IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. JERRY DARNELL MOSLEY, Defendant-Appellant.	)))))))))	Supreme Court 17-1087

APPEAL FROM THE IOWA DISTRICT COURT
FOR CLAY COUNTY
HONORABLE CARL J. PETERSON, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 10th day of April, 2018, 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 Jerry Mosley, # 6382336, Newton Correctional Facility, 307 South 60th Avenue, West, P.O. Box 218, Newton, IA 50208.

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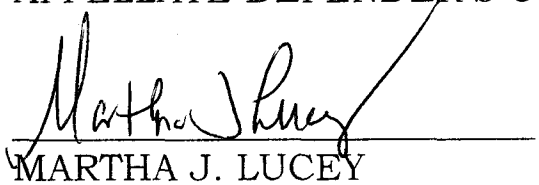

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because an issue raised presents a substantial question of enunciating or changing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(f). Specifically, Mosley requests this Court reexamine its decision in State v. Walker, which affirmed a first-degree burglary conviction concluding the victim's "actions here are sufficient to support a finding that Walker should have known from her resistance to his assault and her begging of him to stop that he no longer had her permission to be in her home." The Walker Court stated its decision was not so broad as to permit a conviction for burglary for the mere commission of a crime in an occupied structure, but this is the result in practice. State v. Walker, 600 N.W.2d 606, 610 (Iowa 1999).

STATEMENT OF THE CASE

Nature of the Case: Appellant Jerry Mosley appeals following his jury trial, judgment and sentence, to the charges of burglary in the first degree in violation of Iowa Code sections 713.1 and 713.3 (2015), and assault causing bodily injury in violation of Iowa Code sections 708.1 and 708.2(2) (2015).[1]

Course of Proceeding and Disposition Below: On June 17, 2016, Mosley was charged by Trial Information with burglary in the first degree for acts alleged on June 6, 2016. (TI)(App. pp. 5-6).

On July 7, 2016, the State moved to amend the Trial Information to include four additional counts. (Motion to Amend TI)(App. pp. 7-8). Mosley resisted the motion to amend the Trial Information. (Resistance to Motion to Amend TI)(App. p. 9). After an unreported hearing, the court granted the motion to amend the Trial Information. (7/11/16 Order)(App.

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1 Mosley was also convicted of criminal mischief in the fifth degree in violation of Iowa Code sections 716.1 and 716.6(2) (2015). Mosley does not have an appeal of right from a simple misdemeanor. Iowa Code §814.6(1)(a) (2015); Tyrell v. Iowa District Court, 413 N.W.2d 674, 675 (Iowa 1987).

pp. 10-11). On July 11, 2016, the Amended Trial Information was filed which charged Mosley with Count I: burglary in the first degree; Count II: assault while participating in a felony; Count III: willful injury; Count IV: harassment in the first degree; and Count V: criminal mischief in the fourth degree. (Amended TI)(App. pp. 12-14).

A jury trial began on June 6, 2017. (Vol. 1 p. 1L1-25). Prior to the presentation of evidence, the State amended Count V to criminal mischief in the fifth degree. (Vol. 1 p. 99L24-p. 100L11). After completion of the evidence, the State amended Count IV to harassment in the second degree. (Vol. 2 p. 31L16-p. 32L8). The jury found Mosley guilty of burglary in the first degree (Count I), assault while participating in a felony (Count II), assault causing bodily injury (Count III), and criminal mischief in the fifth degree (Count V). Mosley was found not guilty of harassment (Count IV). (6/8/17 Order)(App. pp. 37-38).

On June 26, 2017, Mosley was sentenced. The court sentenced Mosley to be incarcerated for a term not to exceed

twenty-five years on Count I: burglary in the first degree. The court did not enter judgment on Count II: assault while participating in a felony as it merged into first-degree burglary. The court ordered Mosley to serve one year on Count III: assault causing bodily injury. Lastly, Mosley was sentenced to thirty days on Count V: criminal mischief in the fifth degree. (Sent. Tr. p. 6L7-22, p. 12L6-p. 14L11; Judgment)(App. pp. 46-52). The district court ordered Mosley to reimburse the state for the cost of his legal assistance. (Sent. Tr. p. 16L3-7; Judgment p. 4)(App. p. 49). Consistent with the jury's verdict of not guilty, the court dismissed Count IV: harassment. (Nunc Pro Tunc)(App. pp. 54-55).

Notice of Appeal was filed on July 6, 2017. (Notice)(App. p. 53).

Facts: Kristen Christoffer began an intimate relationship with Mosley in 2014. Mosley was married. Christoffer and Mosley saw each other almost every day. (Vol. 1 p. 116L2-22). In November of 2015, the relationship ended. (Vol. 1 p. 116L25-p. 117L15). They did not have contact again until

February 2016. (Vol. 1 p. 117L16-24). Mosley messaged Christoffer on Facebook and said he missed her. They met the next day and the relationship began again. They had daily contact. (Vol. 1 p. 117L25-p. 118L10). They would go to the casino and on road trips. When Christoffer had the day off from work, she would go to Mosley's house and then usually Mosley would go to her house later in the day. (Vol. 1 p. 118L16-24).

In June 2016, Christoffer lived a duplex with her two children. (Vol. 1 p. 133L3-10). Christoffer said Mosely did not have a key to the duplex. He did not spend the night because he was married. (Vol. 1 p. 131L16-19, p. 161L4-16, p. 166L13-19). But Mosley was a frequent visitor to Christoffer's home. (Vol. 1 p. 166L20-23). Mosley did not have any property in the house. (Vol. 1 p. 131L20-21). In the past, Mosley would go into Christoffer's house to let the dog out when she was working. Christoffer sold the dog in April 2016. (Vol. 1 p. 131L22-p. 132L6, p. 161L17-p. 162L6).

