IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-1087

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JERRY DARNELL MOSLEY,
Defendant-Appellant.

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

APPELLEE'S BRIEF

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ROUTING STATEMENT

As the defendant admits, this case can be resolved under existing case law, including *State v. Walker*, 600 N.W.2d 606 (Iowa 1999). Defendant's Proof Br. at 16. The defendant's argument for retention is apparently his fear that *Walker* reaches too broadly "in practice," because it might reach a case that involves "the mere commission of a crime in an occupied structure." Defendant's Proof Br. at 16 (citing *Walker*, 600 N.W.2d at 610). This is not that case, and the facts here do not warrant the Supreme Court "reexamining" *Walker*. This case does not involve a crime that just happened to occur in an occupied residence: instead, it falls within the heartland of conduct criminalized by the burglary statute, as reflected by existing Supreme Court case law.

In *State v. Walker*, the Supreme Court held that an offender's permission to enter a residence can be terminated as a result of a victim resisting an attack and begging the offender to leave the residence. *Walker*, 600 N.W.2d at 610. Here, the jury reasonably concluded both that (1) the defendant did not have permission to enter the residence at all; and (2) even if the defendant had some limited permission to enter, that permission was revoked when he

attacked the victim, threw her into a wall, stomped on her, threatened her, and ransacked her kitchen—all while the victim was fighting the defendant off, trying to "kick him in the balls," begging him to stop, screaming for help, and yelling for one of her children to call 911. *See generally* Facts. This case does not stretch *Walker*: it is a straightforward application of *Walker*'s holding. Thus, this case can be decided based on existing legal principles, and transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

The defendant, Jerry Mosley, appeals his convictions for burglary in the first degree, a Class B felony in violation of Iowa Code sections 713.1 and 713.3 (2015), and assault causing bodily injury, a serious misdemeanor in violation of Iowa Code section 708.1 and 708.2(2) (2015). The defendant was convicted following trial by jury in the Clay County District Court, the Hon. Carl J. Petersen presiding.[1]

[1] The defendant notes in his brief that he was also convicted of criminal mischief in the fifth degree, and he correctly admits that there is no right to appeal a simple misdemeanor. Defendant's Proof Br. at 17. He has not made any request for discretionary review.

Course of Proceedings

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

Facts

The defendant and Kristen Christoffer had an affair for about two years, on and off. *See* trial tr. vol. I, p. 116, lines 2–22; p. 160, lines 5–10. In 2015, Kristen grew tired of keeping the defendant's secret, and they split up for several months. Trial tr. vol. I, p. 116, line 25 — p. 117, line 15. Things started up again briefly in 2016, but came to an end during a text-message fight on the morning of June 6, 2016. *See* trial tr. vol. I, p. 117, line 16 — p. 118, line 10; *see generally* State's Exhibit 29: Texts; App. 17–29.

Kristen had heard the defendant was seeing other women—in addition to her and the defendant's wife—and she confronted him about it. Trial tr. vol. I, p. 119, lines 5–11. The defendant denied the allegations and demanded that Kristen name some of the other women he was sleeping with. Trial tr. vol. I, p. 122, lines 11–25. The defendant next accused Kristen of cheating on him. Trial tr. vol. I, p. 123, line 25 — p. 124, line 1. From there, the conversation proceeded apace, with the parties trading accusations, the defendant sending

Kristen angry texts with racial comments and ultimately a suggestion that she kill herself. *See* State's Exhibit 29: Text Messages, pp. 6–13; App. 22–29.

The conversation ended with the defendant telling Kristen "now dew us both a favor lose my number bitch" and Kristen responding "lol will do. peace out douchelord."[2] *See* State's Exhibit 29: Texts, p. 13; App. 29. To Kristen, it was clear her relationship with the defendant "was over." Trial tr. vol. I, p. 134, lines 15–22. Later that same day, the defendant invaded Kristen's home, beat her, and damaged her property.

