IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	S.CT. NO.16-1980
	)	
DUSTIN JAMES ORTIZ,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE JEANIE K. VAUDT, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 13th day of July, 2017, 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 Dustin Ortiz, No. 1012756, Correctional Treatment Unit, 2000 N 16th St., Clarinda, IA 51632-1174.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions:

Statutes and Court Rules:

Other Authorities:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED IN GIVING JURY INSTRUCTIONS 19 (ROBBERY 2ND) AND 20 (ROBBERY 3RD) AS THE INSTRUCTIONS DESCRIBED OFFENSES WHICH REQUIRE THE SAME ACTS?

Authorities

Alcala v. Marriott Int'l, Inc., 880 N.W.2d 699 (Iowa 2016)

State v. Frei, 831 N.W.2d 70, 73 (Iowa 2013)

Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984)

State v. Marshall, 2016 WL 4803763 at *1
(Iowa Ct. App. September 16, 2016)

United States v. Sanchez Guerrero, 546 F.3d 328, 332
(5th Cir.2008)

United Sates v. Gonzalez–Lopez, 548 U.S. 140, 150 (2006)

Arizona v. Fulminante, 499 U.S. 279, 307-09, 111 S.Ct. 1246, 1264-65, 113 L.Ed.2d 302 (1991)

State v. Heemstra, 721 N.W.2d 549, 559-59 (Iowa 2006)

Iowa R. Crim. Proc. 2.24(2)(b)(5)

Iowa R. Crim. Proc. 2.24(2)(b)(7)

State v. Lathrop, 781 N.W.2d 288, 297 (Iowa 2010)

State v. Becker, 818 N.W.2d 135, 141 (Iowa 2012)

State v. Mays, 204 N.W.2d 862, 865 (Iowa 1973)

Iowa Code § 708.1(2) (2015)

U.S. v. Campbell, 410 F.3d 456, 461 (8th Cir. 2005)

United States v. Rodgers, 18 F.3d 1425, 1429 (8th Cir.1994)

Iowa Code § 902.8 (2015)

Iowa Code § 902.9 (2015)

Iowa Code § 902.12 (2015)

Iowa Const. art. I § 9

State v. Seering, 701 N.W.2d 655, 662 (Iowa 2005)

State v. Effler, 769 N.W.2d 880, 895 (Iowa 2009)

State v. Pace, 602 N.W.2d 764, 771 (Iowa 1999)

II. WHETHER THE EVIDENCE WAS SUFFICIENT TO PROVE AN ASSAULT TOOK PLACE AS ORTIZ NEVER FACED THE COMPLAINING WITNESS AND MADE NO THREATENING MOVEMENTS WITH THE KNIFE, NEITHER DID ORTIZ THREATEN THE COMPLAINING WITNESS? WAS THE VERDICT INCONSISTENT WITH THE EVIDENCE AND THE FACTUAL BASIS FOR STATE'S CHARGING DECISION?

Authorities

State v. Thomas, 561 N.W.2d 37, 39 (Iowa 1997)

Iowa Code § 711.2 (2015)

Iowa Code § 711.3 (2015)

Iowa Criminal Jury Instruction No. 1100.2

Iowa Code § 711.3A (2016)

Iowa Code § 708.1(2) (2015)

Iowa Code § 708.1(2) (2015)

State v. Heard, 636 N.W.2d 227, 231 (Iowa 2001)

State v. Keeton, 710 N.W.2d 531, 534 (Iowa 2006)

State v. Taylor, 140 Iowa 470, 118 N.W. 747, 748-49 (Iowa 1908)

State v. Halstead, 791 N.W.2d 805, 815-16 (Iowa 2010)

III. WAS COUNSEL INEFFECTIVE IN FAILING TO OBJECT TO THE STATUTES SUPPORTING JURY INSTRUCTIONS 19 AND 20 AS BEING UNCONSTITUTIONALLY VAGUE AND OVERBROAD?

Authorities

Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984)

State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982)

State v. Kellogg, 263 N.W.2d 539, 543 (Iowa 1978)

U.S. Const. Amend. VI

U.S. Const. Amend. XIV

Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed2d 674, 692 (1984)

Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981)

Iowa Const. Art. I § 10

State v. Brueggar, 773 N.W.2d 862, 883 (Iowa 2009)

State v. Buck, 510 N.W.2d 850, 853 (Iowa 1994)

State v. Bass, 385 N.W.2d 243, 245 (Iowa 1986)

State v. Goff, 342 N.W.2d 830, 838 (Iowa 1983)

Iowa Code § 711.3A (2016)

Iowa Code § 711.3 (2015)

State v. Wiederien, 709 N.W.2d 538, 542 (Iowa 2006)

State v. Reed, 618 N.W.2d 327, 332 (Iowa 2000)

State v. Hunter, 550 N.W.2d 460, 463 (Iowa 1996) *overruled on other grounds by* State v. Robinson, 618 N.W.2d 306 (Iowa 2000)