At the end of May or early June 2016, Christoffer heard that Mosley was involved with multiple women other than Christoffer and his wife. On June 6th, Christoffer confronted Mosley via text message about it and he said she was lying and others were lying to her. (Vol. 1 p. 119L5-16). Christoffer accused Mosley of being involved with "Cede" among other women. (Vol. 1 p. 123L8-18). Mosley denied being involved with anyone else. He texted that his wife was the only one he had to lie to. (Vol. 1 p. 119L17-p. 120L3). In the beginning, Christoffer was laughing at the texts as they were coming in. (Vol. 1 p. 164L15-21). Mosley accused Christoffer of sleeping with "Temi." (Vol. 1 p. 123L25-p. 124L1). The text argument went back and forth with accusations of infidelity by both Christoffer and Mosley. (Vol. 1 p. 124L2-p. 125L14, p. 126L20-p. 129L8; Ex 29)(App. pp. 17-29). Christoffer acknowledged Mosley was not the villain or the victim because they both played their parts and it did not work out. Mosley responded "[n]o hard feelings it all me sorry for bugging u." (Vol. 1 p. 129L9-19; Ex 29 p. 10)(App. p. 26). Mosley then

texted some insults insinuating Christoffer was promiscuous. He then said goodbye again. (Vol. 1 p. 129L20-p. 130L4; Ex. 29 pp. 11-12)(App. pp. 27-28). Christoffer asked Mosley if he felt better now after calling her every name. She then texted, "lol not on hoe shit. I'll be right here with or without u. same as every other day." (Vol. 1 p. 165L21-p. 166L12, p. 172L20-p. 173L3; Ex. 29 p. 12)(App. pp. 28).[2] Mosley responded that "U are who u are an like I said you will die alone." "Yup now dew us both a favor and lose my number." Christoffer responded "lol will do. peace out douchelord..." (Vol. 1 p. 130L11-22; Ex. 29 p. 13)(App. p. 29). "Douchelord" was Christoffer's pet name for Mosley. (Vol. 1 p. 163L16-p. 164L14). After the text argument, Christoffer considered the relationship over. (Vol. 1 p. 134L15-22).

Christoffer was watching her friend's two children on June 6th. Her two children were also at home. (Vol. 1 p. 133L20-p. 134L10). TW was asleep on the floor of Christoffer's son's

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2 LOL means "laugh out loud." (Vol. 1 p. 163L19-20).

room. DI was downstairs watching television. (Vol. 1 p. 138L11-19, p. 176L9-18, p. 177L5-25).

Mosley walked in the door. He walked past DI, stepping over his leg. Mosley said "excuse me" and then ran up the stairs. (Vol. 1 p. 178L4-20). Mosley took off his shoes before going upstairs. (Vol. 1 p. 188L4-11).

Christoffer was getting her son dressed when she heard something on the stairs and saw Mosley running up the stairs. (Vol. 1 p. 133L11-19, p. 134L23-p. 135L4). Christoffer was confused to see Mosley as she thought they had just agreed to they were not going to be talking anymore. Christoffer did not give Mosley permission to come over. She had no idea he was coming over. (Vol. 1 p. 138L20-p. 139L3, p. 145L21-p. 147L4). As soon as Mosley reached the top of the stairs, he started hitting Christoffer. With the first blow, she fell into her son's room onto a sleeping child. When she got up, Mosley kept hitting her. Christoffer hit the wall causing an indentation. At one point, Christoffer had to hold on because she believed Mosley was trying to throw her down the stairs. Christoffer

stated that Mosley stomped on her when she fell down onto the stairs. Christoffer kicked at him to get him off her. Christoffer stated that she was "screaming for [her] babies and to stop, and [she] screamed down the stairs to tell [DI] to call 9-1-1." Christoffer told Mosley to stop and that she loved him. Mosley said "that [Christoffer didn't] love him and to fuck with his emotions again." Christoffer was not sure Mosley continued to assault her after she said she loved him. (Vol. 1 p. 136L11-p. 137L1, p. 137L20-23, p. 139L4-10, p. 142L4-p. 143L2, p. 147L5-22, p. 149L6-15, p. 168L15-24, p. 178L23-p. 179L15, p. 181L3-p. 182L14). DI testified that Mosley threatened to burn down the house and kill everyone in it. (Vol. 1 p. 179L16-25, p. 180L18-24).

At some point, Mosley went into Christoffer's bedroom and took her phone off the charger. Mosley went downstairs where he threw the phone against the wall, breaking it. Mosley threw the microwave on the kitchen floor and tried to tip over the refrigerator. (Vol. 1 p. 141L12-19, p. 149L16-p. 150L13, p. 182L22-p. 183L18; Vol. 2 p. 4L23-p. 5L3, p. 9L4-10, p.

15L15-20). Mosley then went back upstairs and hit Christoffer again. (Vol. 1 p. 137L2-8, p. 183L19-21, p. 184L13-p. 185L5).

When Mosley left, Christoffer and the children locked themselves in the bathroom. Christoffer called 911 using DI's phone. (Vol. 1 p. 137L6-17, p. 143L5-p. 144L19, p. 182L15-18, p. 185L14-19).

Christoffer's face was bleeding. Her ribs hurt. She had bruises on her hands. She missed three or four days of work. (Vol. 1 p. 139L11-p. 140L22, p. 150L14-p. 151L7, p. 157L4-p. 158L1; Vol 2 p. 4L15-22, p. 9L21-p. 10L1, p. 15L21-p. 16L11).

Spencer Police Officer Davenport tried to locate Mosley. He was not able to locate him. (Vol. 2 p. 16L12-16). Davenport was later advised by dispatch that Mosley was at the jail and was turning himself in. Davenport met with Mosley at the jail. Davenport asked Mosley to stand up and turn around. Mosley was placed under arrest. Mosley make a comment "is this just for an assault or what?" (Vol. 2 p. 16L17-p. 17L21). Mosley was very calm. (Vol. 2 p. 18L5-11).

ARGUMENT

I. THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT MOSLEY COMMITTED BURGLARY.

Standard of Review.

The Court reviews challenges to the sufficiency of the evidence for corrections of legal error. State v. Heard, 636 N.W.2d 227, 229 (Iowa 2001).

Preservation of Error.

Mosley moved for a judgment of acquittal. (Vol. 2 p. 19L17-p. 22L21, p. 27L1-p. 28L15; Statement of Case pp. 3-4)(App. pp. 41-42). The motion for judgment of acquittal preserved error on the issue presented. State v. Allen, 304 N.W.2d 203, 206 (Iowa 1981).

Discussion.

The ultimate burden is on the State to prove every fact necessary to constitute the offense with which a defendant has been charged. State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976) (citing In Re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1075 (1970)). Due process guarantees that no person shall

suffer the onus of a conviction except upon sufficient proof - defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of each and every element of the offense. Jackson v. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 2789 (1979).

The jury's findings of guilt are binding on appeal if supported by substantial evidence. State v. Hopkins, 576 N.W.2d 374, 377 (Iowa 1998). Substantial evidence is such evidence as would convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. State v. Allen, 348 N.W.2d 243, 247 (Iowa 1984). In deciding if there is substantial evidence the court views the evidence in the light most favorable to the state, but it considers all the evidence presented at trial and not just the evidence which supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). The evidence must raise a fair inference of guilt as to each essential element of the crime. Evidence which merely raises suspicion, speculation, or conjecture is insufficient. State v. Casady, 491 N.W.2d 782, 787 (Iowa 1992). Evidence that

allows two or more inferences to be drawn, without more, is insufficient to support guilt. State v. Truesdell, 679 N.W.2d 611, 618-19 (Iowa 2004).

