental, the statute must merely survive the rational-basis test. *Klawonn,* 609 N.W.2d at 519. To withstand rational basis review, there must be a reasonable fit between the government interest and the means utilized to advance that interest. *Flores,* 507 U.S. at 305; *Santi,* 633 N.W.2d at 317.

West Vangen asserts that the provisions of section 910.2A are "fundamentally unfair." Appellant's Br. at pp.73–74. Aside from this general claim, she has not affirmatively set forth the right being infringed. The State, however, disputes that West Vangen's claim impacts a fundamental right. Rather, it should be analyzed under the rational-basis test. The rational-basis test under a substantive due process challenge is:

> There is no dispute about the rule that, to be constitutional, a statute must have a definite, rational relationship to a legitimate purpose.

> A party who challenges a statute has the burden of proving it unconstitutional, and must negate every reasonable basis upon which the ordinance must be sustained. This means that the challenger has the burden of producing the evidence, and persuading the court, of the statute's lack of ration nexus with its supposed purpose.
>
> If reasonableness of the statute's nexus to is purported end is fairly debatable, it must be allowed to stand.

Klawonn, 609 N.W.2d at 519 (quoting *Exira Community Sch. Dist. v. State*, 512 N.W.2d 787, 793 (Iowa 1994)) (cleaned up).

As discussed above, the requirement that an offender repay the costs of the prosecution and court-appointed attorney fees serves a remedial purpose in reimbursing the respective counties for the costs of the prosecution as well as the indigent defense fund for the cost of attorney fees. This requirement allows for the normal business of the county to proceed and replenishes the coffers of the indigent defense fund to keep that program working. An offender may feel they are being punished by having to pay costs, but the repayment of those costs serves a rehabilitative purpose in instilling responsibility in the offender. *Bonstetter*, 637 N.W.2d at 165.

It is also important to note that in *State v. Klawonn*, 609 N.W.2d 515, 520 (Iowa 2000), the Iowa Supreme Court considered

and rejected a similar due process challenge to Iowa Code section 910.3B. Section 910.3B requires an offender who 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's estate. . . .

Iowa Code § 910.3B. In *Klawonn*, the defendant alleged the $150,000 restitution bore no rational relationship to any governmental interest. *Klawonn*, 609 N.W.2d at 519. The Court disagreed and held:

> The government interests in restitution awards under section 910.3B are both compensation to the family and punishment for the defendant. We find the award pursuant to section 910.3B is a "reasonable fit" between the above government interests and the means through which the legislature has chosen to accomplish them.

Id. at 520. The same is true here. The presumption that an offender can pay restitution for the court costs and their legal assistance serves to compensate the State for at least a portion of the costs incurred for the prosecution. The amount ordered in this case reflect a portion of the actual amount of costs incurred. *See* Sent. Tr. 9:2–:4 (capping restitution for attorney fees at $60); *see also* 20-1647 Combined General Docket Report at p.15 (showing attorney fees of $60 plus

$240 court costs). Requiring an offender to repay these court costs and attorney fees is a reasonable fit between the government's interest and how the legislature has elected to accomplish them. There is no substantive due process violation.

Section 910.2A is constitutional. This Court should affirm.

III. West Vangen has Failed to Affirmatively Show the Sentencing Court Relied on an Improper Factor.

Preservation of Error

The normal rules of error preservation do not apply to a direct appeal of a sentence. *See State v. Cooley*, 587 N.W.2d 752, 754 (Iowa 1998). The State does not contest error preservation.

Standard of Review

"A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as the trial court's consideration of impermissible factors." *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998) (citing *State v. Wright*, 340 N.W.2d 590, 592 (Iowa 1983)). The defendant must overcome the presumption of regularity when challenging a court's sentence. *See State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983). "Sentencing decisions of the district court are cloaked with a strong presumption in their favor." *State v. Thomas*,

547 N.W.2d 223, 225 (Iowa 1996) (citing *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995)).

Merits

Generally, if the sentencing court relied on improper factors in imposing a sentence, our appellate courts would remand for resentencing. *See State v. Gonzalez*, 582 N.W.2d 515, 517 (Iowa 1998). The same is true even if the sentencing factor was secondary, as the court will not speculate about the weight given to a particular factor. *See State v. Messer*, 306 N.W.2d 731, 733 (Iowa 1981). A sentence imposed within the statutory limits "is cloaked with a strong presumption in its favor and will only be overturned for an abuse of discretion or the consideration of inappropriate matters." *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002) (citing *Pappas*, 337 N.W.2d at 494). "A defendant must affirmatively show that the sentencing court relied on improper evidence to overcome this presumption of validity." *State v. Wickes*, 910 N.W.2d 554, 572 (Iowa 2018).