State v. Musser, 721 N.W.2d 734, 745 (Iowa 2006)

City of Chicago v. Morales, 527 U.S. 41, 52, 119 S.Ct. 1849, 1857, 144 L.Ed.2d 67, 77–78 (1999)

Iowa Criminal Jury Instruction No. 1100.2

Iowa Code § 708.1(2)

Iowa Code § 708.1(2)(b)

State v. Cox, 781 N.W.2d 757, 761 (Iowa 2010)

Iowa Const. art. I, § 9

Broadrick v. Oklahoma, 413 U.S. 601, 602, 93 S.Ct. 2908, 2911, 37 L.Ed.2d 830 (U.S. 1973)

State v. Price, 237 N.W.2d 813, 816 (Iowa 1976)

U.S. v. Reese, 92 U.S. 214, 220, 2 Otto 214, 23 L.Ed. 563 (U.S. 1875)

Iowa Const. Art. III § I

Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (U.S. 1972)

State v. Pace, 602 N.W.2d 764, 771 (Iowa 1999)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because this case involves substantial issues of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c).

1. Is it possible to ascertain a difference in the acts required pursuant to Robbery in the Second Degree and Robbery in the Third Degree based upon the statutes in question?

2. Can a determination that an assault occurred be based upon facts wherein the suspect, although carrying a knife, is running from the victim, does not face the victim and does not speak to the victim?

3. Are Iowa Code §§ 711.1, 711.3 and 711.3A when considered together, void for vagueness and/or overly broad?

STATEMENT OF THE CASE

Nature of the Case: This is an appeal from conviction of the offense of Robbery in the Second Degree in Violation of Iowa Code §§ 711.1 and 711.3 (2015).

Course of Proceedings: Mr. Ortiz was charged with Robbery in the First Degree in Violation of Iowa Code §§ 711.1 and 711.2 (2015)[1] by trial information on July 22, 2016. (Trial Information) (App. pp. 4-5).

On July 26, 2016, Mr. Ortiz filed a written arraignment in which he demanded his right to speedy trial. (Written Arraignment) (App. pp. 6-8).

The case went to trial and the jury returned a verdict of guilty of the lesser-included offense of second degree robbery. (Verdict Forms) (App. pp. 17-18).

On November 11, 2008, Mr. Ortiz was sentenced to serve

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[1] All citations to the Iowa Code refer to the 2015 edition unless noted otherwise.

a term of incarceration consisting of 25 years. (11/08/16 Sentencing Order) (App. pp. 25-28).

A notice of appeal was filed on November 18, 2016. (Notice of Appeal) (App. pp. 29-30).

Facts: Patricia Chavez is the owner of Estrellita Fashion, a clothing store, located at 2501 Easton Boulevard, Des Moines Iowa. (Tr. pp. 145 L 21-23, 148 L 6-16).

Chavez was working in the store alone on June 15, 2016, when she observed a man taking an item of clothing that was displayed outside. (Tr. pp. 148 L 17-25, 149 L 1-14, 157 L 15-25, 158 L 1-1-9, Exhibit 11 picture of store outside, State's Exhibit 1 Skirt) (App. pp. 12, 3).

Chavez ran after the man who she described as being tall, thin, white, wearing a black shirt, a Dickie and black shorts and carrying a backpack. (Tr. pp. 151 L 11-25, 152 L 1-12). According to Chavez, the man brandished a knife. (Tr. p. 152 L 13-24). She went back to the store, locked herself inside

and called police. (Tr. pp. 153 L 13-17, 156 L 3-8, 158 L 22-25, 159 L 1-1-7).

She was not able to observe the man's face; however, the police took her to a location where Ortiz was detained and she identified him. (Tr. pp. 152 L 25, 153 L 1, 160 L 6-25, 161 L 1-4). Ortiz was wearing shorts identical to those worn by the individual who absconded with the skirt. (Tr. p. 161 L 5-22, Exhibits 4 and 5 photographs of Dustin Ortiz) (App. pp. 4-6).

However, she was not certain that the man who the police were detaining was the same man who took the skirt as he was not wearing the shirt she had previously seen. (Tr. p. 167 L 9-15).

Chavez was somewhat ambiguous in identifying the knife used stating "I think it could be this one..." indicating State's Exhibit 8. Chavez could not supply the necessary foundation for the admission of Exhibit 8 into evidence. (Tr. pp. 164 L 16-25, 165 L 1-25, 166 L 1-9, Exhibit 8 photograph of knife) (App. p. 10).

At trial Chavez testified that she saw the individual in question take the skirt from the mannequin while sewing with a machine. However, when she was deposed, Chavez testified that she heard a noise and then went outside where she observed the individual in question passing by. (Tr. pp. 168 L 4-25, 169-171 L 1-25, 172 L 1-5).

The door to the establishment is far to the left of the scene depicted in State's Exhibit 11. Defendant's Exhibit A, a picture of the store, was shown to Chavez and she admitted that the door was not visible in that picture and that she had to go around the corner to get to the alley. (Tr. pp. 180 L 10-25, 181 L 1-24).