The State was required to prove the following elements of burglary in the first degree:

1. On or about the 6th day of June, 2016, the defendant entered the residence of Kristen Christoffer.

2. The residence was an occupied structure as defined in Instruction No. 26.

3. One or more persons were present in the occupied structure.

4. The defendant did not have permission or authority to enter the residence or defendant did not have permission and authority to remain in the residence or defendant's authority to remain had ended.

5. The residence was not open to the public.

6. The defendant did so with the specific intent to commit an assault.

7. During the burglary, the defendant did intentionally or recklessly inflict bodily injury on Kristen Christoffer.

(Ins. 25)(App. p. 31). At issue was element number four – Mosley's right to enter and/or remain in the home. The State presented insufficient evidence to prove this element.

Christoffer was questioned regarding "any permission"

Mosley had to be at her residence on June 6th:

A. As far as I know, I wouldn't be seeing him anymore. I didn't give him permission to come over. I had no idea that he was going to be coming over.

Q. He had come over to your - - to your duplex at 705 8th Avenue East in the past; right?

A. Correct.

Q. And on those occasions when he came over what would happen? Did he knock? Did he call ahead of time?

A. Well, generally speaking he would tell me to leave the door open.

Q. Okay. And so you were generally aware that he was coming over?

A. Correct.

Q. And at that point when - - that was at the point in your relationship was ongoing; correct?

A. Correct.

Q. During that relationship did he have your permission to come into your home?

A. During the relationship, yes.

Q. At some point then did that permission end?

A. Correct.

Q. And tell the jury about that.

A. Um, again, after we had been going back and forth in the text messages that morning I was not expecting him to come over anymore, nor see him. We both agreed to go our own separate ways, and we have done that before. And we did just that in the past, we went our own separate ways.

Q. And so there was no conversation with you, no request on your part - - was there any request on your part that Mr. Mosley come over to your apartment on June 6?

A. No. I was confused to see him.

* * *

Q. Once Jerry was in your home, um, and began assaulting you, what did you want to happen?

A. I wanted him to leave.

Q. You wanted Jerry to leave your house?

A. Correct.

Q. And, again, did he have any - - did he have your permission to remain at your home at that point?

A. No. He was hitting me. I wanted him to leave.

Q. Did you specifically tell him to leave?

A. I don't recall.

Q. You don't know if you told him to leave or not?

A. I don't know that I specifically told him to leave, but I definitely didn't ask him to stay.

* * *

Q. Even though you didn't specifically tell him to leave your residence, do you believe that you were telling him in a non-verbal way that you wanted him to leave?

A. Absolutely.

Q. And how was that?

A. At one point I was kicking at him to get him off of me.

Q. Kicking. Kicking him how?

A. Uh, I was hoping to kick him in the balls to get him to drop down and leave me alone.

(Vol. 1 p. 145L21-p. 149L15).

Christoffer also testified that, "[g]enerally speaking," it was common for Mosley to enter her house without knocking. Christoffer stated that if either of them were coming to the other's house, they "were pretty much aware that someone was showing up." (Vol. 1 p. 160L11-p. 161L3, p. 162L7-11). "Generally", the backdoor was left open because it actually does not lock. (Vol. 1 p. 170L18-p. 171L1). Christoffer testified:

Q. Okay. During the course of the assault that you've described then, you said that you were telling him that you loved him; is that right?

A. I told him that I loved him to try and get him to stop hitting me.

Q. Okay. And [the prosecutor] was asking you about whether you ever told him, no, I want you to leave. You didn't tell him you wanted him to leave. In fact, you told him that you loved him during that; is that right?

A. And I also kicked him.

Q. Okay. There was no conversation between the two of you, though, about that he had to leave, and he had no permission to be present in your residence; correct?

A. I mean, I guess if that's what you want to say.

Q. Are you saying that you did have that conversation?

A. I didn't tell him to keep hitting me.

Q. You didn't tell him to leave; correct?

A. Correct.

(Vol. 1 p. 168L20-p. 169L8).

DI testified that Mosley was at Christoffer's house most times DI was there. Christoffer's close friends entered her house without knocking. For that reason, DI was not

concerned when he first saw Mosley come into the house. (Vol. 1 p. 187L2-p. 188L3).

Permission or authority to enter the residence

The State presented insufficient evidence that Mosley did not have the right to enter Christoffer's home. Mosley and Christoffer had an approximately two year intimate relationship where they saw each other almost daily. Mosley was a frequent visitor to Christoffer's home and generally entered without knocking. He was present so often, that DI was not concerned when Mosley appeared in the home. (Vol. 1 p. 166L20-23, p. 145L21-p. 149L15, p. 160L11-p. 161L3, p. 162L7-11, p. 168L20-p. 169L8, p. 170L18-p. 171L1, p. 187L2-p. 188L3). The record is clear that Mosley has permission to enter the home during the relationship. (Vol. 1 p. 146L5-17).

The record does not demonstrate that both parties believed the relationship was over. During the text exchange Christoffer stated, "I'll b right here with or without u. same as every other day." (Ex. 29 p. 12)(App. p. 28). While Christoffer explained what she meant by the text, the text message itself is

unclear. (Vol. 1 p. 129L25-p. 130L10, p. 165L21-p. 166L12, p. 172L20-p. 173L3). The argument via text message ended with Mosley texting "yup now dew us both a favor lose my number bitch." Christoffer responded, "lol will do. peace out douchelord ..." (Ex. 29 p. 13)(App. p. 29). Christoffer acknowledged "lol" means "laugh out loud." (Vol. 1 p. 163L16-20). She did not testify that she meant the updated or current definition of "lol" which means "lack of laughter." https://www.urbandictionary.com/define.php?term=lol (last visited 2/11/18). Christoffer's message conveyed that she was not upset and she found Mosley's message amusing. Likewise, "peace out" can have different meanings. However, Christoffer did not testify what she meant by it. But in the context of the argument, a jury could have reasonably concluded she meant "good bye." https://www.urbandictionary.com/define.php?term=Peace%20Out (last visited 2/11/18). In combination with the use of his pet name "douchelord", Christoffer's text message did not reasonably convey the message she was finished with the

relationship. The evidence was insufficient to show Mosley lacked the right to enter Christoffer's home. See State v. Truesdell, 679 N.W.2d 611, 618-19 (Iowa 2004)(Evidence that allows two or more inferences to be drawn, without more, is insufficient to support guilt.).