West Vangen argues she should be resentenced because the sentencing court considered an improper factor. Appellant's Br. at p.78. Specifically, she challenges her sentence because, in her view,

"the court's statements that it relied upon West Vangen's 'refusal to take responsibility' was a clear reference to the State's argument that West Vangen refused to take responsibility by forcing the State to prove her guilty in a trial, during a pandemic, no less." Appellant's Br. at p.77. The State disagrees with West Vangen's characterization and submits she has failed to overcome the presumption of regularity. The sentence should be affirmed.

" 'A defendant's acceptance of responsibility for the offense, and a sincere demonstration of remorse, are proper considerations in sentencing. They constitute important steps toward rehabilitation.' " *State v. Knight*, 701 N.W.2d 83, 87 (Iowa 2005) (quoting *State v. Sims*, 608 A.2d 1149, 1158 (Vt. 1991)). To avoid crossing the "fine line" of punishing the defendant for exercising his right to a trial, the sentencing court "must carefully avoid any suggestions in its comments at the sentencing stage that it was taking into account the fact defendant had not pleaded guilty but had put the prosecution to its proof." *Id.* (quotation omitted). Because "a defendant's lack of remorse is highly pertinent to evaluating his need for rehabilitation and his likelihood of reoffending," the court may consider that factor "as evidenced by facts other than the defendant's not-guilty plea." *Id.*

at 88; *see, e.g.*, *State v. Lovan*, No. 12-0716, 2013 WL 541643, at *3 (Iowa Ct. App. Feb. 13, 2013) ("[T]he court appropriately considered whether Lovan was remorseful and whether he took responsibility for his involvement in the crimes, [and] could also consider Lovan's voluntary statement as it bore on these sentencing factors."); *State v. Wilson*, No. 05-0595, 2006 WL 2265432, at *3 (Iowa Ct. App. Aug. 9, 2006) (quoting *Knight*, 701 N.W.2d at 88) ("[T]he court focused on Wilson's attitude rather than on his refusal to admit to the crime. The sentencing decision, therefore, was not based on Wilson's 'decision to stand trial.' ").

Here, the court included West Vangen's refusal to accept responsibility for her actions as one factor considered, and the court's comments demonstrate the court did not impermissibly consider the exercise of her rights as part of that consideration:

> The reasons for this sentence are the facts and circumstances surrounding the case, this Court's knowledge of the testimony at trial, the need to have victim restitution paid in this matter, *the defendant's non-acceptance of responsibility in this case*. Furthermore, it's the Court's feeling that the sentence provides the maximum protection for the community as well as the maximum opportunity for rehabilitation to the defendant.

Sent. Tr. 9:18–10:1 (emphasis added). The court again included a more expansive list of factors it considered in the written sentencing order:

> The reasons for this sentence include information provided the Court at sentencing and as set out in the court file herein, including the Defendant's age, family circumstances, education, prior criminal record, the facts and circumstance of this offense, and the belief that this sentence will provide the greatest benefit to the Defendant and the community. The Court has also considered Defendant's need to timely pay victim restitution and *Defendant's failure to accept responsibility*.

Sent. Order (emphasis added); App. 28–29. The State submits the court's consideration of her refusal to accept responsibility was appropriate.

The court's conclusion that West Vangen failed to take responsibility was supported by the record and was not impermissibly based on her exercise of her rights. At the sentencing hearing, it is true the State mentioned during its argument that West Vangen failed to accept responsibility for her actions including by proceeding to trial: "The defendant had multiple opportunities to take responsibility and do the right thing. It took a day and a half of evidence and argument in the middle of a pandemic for the defendant to be

brought to justice in this matter." Sent. Tr. 3:15–:19. But more importantly, West Vangen herself, during her allocution, once again directly refused to take responsibility and refused to show remorse for her actions: "So, yeah, like he said, I'm going to file an appeal. I didn't do this." Sent. Tr. 8:11–:13; *see Knight*, 701 N.W.2d at 87–88 (quoting *State v. Shreves*, 60 P.3d 991, 996 (Mont. 2002)) ("A defendant's lack of remorse can be discerned 'by any admissible statement made by the defendant pre-trial, at trial, or post-trial,' or by 'other competent evidence properly admitted at the sentencing hearing.' "). The court's consideration of West Vangen's continued refusal to accept responsibility or show remorse, even at the time of her sentencing, was appropriate. The court could consider West Vangen's defiant attitude and her refusal to start down the path of rehabilitation by showing remorse or accepting responsibility for her actions. Because West Vangen cannot affirmatively show the sentencing court was relying on an improper consideration of the exercise of her trial rights, and not the proper consideration of her statements at sentencing refusing to accept responsibility, her claim must fail because she cannot overcome the presumption of regularity.

See Wickes, 910 N.W.2d at 572. This Court should affirm her sentence.

CONCLUSION

This Court should affirm Erica Lyne West Vangen's conviction and sentence.

REQUEST FOR NONORAL SUBMISSION

Oral submission is unnecessary.

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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Dated: October 26, 2021

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