Chavez admitted that when she got outside, the individual was already running away (although later she said he was walking) and ran around the back of the store where she yelled at him. (Tr. pp. 172 L 6-25, 173-174 L 1-25, State's Exhibit 11 photo of store, State's Exhibit 12 photo of rear of store) (App. pp. 12-13). She noted he was wearing a

hat, but did not observe him to be wearing headphones. (Tr. p. 175 L 1-9).

Chavez testified that she got to within 10 feet of the man at which time she observed the knife; he was facing away from her. (Tr. pp. 175 L 10-25, 176 L 1-4). The man never stopped and turned toward her, nor did he make any threatening movements with the knife. (Tr. p. 176 L 5-16).

Chavez admitted that she did not get a good look at the knife and she estimated that it was about 4-5 inches in length. (Tr. pp. 178 L 10-25, 179 L 1-3).

Brian Vance is employed as a sergeant with the Des Moines Police Department. (Tr. pp. 185 L 19-21, 186 L 10-13). On June 15, 2016, he was dispatched to a robbery on Easton Boulevard. (Tr. pp. 186 L 24-25, 187 L 1-18).

The description given to the police was of a white man, tall, black hair and carrying a black backpack. (Tr. pp. 187 L 19-25, 188 L 1- 4). Another officer observed an individual matching the description, so Vance went to the 2200 block of

East 27th to meet him. The individual detained was Mr. Ortiz. (Tr. pp. 188 L 20-25, 189 L 1-25, 190 L 1-12, State's Exhibits 4 & 5 photos of Dustin James Ortiz) (App. pp. 4-6).

According to Vance, Ortiz told him he had just exited the bus from the south side and was going to a friend's house. (Tr. pp. 190 L 18-25, 191 L 1-6). Vance patted Ortiz down and discovered a knife in the front pocket of his shorts. (Tr. p. 191 L 7-21, State's Exhibit 8 photo of knife) (App. p. 10).

Additionally, Vance discovered an item matching the description of that which Chavez claimed was stolen. (Tr. p. 194 L 20-24).

Detective Matt Towers, of the Des Moines Police Department, testified that after Ortiz was arrested, he tendered a pocketknife to Towers. (Tr. pp. 198 L 14-25, 199 L 1-6, 200 L 1-21, State's Exhibit 7 photo of pocketknife) (App. pp. 8-9). Towers admitted that it is not unusual for individuals to carry pocketknives on their persons. (Tr. p. 202 L 1-5).

Tim Coughenower, of the Des Moines Police Department, was summoned to the scene of the incident and talked to Patricia Chavez. (Tr. pp. 202 L 15-17, 204 L 19-24). He transported Chavez to the location at which Ortiz was being detained. (Tr. pp. 207 L 1-25, 208 L 1-15, State's Exhibits 4 and 5 photographs of Ortiz) (App. pp. 4-6).

Coughenower admitted that Chavez was "...hesitant in initially making an identification..." (Tr. pp. 210 L 22-25, 211 L 1-7). It appeared to him that she was able to identify the backpack. (Tr. p. 211 L 2-4).

On cross-examination Vance admitted that, consistent with his deposition testimony, he never spoke to Patricia Chavez. (Tr. pp. 197 L 11-25, 198 L 1-4).

Additional relevant facts will be discussed below.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GIVING JURY INSTRUCTIONS 19 (ROBBERY 2ND) AND 20 (ROBBERY 3RD) AS THE INSTRUCTIONS DESCRIBED OFFENSES WHICH REQUIRE THE SAME ACTS.

A. Standard of Review: Review of jury instruction issues is for errors at law. Alcala v. Marriott Int'l, Inc., 880 N.W.2d 699 (Iowa 2016). A failure to provide a requested instruction is reviewed for abuse of discretion. State v. Frei, 831 N.W.2d 70, 73 (Iowa 2013). Constitutional issues are reviewed de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

B. Preservation of Error: Error was preserved by counsel's objection to the instruction given and the court's adverse ruling. (Trial Tr. pp. 238 L 19-25, 239-254 L 1-25, 255 L 1-21, Jury Instructions 18, Robbery in the First Degree, 19 Robbery in the Second Degree, 20 Robbery in the Third Degree, 21 Simple Assault, 22 Assault Defined) (App. pp. 11, 12-15).

Counsel filed a motion for new trial alleging error based upon the instructions, but withdrew the motion prior to

sentencing. (Sent. Tr. pp. 2-8 L 1-25, 9 L 1-9). It is Ortiz' position that this did not waive the court's ruling at trial. Additionally, this jury instruction issue consists of structural error and, therefore, not subject to waiver or harmless error analysis. State v. Marshall, 2016 WL 4803763 at *1 (Iowa Ct. App. September 16, 2016) (citing United States v. Sanchez Guerrero, 546 F.3d 328, 332 (5th Cir.2008) and United Sates v. Gonzalez–Lopez, 548 U.S. 140, 150 (2006); Arizona v. Fulminante, 499 U.S. 279, 307-09, 111 S.Ct. 1246, 1264-65, 113 L.Ed.2d 302 (1991)).