Authority to remain had expired

The prosecuting attorney argued, and the district court agreed, that this Court's decision in Walker supported the submission of the burglary alterative of "remaining over" to the jury. (Vol. 2 p. 19L17-p. 22L21, p. 27L1-p. 28L15; Statement of Case pp. 3-4)(App. pp. 41-42). The question in Walker was whether a defendant may be convicted of committing burglary by remaining on the premises after his privilege to be there has been revoked where the victim testifies that she did not expressly ask the defendant to leave. The Court concluded that a revocation of the victim's consent to the defendant's presence may be inferred from the victim's resistance to the defendant's assault on her. State v. Walker, 600 N.W.2d 606, 607 (Iowa 1999). The facts in Walker appear to be somewhat

similar to the present case. In Walker, the victim "testified that she never expressly told Walker to leave. She merely asked him to stop and asked him to tell her what was wrong, all the while struggling against his assaultive actions." Id. at 608-609. The determinative question was "whether a defendant's permission to be on the premises must be expressly revoked, or whether the withdrawal of consent may be implied from the circumstances." Id. at 609.

The Walker Court surveyed other courts. The Court stated the other courts had concluded "that the victim's resistance to the defendant's actions gives the defendant reason to know that the victim is no longer willing to have the defendant remain on the premises." Id. This Court held:

> that the victim need not expressly revoke his or her consent to the defendant's presence; it is sufficient that the victim's actions give the defendant reason to know that such consent has been withdrawn. If the defendant remains on the premises after having reason to know he has no right to do so, he has "remained over" and, if, during the time he unlawfully remains on the premises, he forms the requisite intent to commit a felony, assault or theft, the defendant has committed a burglary.

* * *

We do not agree that permission to be present is automatically revoked once the defendant commences his criminal conduct. The mere commission of a crime in an occupied structure does not automatically constitute a burglary, nor does the defendant's criminal intent substitute for proof that consent to remain has been revoked. * * *

If the mere commission of a crime or the formation of a criminal intent could be used to support an inference that the defendant's right to be in the premises has been revoked, every offense committed in an occupied structure would be transformed into a burglary.

Our decision is not so broad. We merely hold that a jury can find that the defendant's privilege to be on the premises has been withdrawn where the actions of the person giving permission to enter reasonably indicate to the defendant that such permission has been revoked. We conclude that [victim's] actions here are sufficient to support a finding that Walker should have known from her resistance to his assault and her begging of him to stop that he no longer had her permission to be in her home. As other courts have similarly held, she did not have to scream "Get out!" for Walker to know that his right to be present had expired. Therefore, the trial court did not err in submitting the "remaining over" alternative to the jury.

Id. at 609-610.

The evidence presented by the State failed to present a jury question on the "remaining over" alternative. A person commits burglary if he has the requisite intent and remains in an occupied structure "after it is closed to the public or after the

person's right, license or privilege to be there has expired..." Iowa Code §713.1(2015). The evidence presented failed to show Mosley's right to be in Christoffer's home had expired. Christoffer did not tell Mosley to leave or he was no longer welcome in the house. (Vol. 1 p. 147L18-22, p. 149L6-9, p. 168L20-p. 169L8). Christoffer asked Mosley to stop and told him she loved him. (Vol. 1 p. 136L18-p. 137L1, p. 142L14-p. 143L2, p. 168L15-19). Christoffer also told DI to call 911. (Vol. 1 p. 136L18-p. 137L1, p. 181L23-24). Christoffer attempted to defend herself from being hit. (Vol. 1 p. 142L10-13, p. 149L6-15).

The present case is distinguishable from the facts presented in Walker. Walker was the boyfriend of the victim's friend. Walker had only been in the home one time prior with his girlfriend. State v. Walker, 600 N.W.2d at 607. Walker attacked his victim without saying a word. The victim in Walker did not verbally express anything which reasonably be interpreted as consent to remain. Id. at 608. Mosley and Christoffer had an intimate relationship and spent significant

time together. Mosley was in Christoffer's home frequently. While asking Mosley to stop his assault, Christoffer expressed her love. The evidence is clear that Christoffer wanted Mosley to stop his assault. But the evidence does not demonstrate Christoffer had rescinded her permission for Mosley to be in the home. Nor are Christoffer's actions sufficient for a finding Mosley should have known that he no longer had her permission to remain in the home. The commission of an assault in Christoffer's home does not automatically elevate the incident into a burglary.

Alternatively, Mosely asks this Court to reexamine its decision in Walker. While the Walker Court expressly stated the commission of a crime does not automatically show the defendant's right to be present has expired, the circumstantial evidence of the crime necessarily is the key factor. This results in any criminal offense committed in an occupied structure being elevated to a felony burglary. The cases the Walker Court relied upon are instructive as to what constitutes implicit

revocation of a right to be present in the home and demonstrate the overly broad application of Walker.

In Ex parte State, the Alabama Supreme Court reviewed the sufficiency of the evidence of a murder committed during a burglary. Ex parte State, 737 So.2d 480 (Ala. 1999).[3] The defendant, Davis, was implicated in a murder of his neighbor. There was no evidence of forced entry. Id. at 481-82. The Alabama Supreme Court stated:

> Evidence of a struggle that gives rise to circumstantial evidence of revocation of a license or privilege can be used to show an unlawful remaining, a separate prong of the offense of burglary upon which a conviction can be based. * * *
>
> We reiterate that the evidence of a commission of a crime, standing alone, is inadequate to support the finding of an unlawful remaining, but evidence of a struggle can supply the necessary evidence of an unlawful remaining. In homicide cases, the mere fact of the victim's death cannot be equated with a struggle. For example, evidence of a privileged entry followed by death from an injury inflicted by surprise or stealth and causing instantaneous death would not constitute circumstantial evidence of an unlawful remaining. Likewise, a privileged entry followed by death from an injury inflicted by a delayed mechanism, such as poison, would be equally deficient.
>
> The evidence was sufficient for the jury to find that Davis killed [victim] during a burglary. The evidence of a struggle giving rise to the inference of an unlawful remaining is supplied by

---

3 Also referred to as Davis v. State.

Davis's choice to kill by a less-than-instantaneous technique of strangulation and by his use of three nonfatal stab wounds to the victim's lower back. Based on the circumstances suggested by the evidence, the jury reasonably could have found that Davis, from the point at which he began committing his criminal acts, "remain[ed] unlawfully" in [victim's] home with the intent to commit a crime.