C. Discussion: A hearing on jury instructions was held after the close of all evidence. At hearing, counsel for Ortiz noted the problem with reconciling the jury instructions for robbery in the first degree and robbery in the second degree with the instruction for robbery in the third degree. (Tr. pp. 238 L 19-25, 239 L 1-23).

Counsel articulated the problem in terms associated with a conviction for robbery 2nd in a situation wherein there is no

explanation of exactly what behavior differentiates robbery 2nd from robbery 3rd. (Tr. p. 239 L 4-19).

Counsel went on to draw attention to the potential for producing a general verdict which "...does not reveal the basis for a guilty verdict" and prevents the reviewing court from addressing the legality of reasoning supporting the conviction. (Tr. p. 239 L 20-25). State v. Heemstra, 721 N.W.2d 549, 559-59 (Iowa 2006). (Tr. pp. 239 L 24-25, 240-242 L 1-25, 243 L 1-3).

Counsel for Ortiz requested that the marshaling instructions for robbery 1st and 2nd be clarified with the addition of the phrase "'committed an assault with the intent to inflict serious injury'". (Tr. pp. 243 L 4-25, 244 L 1-5). Following argument, in which the State resisted, the court denied Ortiz request. (Tr. pp. 244 L 6-25, 245-254 L 1-25, 255 L 1-21).

Following conviction, Ortiz filed a motion for new trial on the basis of the assertion that the Robbery 2nd and 3rd

instructions describe the same offense as it is impossible to ascertain which theory (contained in Instruction No. 19) the jury relied upon thus producing a general verdict. (12/03/16 Motion for New Trial/Motion In Arrest of Judgment) (App. pp. 22-24).

The jury was given a reasonable doubt instruction as follows:

> INSTRUCTION NO. 8
>
> If there is a reasonable doubt as to any crime, the defendant shall only be convicted of the crime for which there is no reasonable doubt.

(Jury Instruction No. 8 No Reasonable Doubt) (App. p. 9).

The jury was also instructed on the concept of lesser-included offenses:

> INSTRUCTION NO. 17
>
> The allegations of the Trial Information in Count I includes not only the offense of Robbery in the First Degree but also the lesser included offenses of Robbery in the Second Degree, Robbery in the Third Degree, and Assault. You will convict the defendant of the highest of said above named offenses of which he is proven guilty beyond a reasonable doubt, if any, and you will acquit

him of any and all offenses of which he was not proven guilty.

(Jury Instruction No. 17 Lesser-Included Offenses) (App. p. 10).

With both offenses described in instructions 19 and 20 being equal, the jury would understand instruction 17 to require them to convict him of the greater offense.

"The Court both misdirected the jury on a material matter of law pursuant to Iowa R. Crim. Proc. 2.24(2)(b)(5), and the Court has refused to properly instruct the jury pursuant to Iowa R. Crim. Proc. 2.24(2)(b)(7)." (Motion for New Trial p. 1) (App. p. 22).

The instructions given at Ortiz' trial are confusing and contradictory. Theoretically, the jury could have found Ortiz guilty under both instructions 19 and 20. (Jury Instructions No. 19 & 20) (App. pp. 12-13).

"When circumstances make it impossible for the court to determine whether a verdict rests on a valid legal basis or on an alternative invalid basis, we give the defendant the benefit

of the doubt and assume the verdict is based on the invalid ground." State v. Lathrop, 781 N.W.2d 288, 297 (Iowa 2010) (*referencing* State v. Heemstra, 721 N.W.2d 549, 558–59 (Iowa 2006)). (*See* Motion for New Trial p. 2) (App. p. 23).

Ortiz has been prejudiced as it is impossible to ascertain which alternative it embraced in finding him guilty of Robbery in the Second Degree. The provision of counsel's requested instruction would have shed some light the jury's decision, but the court refused to so instruct the jury.

"[P]rejudice will be found ... where the instruction could reasonably have misled or misdirected the jury." State v. Becker, 818 N.W.2d 135, 141 (Iowa 2012). The jury was given instructions (19 & 20) which were confusing and impossible to differentiate.

The jury could have made its determination on one of the following alternatives of element number 2:

a. Committed an assault on Patricia Chavez or
b. Threatened Patricia Chavez with or purposefully put Patricia Chavez in fear of immediate serious injury.

(Jury Instruction No. 19) (App. p. 12).

As argued below, the evidence does not prove that an assault occurred. However, neither does the evidence show that Ortiz threatened Chavez, or that he intentionally put her in fear of immediate serious injury.

"The present case falls under the principle that an instruction submitting an issue unsubstantiated by evidence is generally prejudicial." State v. Mays, 204 N.W.2d 862, 865 (Iowa 1973) (citations omitted).