Id. at 483-84. The dissent was not impressed with the

majority's reasoning:

As to the burglary/murder conviction, the majority of this Court is allowing a murder conviction to be made capital by allowing a jury to draw an inference of an implied revocation of a privilege to remain. Is an inference of an implied revocation a basis on which to " 'genuinely narrow' the class of persons eligible for the death penalty so that capital punishment is reserved for the most egregious crimes"?
* * *
I adhere to the position stated in *Gentry III* that the State cannot meet its burden of proving a burglary simply by proving that a murder occurred in a building occupied by the victim. I think the majority errs in allowing the State to meet its burden of proving a burglary by showing that death was not instantaneous and that the victim struggled before dying. I understand the inference that, in those circumstances, the killer will understand that he is not welcome. However, even the expansive statutory element of "unlawfully remains" requires evidence of something more than a subjective thought by a killer that the occupant probably does not want him to stay.
* * *
Does the majority allow an inference that the victim told Davis to leave before he wrapped the cord around her neck, or an inference that, while he was strangling her, she somehow communicated the revocation of his privilege to remain, or does

the majority simply hold that her struggle for life was an implied revocation of his privilege to be in her home?
* * *
These inferences that the majority is allowing concern me. Essentially, a defendant is being "guessed" into a capital conviction.* * *
* * *
I simply do not think that an absence of proof of either an unlawful entry or an unlawful remaining can be overcome by evidence that the defendant committed an indoor crime of which the occupant of the premises was aware.

Ex parte State, 737 So.2d at 485-86 (Almon, J., dissenting).

In Hambrick v. State, the Georgia Court of Appeals held that a victim does not have to tell the defendant to "get out" in order to revoke the authority to remain. Hambrick v. State, 330 S.E.2d 383 (Ga. Ct. App. 1985).

Although the disguised caller initially had [victim's] authority to enter and remain for a friendly visit, there was sufficient evidence, including testimony of the victim's struggle with Hambrick, to create a jury question regarding whether the authority to remain ceased at the time the offensive, aggressive behavior began. When Hambrick's ulterior purpose beyond the bounds of a friendly visit became known to [victim], who was the source of the authority, and he reacted against it, a reasonable inference could be drawn that the authority to remain ended. [Victim] did not have to shout "Get out!" for this to be so. Yet Hambrick remained until he got possession of the money, far beyond the time at which the scope of the permission ended.

Id. at 385-86.

The Oregon Court of Appeals in Felt likewise found sufficient evidence of remaining from evidence that the defendant's behavior exceeded the victim's scope of consent and her actions impliedly revoked her permission to remain on the premise. State v. Felt, 816 P.2d 1213, 1214 (Or. Ct. App. 1991). Felt only had permission to be in the home to use the phone and hug the victim because she consented to those acts. However, she did not consent to further intimacy and she resisted his advances. The evidence presented a fact question of whether the victim withdrew her consent. Id.

The Washington Supreme Court held in State v. Collins "that, in some cases, depending on the actual facts of the case, a limitation on or revocation of the privilege to be on the premises may be inferred from the circumstances of the case." State v. Collins, 751 P.2d 837, 841 (Wash. 1988). The Collins Court also found the defendant only had an implied limitation on consent to enter. The record supported an inference that the invitation or license extended to the defendant was limited

to a specific area and a single purpose. He then went beyond the scope of the permission. Id. at 841.

In Ray v. State, the defendant entered his neighbor's apartment with her permission. Once lawfully inside, the defendant assaulted her. The question was whether he remained without her consent. Ray v. State, 522 So.2d 963, 964 (Fla. Dist. Ct. App. 1988). The Florida court stated:

> It is undeniably true that a person would not ordinarily tolerate another person remaining in the premises and committing a crime, and that when a victim becomes aware of the commission of a crime, the victim implicitly withdraws consent to the perpetrator's remaining in the premises.

Id. at 966. The court concluded that the victim's "struggle with the defendant was sufficient evidence that she withdrew her consent to Ray's remaining in the premises, making his remaining in the premises after the withdrawal a burglary." Id. at 967.

Ray was abrogated by Delgado v. State, 776 So.2d 233 (Fla. 2000). The question in Delgado was "whether the phrase "remaining in" found in Florida's burglary statute should be limited to situations where the suspect enters lawfully and

subsequently secretes himself or herself from the host." Id. at 238. The Florida Supreme Court found the Ray decision's requirement for the state to present circumstantial evidence to establish consent had been withdrawn had obvious flaws.

> First, if we are certain that "a person would not ordinarily tolerate another person remaining in the premises and committing a crime," then it would not be logical to require the State to produce circumstantial evidence of this fact.
> * * *
> More importantly, if we make the assumption that "a person would not ordinarily tolerate another person remaining in the premises and committing a crime," and assuming that this withdrawn consent can be established at trial, a number of crimes that would normally not qualify as felonies would suddenly be elevated to burglary. In other words, any crime, including misdemeanors, committed on another person's premises would become a burglary if the owner of the premises becomes aware that the suspect is committing the crime.

Id. at 238-39. Under the Ray "Court's reasoning, even if a defendant was licensed or invited to enter, the moment he or she commits an offense in the presence of an aware host, a burglary is committed." The Delgado Court concluded "in order to give meaning to the entire burglary statute (the "remaining in" clause and the "unless" clause), the "remaining

in" clause should be limited to the defendant who surreptitiously remains." Id. at 240.

> This interpretation is consistent with the original intention of the burglary statute. In the context of an occupied dwelling, burglary was not intended to cover the situation where an invited guest turns criminal or violent. Rather, burglary was intended to criminalize the conduct of a suspect who terrorizes, shocks, or surprises the unknowing occupant.

Id.

New York also limits the application of the "remaining" language. People v. Hutchinson, 477 N.Y.S.2d 965, 968 (Sup.Ct.1984). Hutchinson held that once a person is lawfully on the premises, "there must be something more to establish termination of license than the commission of a criminal act or an order to leave after a criminal intention is manifested." The prosecution had argued that a defendant violated this statute when he entered a private home with permission but subsequently pulled a knife on the owner automatically revoking any consent. The Hutchinson Court held that if a criminal defendant entered with consent, his subsequent commission of a criminal act alone could not convert a lawful

entry into an unlawful remaining sufficient to sustain a burglary charge. Id. at 967.

The Hambrick, Felt, and Collins holdings relied in part on the determination the defendant's exceeded the scope of permission to be present. This is a significant factor in the decisions. Given that factual situations presented, the consideration of the victim's actions in resisting the defendant's actions which exceeded the permissible scope of consent does not elevate every indoor assault into a burglary. However, the Walker decision does not include the consideration of a limited consent to be present within the home. This fact, vastly expands the situations where mere commission of a crime indoors would be a burglary under the Walker holding.

Another flaw in the Walker holding is the announcement "it is sufficient that the victim's actions give the defendant reason to know that such consent has been withdrawn." Is the defendant's subjective belief the key to a finding of a burglary. The answer must be no. The "element of "unlawfully remains" requires evidence of something more than a subjective thought

by a [offender] that the occupant probably does not want him to stay." Ex parte State, 737 So.2d at 486 (Almon, J., dissenting). This Court should reexamine its holding in Walker and overrule it.

Remedy

The State's evidence was insufficient on both burglary alternatives. This Court must reverse and remand for entry of a judgment of acquittal.

If this Court were to find sufficient evidence on one alternative, but not the other, Mosley must be granted new trial. The charge of burglary in the first degree was marshalled in the alternative. (Ins. 25)(App. p. 31). The jury was instructed that the verdict itself had to be unanimous, not the theory or facts it was based upon. (Ins. 14)(App. p. 30). The verdict form only provided for a general verdict. (Verdict Form No. 1)(App. p. 33). When a general verdict does not reveal the basis for a guilty verdict, reversal is required. State v. Heemstra, 721 N.W.2d 549, 558 (Iowa 2006).

II. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO A STATE'S WITNESS, DI, TESTIFYING TO MATTERS BEYOND THE SCOPE OF THE MINUTES OF TESTIMONY.

Preservation of Error.

A claim of ineffective assistance of counsel is an exception to the general rule of error preservation. State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982).

Standard of Review.

Ineffective assistance of counsel claims involve the violation of a constitutional right. The totality of the circumstances relating to counsel's conduct must be reviewed de novo. State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987).

Discussion.

The Sixth and Fourteenth Amendments of the United States Constitution and article I section 10 of the Iowa Constitution guarantees a defendant is entitled to the assistance of counsel. U.S. Const. amend. VI; U.S. Const. amend. XIV; Iowa Const. art. I, section 10. The United States Supreme Court held a defendant is entitled to effective

assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984). The test for determining whether a defendant received effective assistance of counsel is "whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). The defendant must demonstrate (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. Id. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

To prove the attorney failed to perform an essential duty, the defendant must show the attorney's performance fell outside the normal range of competency. Snethen, 308 N.W.2d at 14. The Court starts with the presumption the attorney performed in a competent manner. State v. Maxwell,

743 N.W.2d 185, 196 (Iowa 2008). The Court then measures the attorney's performance against the standard of a reasonably competent practitioner. Id. at 195. Counsel must "exercise reasonable diligence in deciding whether an issue is worth raising." State v. Westeen, 591 N.W.2d 203, 210 (Iowa 1999). An attorney has no duty to raise an issue that has no merit. State v. Schaer, 757 N.W.2d 630, 637 (Iowa 2008).

"More than mere improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience" must be shown. State v. Cromer, 765 N.W.2d 1, 8 (Iowa 2009) (citations omitted). "If there is no possibility that trial counsel's failure to act can be attributed to reasonable trial strategy, then we can conclude the defendant has established that counsel failed to perform an essential duty." State v. Graves, 668 N.W.2d 860, 870 (Iowa 2003).

State's witness DI impermissibly testified to matters beyond the scope of the Minutes of Testimony. At trial, DI testified Mosley made threatening statements while hitting Christoffer. DI testified:

Q. At some point did you hear him saying something to Kristen?

A. Uh, yeah.

Q. What was that?

A. Uh, he threatened to burn down the house and kill everybody who was in it, including her and her kids and me and my brother.

Q. When -- what was he doing while he was saying that?

A. Uh, beating Kristen up.

(Vol. 1 p. 179L16-25).

Q. And you saw Jerry hitting Kristen and heard him -- heard him say at that point that he was going to burn down the house?

A. Yeah.

Q. Okay. And heard him say that he was going to kill everybody in it?

A. Yes.

(Vol. 1 p. 180L18-24). However, this statement was not included in the Minutes of DI's expected testimony. (Minutes)(Conf. App. pp. 4-5). Defense counsel did not lodge an objection to this portion of DI's testimony and was ineffective in failing to do so.

Iowa Rule of Criminal Procedure 2.5(3) requires the State to file, with the Trial Information, Minutes of Evidence of each witness whose testimony the prosecutor expects to offer at trial. State v. Bennett, 503 N.W.2d 42, 46-47 (Iowa Ct. App. 1993). The Minutes must provide "a full and fair statement of the witness' expected testimony." Iowa R. Crim. P. 2.5(3). Compliance with the rule is mandatory, not as a matter of ritual, but in order to "fully and fairly" apprise a criminal defendant of the testimony to be expected at trial. State v. Musso, 398 N.W.2d 866, 868 (Iowa 1987).

The purpose of the rule is "to assure minutes which would eliminate most claims of foul play and would provide meaningful minutes from which a defense could be prepared." State v. Ristau, 340 N.W.2d 273, 274 (Iowa 1983)(quoting State v. Walker, 281 N.W.2d 612, 612-613 (Iowa 1979)). The Minutes must "alert defendant generally to the source and nature of the evidence against him." State v. Lord, 341 N.W.2d 741, 743 (Iowa 1983); State v. Olsen, 293 N.W.2d 216, 220 (Iowa 1980), cert. denied, 449 U.S. 993, 101 S.Ct. 530 (1980);

Walker, 281 N.W.2d at 614. The requirement is more functional than it is formal. Musso, 398 N.W.2d at 866. Its purpose is to fill a need, the need to apprise an accused of the evidence in the prosecution's arsenal. Id. When the Minutes fail to adequately do so to defendant's prejudice a reversal will follow. Walker, 281 N.W.2d at 614-615.

The Minutes do not apprise the defense of the alleged statements of Mosley. As such, the Minutes were not a "full and fair statement" of DI's expected testimony at trial. Defense counsel was aware the Minutes of Testimony failed to include the allegations Mosley threatened to burn down the house and kill everyone in it. (Minutes; Add. Minutes; Vol 2 p. 30L5-p. 31L10)(Conf. App. pp. 4-9). The prosecutor did not allege DI disclosed this evidence during a deposition. Defense counsel breached an essential duty by failing to object.