Complicating matters, is the redundancy of instructions 19 and 20 based upon the definition of assault. Iowa Code § 708.1(2). Ortiz has been prejudiced by this redundancy as the jury could have convicted him of Robbery in the Third Degree based upon instructions 19 and 20 when considered with the assault instruction and the instruction defining assault. (Jury Instructions 21 "Assault" and 22 "Definition of Assault") (App. pp. 14-15).

In withdrawing his motion for new trial, Ortiz was persuaded to do so by the State's threat to file habitual offender enhancement upon retrial.

> A defendant can establish prosecutorial vindictiveness through objective evidence that the prosecutor's decision to seek a more severe sentence was intended to punish the defendant for the exercise of a legal right.

U.S. v. Campbell, 410 F.3d 456, 461 (8th Cir. 2005) (*citing* United States v. Rodgers, 18 F.3d 1425, 1429 (8th Cir.1994)).

Objective proof of prosecutorial vindictiveness appears in the record of the instant matter. Counsel filed a motion for new trial based upon the incorrect jury instructions in question. (Motion for New Trial) (App. pp. 22-24). At hearing, prior to sentencing, counsel for Ortiz withdrew the motion for new trial based upon the prosecutor's stated intention of filing enhanced charges should a new trial be granted. (Sent. Tr. pp. 3 L 2-25, 4-8 L 1-25, 9 L 1-11). The State was even willing to concede to the request for a new trial, a tantamount admission to the complained of error. (Sent. Tr. p. 3 L 23-25).

Vindictiveness can also be seen in the State's threat to file the enhancement upon retrial as it would have increased his sentence from 10 years to 15. (Sent. Tr. pp. 4 L 11-25, 5 L 1-25, 6 L 1-10). *See* Iowa Code §§ 902.8, 902.9 & 902.12.

> Alternatively, the defendant is entitled to a presumption of vindictiveness where there exists a reasonable likelihood of vindictiveness, which may arise when prosecutors increase the number or severity of charges. Id. at 1429–30 (quoting Goodwin, 457 U.S. at 373, 102 S.Ct. 2485); United States v. Punelli, 892 F.2d 1364, 1371 (8th Cir.1990).

The State threatened to increase the severity of the charge based upon Ortiz being granted a new trial.

Accurate instructions are guaranteed by due process and the right to a fair trial guaranteed by Article I, section 9 of the Iowa Constitution. Article I, section 9 of the Iowa Constitution guarantees that "... no person shall be deprived of life, liberty, or property without due process of law." Iowa Const. art. I § 9. In the past, this Court has interpreted the United States and the Iowa Constitutions in similar fashion. State v. Seering, 701 N.W.2d 655, 662 (Iowa 2005). However, this

Court has expressed a willingness to depart from the federal precedents in important state constitutional questions. State v. Effler, 769 N.W.2d 880, 895 (Iowa 2009)(Appel, J, specially concurring).

This matter should be reversed and remanded for retrial for the offense of Robbery in the Third Degree as that is highest level offense charged for which proof beyond a reasonable doubt could, arguably, exist. All statutory ambiguities must be resolved in favor of the accused. State v. Pace, 602 N.W.2d 764, 771 (Iowa 1999) (citation omitted).

However, should this Court reverse for retrial on the charge of Robbery in the Second Degree, the State should not be allowed to file an habitual offender enhancement as that would constitute prosecutorial vindictiveness visited upon Ortiz in retaliation for exercising his constitutional rights to due process including his right to appeal his conviction.

II. THE EVIDENCE WAS INSUFFICIENT TO PROVE AN ASSAULT TOOK PLACE AS ORTIZ NEVER FACED THE COMPLAINING WITNESS AND MADE NO THREATENING MOVEMENTS WITH THE KNIFE, NEITHER DID ORTIZ THREATEN THE COMPLAINING WITNESS. THE VERDICT IS INCONSISTENT WITH THE EVIDENCE AND THE FACTUAL BASIS SUPPORTING THE STATE'S CHARGING DECISION.

A. Standard of Review: Review for sufficiency of evidence claims is for errors at law. State v. Thomas, 561 N.W.2d 37, 39 (Iowa 1997).

B. Preservation of Error: Error was preserved by virtue of Ortiz' motions for judgment of acquittal and adverse rulings (Tr. pp. 218 L 16-25 219-225 L 1-25, L1).

C. Discussion: Ortiz was initially charged with robbery in the first degree based upon the use of a dangerous weapon. (Trial Information) (App. pp. 4-5).

> A person commits robbery in the first degree when, while perpetrating a robbery, the person purposely inflicts or attempts to inflict serious injury, or is armed with a dangerous weapon. Robbery in the first degree is a class "B" felony.

Iowa Code § 711.2.

The jury returned a verdict of second degree robbery:

> All robbery which is not robbery in the first degree is robbery in the second degree, except as provided in section 711.3A. Robbery in the second degree is a class "C" felony.

Iowa Code § 711.3.

The elements of this offense are reflected in the standard marshalling instruction:

> 1100.2 Robbery In The Second Degree - Elements. The State must prove all of the following elements of Robbery In The Second Degree:
>
> 1. On or about the _____ day of _____, 20___, the defendant had the specific intent to commit a theft.
>
> 2. In carrying out [his] [her] intention or to assist [him] [her] in escaping from the scene, with or without the stolen property, the defendant:
>
> a. Committed an assault on (victim).
> b. Threatened (victim) with or purposely put (victim) in fear of immediate serious injury.
> c. Threatened to immediately commit (name of forcible felony).

Iowa Criminal Jury Instruction No. 1100.2.

The jury was also instructed on the offense of robbery in the third degree:

> 1. A person commits robbery in the third degree when, while perpetrating a robbery, the person commits an

assault as described in section 708.2, subsection 6, upon another person.
2. Robbery in the third degree is an aggravated misdemeanor.

Iowa Code § 711.3A.

Regardless of the level of the offense, the commission of an assault is necessary component. Without an assault, there is no robbery.

Assault is defined in the Iowa Code as follows:

A person commits an assault when, without justification, the person does any of the following:
a. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.
b. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.
c. Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.

Iowa Code § 708.1(2).

The facts of the instant case do not support the commission of an assault, or the exhibition of threatening behavior.

Chavez testified that when she got outside he was leaving the outside front area of her store. (Tr. pp. 172 L 6-25, 173-174 L 1-25).

At all times Ortiz was facing away from Chavez, and was moving away from her. Ortiz never turned toward her, nor did he use the knife in a threatening manner. (Tr. pp. 175 L 10-25, 176 L 1-16).

Chavez never saw Ortiz' face. (Tr. pp. 152 L 25, 153 L 1, 160 L 6-25, 161 L 1-4).

These facts are underscored by Chavez' hesitation to identify Ortiz. (Tr. pp. 210 L 22-25, 211 L 1-7). Chavez was not certain Ortiz was the same man who took the skirt. (Tr. p. 167 L 9-15).

There is no proof of the existence of specific intent as required for the commission of an assault. Iowa Code § 708.1(2) (2015).

Contrast the facts of State v. Heard wherein the existence of an assault was at issue:

> Heard's use of a bag over his head and socks over his hands signaled his intention to commit some unauthorized act, placing the clerk in fear that she would be harmed, injured or offended in some fashion if she failed to comply with his instructions to give him the money.

State v. Heard, 636 N.W.2d 227, 231 (Iowa 2001).

The Supreme Court found that "overt acts" were committed including the defendant's demand for money and his order to the clerk to lie down. State v. Heard at 232.

The Court also found the evidence sufficient to support the commission of an assault in State v. Keeton:

> The surveillance video of the incident offered into evidence at trial showed that the clerk blocked one of the double doors as Keeton tried to exit by standing in front of the door. After the clerk attempted to retrieve the money, Keeton moved in the direction of the other door to exit, and the clerk lunged in front of that door to block Keeton from leaving. Keeton then backed up and began to walk toward the clerk with his hand extended, holding the money. He then pulled his hand to his chest at the same time as the clerk moved off to the side of the doors to permit Keeton to exit.

State v. Keeton, 710 N.W.2d 531, 534 (Iowa 2006).

Keeton approached the clerk in a threatening manner. Ortiz never approached, nor even faced Chavez. Nor did Ortiz

speak to Chavez. The record does not establish whether Ortiz was even aware of Chavez' presence.

Force and violence are essential to proving the offense of robbery. State v. Taylor, 140 Iowa 470, 118 N.W. 747, 748-49 (Iowa 1908).

There is no evidence of force, violence or threatening behavior. At all relevant times, Ortiz was trying to get away with Chavez in pursuit of him. Taking the facts if the instant case into consideration, would it even be possible to commit an assault while fleeing? The resounding answer must be "No".

Factually, there is no basis for an assault without the use of a weapon. The trial information asserts that an assault was committed while Ortiz was in possession of a dangerous weapon. (Trial Information) (App. pp. 4-5). The jury returned a verdict of robbery in the second degree. The jury necessarily found that Ortiz was not armed with a dangerous weapon, therefore, no assault could have been committed under the State's theory as evidenced by the trial information.

The State's entire case depended upon the existence and use of a dangerous weapon. In its closing argument, the State indicated to the jury that Ortiz brought a knife which was intended to place Chavez in "...fear of immediate physical contact which, obviously, can be painful..." (Tr. p. 272 L 12-16).

The State stressed, to the jury, that Ortiz was in possession of two knives, that Chavez indicated that he was armed with a "dangerous weapon" and that knives are "...capable of inflicting death". (Tr. pp. 274 L 1-25, 275 L 1-16).

Other references by the State in closing argument include the rhetorical question "...if you don't know why they are following you, why bring out a knife?" (Tr. pp. 289 L 9-14, 291 L 5-11).