The State's case regarding the burglary charge was not overwhelming. The main fighting issue was whether Mosley had the right to enter and/or remain in the house. There was no dispute he assaulted Christoffer. Assuming, the evidence

was sufficient to generate a jury question, the State's evidence on the lack of permission and/or withdrawal of consent was not overwhelming. Mosley and Christoffer had a sexual relationship and Mosley was frequently in her home. He would enter without knocking. (Vol. 1 p. 166L20-23, p. 145L21-p. 149L15, p. 160L11-p. 161L3, p. 162L7-11, p. 168L20-p. 169L8, p. 170L18-p. 171L1, p. 187L2-p. 188L3). The record does not objectively demonstrate Mosley would have known the relationship had ended. Additionally, Christoffer did not specifically tell Mosley to leave during the assault. She did tell him to stop, wanted DI to all the police, and kicked at him. But she also told Mosley she loved him. (Vol. 1 p. 136L18-p. 137L1, p. 142L10-p. 143L2, p. 147L18-22, p. 149L6-15, p. 168L15-p. 169L8, p. 181L23-24). The inclusion of Mosley's unnoticed alleged threat to burn down the house and kill everyone in the house was likely the evidence which tipped the scale.

The confidence in the outcome is undermined. Strickland v. Washington, 466 U.S. 668, 694 (1984). Mosley

should be granted a new trial on the charge of burglary in the first degree. Alternatively, if the record is inadequate to address this issue on direct appeal, it should be preserved for a postconviction relief hearing. State v. Shorter, 893 N.W.2d 65, 83 (Iowa 2017).

III. THE DISTRICT COURT IMPOSED AN ILLEGAL SENTENCE BY FAILING TO MERGE ASSAULT CAUSING BODILY INJURY INTO BURGLARY IN THE FIRST DEGREE.

Standard of Review.

Mosley's sentence is illegal because the district court failed to merge the sentences under Iowa Code §701.9 (2015), therefore, the appellate review is for the correction of errors at law. State v. Mulvany, 600 N.W.2d 291, 293 (Iowa 1999); State v. Finnel, 515 N.W.2d 41, 43 (Iowa 1994).

Preservation of Error.

An illegal sentence may be corrected at any time. Iowa R. Crim. P. 2.24(5)(a).

Discussion.

The merger doctrine prohibits the convictions for both burglary in the first degree and assault causing bodily injury. Iowa Code section 701.9 provides:

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

Iowa Code §701.9 (2015). Additionally, the Iowa Rules of Criminal Procedure prohibit a conviction for both the greater and lesser offenses. "Upon prosecution for a public offense, the defendant may be convicted of either the public offense charged or an included offense, but not both." Iowa R. Crim. P. 2.6(2). The statute and the rule express the merger doctrine in Iowa. State v. Anderson, 565 N.W.2d 340, 343 (Iowa 1997). Iowa Code section 701.9 codified the double jeopardy protection against cumulative punishment. State v. Halliburton, 539 N.W.2d 339, 344 (Iowa 1995).

Iowa courts apply a strict statutory approach when considering merger issues. State v. Anderson, 565 N.W.2d at 343. "Under this approach, if the lesser offense contains an element that is not part of the greater offense, the lesser cannot be included in the greater." Id. (citing State v. Jeffries, 430 N.W.2d 728, 730 (Iowa 1988)). Courts also adhere to the impossibility test, which provides that "one offense is a lesser-included offense of the greater when the greater offense cannot be committed without also committing the lesser." Id. (citing State v. McNitt, 451 N.W.2d 824, 825 (Iowa 1990)).

The jury was instructed that the State was required to prove the following elements of burglary in the first degree (Count I):

1. On or about the 6th day of June, 2016, the defendant entered the residence of Kristen Christoffer.

2. The residence was an occupied structure as defined in Instruction No. 26.

3. One or more persons were present in the occupied structure.

4. The defendant did not have permission or authority to enter the residence or defendant did not have permission and

authority to remain in the residence or defendant's authority to remain had ended.

5. The residence was not open to the public.

6. The defendant did so with the specific intent to commit an assault.

7. During the burglary, the defendant did intentionally or recklessly inflict bodily injury on Kristen Christoffer.

(Ins. 25)(App. p. 31).

The jury was instructed the State had to prove the following elements of willful injury (Count III):

1. On or about the 6th day of June, 2016, the defendant did commit an assault against Kristen Christoffer.

2. The defendant specifically intended to cause a serious injury to Kristen Christoffer.

3. The defendant's acts caused a bodily injury to Kristen Christoffer as defined in Instruction No. 22.

If you find the State has proved all of the elements, the defendant is guilty of Willful Injury. *If the State has proved only elements 1 and 3, the defendant is guilty of Assault Causing Bodily Injury.* * * *

(Ins. 31)(App. p. 32)(emphasis added). The jury found Mosley guilty of the lesser-included offense of assault causing bodily injury. (6/8/17 Order)(App. pp. 37-38). The Supreme Court

has previously observed that it is impossible to commit first-degree burglary by intentionally or recklessly injuring another without also committing assault causing bodily injury. State v. Peck, 539 N.W.2d 170, 175 (Iowa 1995); State v. Lambert, 612 N.W.2d 810, 816 (Iowa 2000).

Assault causing bodily injury (Count III) must merge into the greater offense of burglary in the first degree (Count I). This Court must vacate the judgment for assault causing bodily injury and remand for an appropriate district court order. Iowa Code §701.9 (2015).

IV. THE DISTRICT COURT ERRED IN ORDERING MOSLEY TO REIMBURSE THE STATE FOR THE COST OF HIS LEGAL ASSISTANCE WITHOUT FIRST CONSIDERING HIS REASONABLE ABILITY TO PAY SUCH RESTITUTION.

Standard of Review.

This Court reviews restitution orders for correction of errors at law. When reviewing a restitution order, the appellate court determines whether the district court has properly applied the law. State v. Jenkins, 788 N.W.2d 640, 642 (Iowa 2010); State v. Klawonn, 688 N.W.2d 271, 274 (Iowa 2004).

The Court's review of constitutional claims is de novo. State v. Dudley, 766 N.W.2d 606, 612 (Iowa 2009).

Preservation of Error.

An improper award of criminal restitution is an illegal sentence. See State v. Janz, 358 N.W.2d 547, 548-49 (Iowa 1984)(Noting that the practice in Iowa for many years had been to allow either the district court or the appellate court to correct an illegal sentence.); State v. Jose, 636 N.W.2d 38, 44 (Iowa 2001)("[The court noted that where the time for appeal has expired, a defendant must petition the district court under Iowa Rule of Criminal Procedure 23(5)(a) to correct an illegal sentence.]").[4] A challenge to an illegal sentence includes a claim that that the sentence itself is unconstitutional. State v. Bruegger, 773 N.W.2d 862, 871 (Iowa 2009). An illegal sentence may be corrected at any time. Iowa R. Crim. P. 2.24(5)(a).

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[4] Current Iowa Rule of Criminal Procedure 2.24(5)(a).

Discussion.