The verdict in the instant case, although not involving a compound felony, is inconsistent with the facts pled by the

State. Consider the reasoning, provided by the Court, in State v. Halstead:

> "A jury simply could not convict Halstead of the compound crime of assault while participating in a felony without finding him also guilty of the predicate felony offense of theft in the first degree. There is simply no exit from this air-tight conundrum."

State v. Halstead, 791 N.W.2d 805, 815-16 (Iowa 2010).

Neither is there an exit from the air-tight conundrum of the State's charge necessitating assault by use of a dangerous weapon and the jury acquitting him of the use of that weapon.

There was no assault proven at trial. The jury determined Ortiz did not employ a weapon. This matter should be reversed and remanded for dismissal with prejudice.

III. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE STATUTES SUPPORTING JURY INSTRUCTIONS 19 AND 20 AS BEING UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

A. Standard of Review: Because a constitutional right is presented, the standard of review is de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

B. Error Preservation: Neither the defendant nor the

defendant's counsel has the duty to personally raise the issue of whether the defendant received ineffective assistance of counsel during trial. When a claim of ineffective assistance of counsel is made, the Iowa Supreme Court allows an exception to the general rule or error preservation. State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982); see also State v. Kellogg, 263 N.W.2d 539, 543 (Iowa 1978). As the Court stated in Lucas, these claims, realistically, are not made by attorneys against their own action; therefore, the Court does not require the defendant to raise the ineffective assistance of counsel claim before the trial court. State v. Lucas, 323 N.W.2d at 232.

C. Discussion: Pursuant to the Sixth and Fourteenth Amendments of the United States Constitution, the defendant is entitled to the assistance of counsel. Further, the defendant is entitled to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed2d 674, 692 (1984). The test to be applied to determine if a defendant was denied effective assistance of

counsel is "whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competence." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981).

Additionally, pursuant to Article I § 10 of the Iowa Constitution, the defendant is entitled to effective assistance of counsel. State v. Brueggar, 773 N.W.2d 862, 883 (Iowa 2009).

Claims of ineffective assistance of counsel are properly before the Court on direct appeal. See State v. Kellogg, 263 N.W.2d 539, 542 (Iowa 1978). The present record is adequate to resolve all claims on direct appeal. See State v. Buck, 510 N.W.2d 850, 853 (Iowa 1994) ("We will resolve the claim on direct appeal... when the record adequately presents the issue").

When specific errors are relied upon to show the ineffectiveness of counsel, the defendant must demonstrate: "1) counsel failed to perform an essential duty; and 2) prejudices resulted therefrom." Snethen, 308 N.W.2d at 14.

The essential duty prong is "whether counsel's assistance was reasonable considering all the circumstances." Strickland, 466 U.S. at 668, 104 S.Ct. at 2065, 80 L.Ed.2d at 694. Prejudice is found where "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceedings would have been different." Id. 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698.

While it is true that this Court has expressed a preference for resolving claims of ineffective assistance of counsel post-conviction relief to allow the trial counsel an opportunity to explain the reasons, if any, for his acts or omissions, State v. Bass, 385 N.W.2d 243, 245 (Iowa 1986), such claims may be resolved on direct appeal when the trial attorney's acts, or lack thereof, cannot be explained by plausible strategic and tactical considerations. State v. Goff, 342 N.W.2d 830, 838 (Iowa 1983).

Should this Court deem any issues raised in this brief waived, Mr. Ortiz respectfully requests that this Court proceed

on a claim of ineffective assistance of counsel. There exists no explanation of strategic or tactical considerations for not competently litigating the issues in question.

One issue not raised by counsel consists of a claim of vagueness implicating Iowa Code § 711.3A in conjunction with Iowa Code § 711.3. The statutes are vague under both the U.S. and Iowa constitutions. The crimes described in the statutes in question require the same acts as explained in § I above.

"The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits vague statutes." State v. Wiederien, 709 N.W.2d 538, 542 (Iowa 2006) (citing State v. Reed, 618 N.W.2d 327, 332 (Iowa 2000)).

"A defendant charged with the violation of a statute has standing to claim the statute is unconstitutionally vague as applied to him or her." State v. Hunter, 550 N.W.2d 460, 463 (Iowa 1996) *overruled on other grounds by* State v. Robinson, 618 N.W.2d 306 (Iowa 2000). With a vague-as-applied

challenge, the question is "whether the defendant's conduct clearly falls within the proscription of the statute under any construction." State v. Musser, 721 N.W.2d 734, 745 (Iowa 2006) (quoting State v. Hunter, 550 N.W.2d 460, 465 (Iowa 1996) (citation omitted), *overruled on other grounds by* State v. Robinson, 618 N.W.2d 306, 312 (Iowa 2000)) (internal quotation marks omitted).

A criminal statute may be facially vague "...because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." City of Chicago v. Morales, 527 U.S. 41, 52, 119 S.Ct. 1849, 1857, 144 L.Ed.2d 67, 77–78 (1999)(citations omitted).