At sentencing, the district court ordered Mosley to pay restitution for court costs and court-appointed attorney fees. The court stated "a separate hearing will be set if the defendant requests demonstrating he doesn't have the ability to pay those fees in the future." (Sent. Tr. p. 16L3-7). The judgement entry states, in relevant part:

> 11. **Restitution**. Pursuant to Iowa Code § 910.3, the defendant shall pay and judgment is imposed against the defendant as follows: (check all that apply)
> _X_ **Court-appointed attorney's fees** per Iowa Code § 815.9, if the defendant is receiving court appointed legal assistance, the court finds upon inquiry, review of the case file any other information provided by the parties, the defendant has the reasonable ability to pay restitution of fees, including expense of a public defender
> _X_ in the amount approved by the State Public Defender
> * * *
> ___ Reasonable Ability to Pay Adjustment Option: Pursuant to Iowa Code 910.2(1) the court finds upon inquiry, review of the case file and any other information provided by the parties, that the defendant has the reasonable ability to pay restitution for the above items of $ _____.

(Judgment p. 4)[5](App. p. 49). The box for the reasonable ability determination was not marked.

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5 The judgment entry contains boxes for the court to check. The boxes were not able to be recreated in the brief.

When a person is granted an appointed attorney, he shall be required to reimburse the state for the total cost of legal assistance provided to the person. Iowa Code §815.9(3) (2015). In all criminal cases where judgment is entered, the sentencing court shall order restitution be made. Restitution includes court-appointed attorney fees. Iowa Code §§910.2 and 815.9(4)(2015). Criminal restitution is a criminal sanction that is part of the sentence. Iowa Code §910.2(1) (2015); State v. Alspach, 554 N.W.2d 882, 883 (Iowa 1996); State v. Mayberry, 415 N.W.2d 644, 646 (Iowa 1987). The legislature has inserted restitution, which otherwise would normally be civil, into the criminal proceeding. Cf. State v. Dudley, 766 N.W.2d 606, 620 (Iowa 2009)("the legislature has injected this matter, which would ordinarily be civil, in a criminal action and provided for counsel throughout the criminal prosecution, ending with judgment on behalf of the State."). The court is authorized to order criminal restitution pursuant to the restitution statutes. Absent such statutes, the court has no

power to issue a criminal restitution order. State v. Bonstetter, 637 N.W.2d 161, 166 (Iowa 2001).

The legislature specifically provided that the imposition of restitution for court-appointed attorney fees is subject to a determination of the defendant's reasonable ability to pay. Iowa Code section 910.2(1) (2015) provides in relevant part:

> 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 restitution be made by each offender to the victims of the offender's criminal activities, to the clerk of court for fines, penalties, surcharges, and, **to the extent that the offender is reasonably able to pay**, for crime victim assistance reimbursement, restitution to public agencies pursuant to section 321J.2, subsection 13, paragraph "b", court costs including correctional fees approved pursuant to section 356.7, court-appointed attorney fees ordered pursuant to section 815.9, including the expense of a public defender, when applicable, contribution to a local anticrime organization, or restitution to the medical assistance program pursuant to chapter 249A.

Iowa Code §910.2(1) (2015)(emphasis added). See also Iowa Court R. 26.2(10)(a) ("the court shall order the payment of the total costs and fees for legal assistance as restitution to the extent the person is reasonably able to pay").

A defendant's reasonable ability to pay is a constitutional

prerequisite for a criminal restitution order provided by Iowa Code chapter 910. State v. Haines, 360 N.W.2d 791, 797 (Iowa 1985); State v. Harrison, 351 N.W.2d 526, 529 (Iowa 1984). Cf. Bearden v. Georgia, 461 U.S. 660, 667 n.8, 103 S.Ct. 2064, 2069 n.8 (1983)("The more appropriate question is whether consideration of a defendant's financial background in setting or resetting sentence is so arbitrary or unfair as to be a denial of due process."). Iowa's recoupment statute does not infringe on a defendant's right to counsel because of the "reasonable ability to pay" determination. Haines, 360 N.W.2d at 793; Dudley, 766 N.W.2d at 614-615. "A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment." Id. at 615.

Harrison provided that the "reasonable ability to pay" provision is an "express condition on the determination of the amount of restitution for court costs and attorney fees." "The sentencing court would never get to the point of exercising this authority if it were mandated to order full restitution for court

costs and attorney fees without regard to the offender's ability to pay." State v. Harrison, 351 N.W.2d at 529. Therefore, this discretion must be exercised at the sentencing hearing. Id. The Harrison holding was followed in Haines. State v. Haines, 360 N.W.2d at 797 (Court failed to exercise discretion to determine whether Haines was reasonably able to pay all or part of attorney fees).

The district court must determine Mosley's reasonable ability to pay the attorney fees prior to imposing the fees as part of criminal restitution. State v. Jenkins, 788 N.W.2d 640, 646 (Iowa 2010)(denying defendant an opportunity to challenge the amounts of the restitution order before the district court implicates his right to due process.). See also Iowa Court R. 26.2(10)(c)("After the judicial officer makes a rule 26.2(10)(a) or (b) determination, the judicial officer shall set forth in the sentencing order the amount the person is required to pay for legal assistance."). The "reasonable ability to pay" determination is the sentencing court's duty. Here, the district court ordered total reimbursement and shifted its responsibility

to Mosley to request a hearing to prove he did not have the ability to pay the costs of his legal assistance. This was error and unconstitutional. The district court failed to consider Mosley's reasonable ability to pay the cost of his legal assistance prior to the order entering judgment for reimbursement of the court-appointed attorney fees. See State v. Coleman, # 16-0900, 2018 WL 672132, at *16 (Iowa Feb. 2, 2018)("when the district court assesses any future attorney fees on Coleman's case, it must follow the law and determine the defendant's reasonable ability to pay the attorney fees without requiring him to affirmatively request a hearing on his ability to pay.").

The case must be remanded for a determination of Mosley's reasonable ability to pay the cost of his legal assistance. The district court should also consider the amount of interest, if any, that has been added to the original restitution amount and reduce this amount accordingly.

CONCLUSION

Jerry Mosley respectfully requests this Court reverse his conviction for burglary in the first degree and remand for entry of a judgment of acquittal. Alternatively, Mosley request this Court reverse his conviction for burglary in the first degree and remand for a new trial. If the record is inadequate to address his claim of ineffective assistance of counsel, Mosely requests the issue be preserved for a postconviction relief hearing.

Lastly, Mosley respectfully requests this Court vacate his sentence for assault causing bodily injury and remand for resentencing for an order merging the assault conviction into the conviction for burglary in the first degree and/or for consideration of his reasonable ability to pay the cost of his legal assistance.

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 $5.58, and that amount has been paid in full by the Office of the Appellate Defender.

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