To meet constitutional requirements, the statute must "provide sufficiently specific limits on the enforcement discretion of the police." City of Chicago v. Morales, 527 U.S. 41 at 64, 119 S. Ct. 1849 at 1863 (1999).

This Court has held that a statute can be impermissibly

vague if it fails to provide people of ordinary intelligence a what conduct it prohibits, or if it allows enforcement that is arbitrary and discriminatory. State v. Musser, 721 N.W.2d 734, 745 (Iowa 2006).

The statutes in question fail both inquiries. The statutes fail to provide citizens of the consequences of certain behavior and they allow discriminatory enforcement as to the level of the offense.

Robbery in the Second Degree is defined as follows:

> All robbery which is not robbery in the first degree is robbery in the second degree, except as provided in section 711.3A. Robbery in the second degree is a class "C" felony.

Iowa Code § 711.3 (2015).

The standard Iowa Criminal Jury Instruction for Robbery in the Second Degree is as follows:

> 1. On or about the _____ day of _____, 20___, the defendant had the specific intent to commit a theft.
>
> 2. In carrying out [his] [her] intention or to assist [him] [her] in escaping from the scene, with or without the stolen property, the defendant:

a. Committed an assault on (victim).
b. Threatened (victim) with or purposely put (victim) in fear of immediate serious injury.
c. Threatened to immediately commit (name of forcible felony).

Iowa Criminal Jury Instruction No. 1100.2.

Instruction 19, the marshalling instruction for Robbery in the Second Degree, was patterned on Jury Instruction No. 1100.2, but did not include alternative 2(c). (Jury Instruction NO. 19) (App. p. 12).

Instruction 20 is based upon Iowa Code § 711.3A which states:

1. A person commits robbery in the third degree when, while perpetrating a robbery, the person commits an assault as described in section 708.2, subsection 6, upon another person.
2. Robbery in the third degree is an aggravated misdemeanor.

Iowa Code § 711.3A (2016).

Instruction 20 provides two elements: 1. Ortiz had the specific intent to commit a theft, and 2. Ortiz committed an assault in attempting to flee, with or without the stolen property. (Instruction No. 20) (App. p. 13).

Robbery, by definition, includes the act of theft § 711.1.

Assault is defined in the Iowa Code as follows:

> A person commits an assault when, without justification, the person does any of the following:
>
> a. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.
> b. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.
> c. Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.

Iowa Code § 708.1(2).

Both statutes require theft and assault. As witnessed by Iowa Code § 708.1(2)(b), elements 2(a) and 2(b) say the same thing. 2(a) recites the necessity of proof of an assault, and 2(b) describes behavior that constitutes an assault.

Ascertaining the level of the offense, Class C Felony or Aggravated Misdemeanor, and the punishments assigned to those offenses, 10 years versus 2 years, is left to police who

initially charge the crime and later to prosecutors who file indictments.

"Article I, section 9 of the Iowa Constitution guarantees that 'no person shall be deprived of life, liberty, or property without due process of law.'" State v. Cox, 781 N.W.2d 757, 761 (Iowa 2010) (quoting Iowa Const. art. I, § 9). This language is very similar to the Fourteenth Amendment to the United States Constitution's declaration that "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV. But Iowa's Constitution should demand greater due process protections to Iowa citizens than does the United States' Constitution.

Ortiz' challenges the statutes in question on an as-applied basis. His conduct falls within the proscription of the statutes. *See* Broadrick v. Oklahoma, 413 U.S. 601, 602, 93 S.Ct. 2908, 2911, 37 L.Ed.2d 830 (U.S. 1973).

Ortiz also challenges the statutes in question as being facially unconstitutional. Ortiz asserts standing by way of exception:

> "One exception is a situation where persons who are not parties to the suit stand to loss by its outcome and yet have no effective avenue of preserving their rights themselves."

State v. Price, 237 N.W.2d 813, 816 (Iowa 1976).

The question, in the instant case, is under the facts of this case, which crime is the perpetrator committing?

> "Penal statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by statute a new offence, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

U.S. v. Reese, 92 U.S. 214, 220, 2 Otto 214, 23 L.Ed. 563 (U.S. 1875).

The separation of powers doctrine is implicated when statutes are vague or overly-broad. Art III § 1 Iowa Constitution. The separation of powers sentiment is captured in Supreme Court's analysis in Grayned v. Rockford:

> A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (U.S. 1972).

This matter should be reversed and remanded for retrial on the offense of Robbery in the Third Degree as all statutory ambiguities must be resolved in favor of the accused. State v. Pace, 602 N.W.2d 764, 771 (Iowa 1999) (citation omitted).

CONCLUSION

WHEREFORE, Dustin James Ortiz respectfully requests that this Court reverse and remand for retrial pursuant to the arguments advanced in §§ I & III above, and dismissal in keeping with those advanced in § II.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $5.13, and that amount has been paid in full by the Office of the Appellate Defender.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

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) because:

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/s/ STEPHAN J. JAPUNTICH Dated: *7/13/17*

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