The burglary and assaults

On June 6, 12-year-old D.I. was watching TV downstairs, while Kristen got one of her children dressed upstairs. *See* trial tr. vol. I, p. 133, lines 11–19; p. 174, lines 7–8; p. 175, lines 15–17; p. 177, lines 5–9. D.I. saw the defendant come in the door, then "r[u]n up the stairs and tackle[] Kristen to the wall." Trial tr. vol. I, p. 178, lines 11–14. The attack happened "within, like, seconds" of the defendant entering

[2] The record is somewhat ambiguous about whether "Douchelord" is always a term of endearment, sometimes derogatory, or possibly both. Kristen explained at trial that she learned this was the defendant's nickname from Facebook, and that it meant "lord of the douchebag." Trial tr. vol. I, p. 163, line 21 — p. 164, line 14.

the residence—as soon as he got to the top of the stairs, where Kristen was. Trial tr. vol. I, p. 136, lines 11–17; p. 194, lines 19–25.

D.I. ran to the bottom of the stairs to see what was happening: he saw the defendant on top of Kristen, punching her in the face and upper body with a closed fist. Trial tr. vol. I, p. 179, lines 1–9. While the defendant was "beating Kristen up," D.I. heard the defendant threaten to "burn down the house and kill everybody who was in it." Trial tr. vol. I., p. 179, lines 16–25.

Kristen was begging the defendant to stop, telling him that he was hurting her, as she was "on the ground in a ball." Trial tr. vol. I, p. 181, lines 3–5; p. 181, lines 14–22. During the attack, the defendant "stomped" on Kristen's ribs "four or five times." Trial tr. vol. I, p. 184, lines 13–22.

Kristen screamed for her children to get help and she even tried telling the defendant she loved him, to get him to stop beating her. Trial tr. vol. I, p. 142, lines 14–18. He responded by telling her that she didn't love him and that she had "fuck[ed]" with his emotions. Trial tr. vol. I, p. 142, lines 19–21

One of the blows knocked Kristen into the bedroom, where she landed on a sleeping child. Trial tr. vol. I, p. 136, lines 11–17. She got

up and the defendant kept hitting her. Trial tr. vol. I, p. 136, line 18 — p. 137, line 17. The defendant knocked Kristen into a wall so hard that D.I. could see the imprint of Kristen's body. Trial tr. vol. I, p. 136, line 18 — p. 137, line 17; p. 189, line 15 — p. 190, line 1. The defendant also tried to throw Kristen down the stairs. Trial tr. vol. I, p. 136, line 18 — p. 137, line 17.

Kirsten screamed for D.I. (or any of the other children) to call 911. Trial tr. vol. I, p. 136, line 18 — p. 137, line 17. D.I. tried to dial for help, but dropped the phone because his hands were shaking. Trial tr. vol. I, p. 181, lines 23–25; p. 182, lines 12–14. The defendant got ahold of Kristen's phone and threw it against the wall until it "shattered."[3] Trial tr. vol. I, p. 182, line 22 — p. 183, line 9.

At some point, the defendant went downstairs to the kitchen and tried to tip the fridge over, but apparently was unable to do so. Trial tr. vol. I, p. 183, lines 10–18. So he "threw the microwave" to the floor instead. Trial tr. vol. I, p. 183, lines 15–18.

Some time after the defendant rampaged through the kitchen, Kristen gathered her children, hid in the bathroom, and called 911. Trial tr. vol. I, p. 136, line 18 — p. 137, line 17. While she was trying to

[3] The shattered phone provided the basis for the criminal mischief count, given the cost of repairs. *See* trial tr. vol. I, p. 149, lines 5–13.

dial, the defendant was pounding on the door and yelling. Trial tr. vol. I, p. 136, line 18 — p. 137, line 17; p. 185, line 17 — p 186, line 6.

Eventually, Kristen was able to contact 911. She was crying and told the dispatcher she was "petrified" and "hiding in the bathroom" with her children. *See* State's Exhibit 1: 911 call, at 1:30–3:00. When the dispatcher asked Kristen what happened, she identified the defendant by name and said that "he just walked in my house and started kicking my ass." State's Exhibit 1: 911 call, at 2:20–2:40.

The police

Spencer police officers responded to the 911 call and observed that Kristen "had multiple cuts on her face and was bleeding, and she was also holding her left side." Trial tr. vol. II, p. 4, lines 15–19. Kristen also reported pain in the area of her ribs and seemed to visibly be in pain. Trial tr. vol. II, p. 9, line 21 — p. 10, line 1; p. 16, lines 5–7.

Inside the residence, officers saw that "the whole kitchen was trashed," with items "thrown everywhere" and the microwave on the floor. Trial tr. vol. II, p. 4, line 20 — p. 5, line 3; p. 15, lines 15–20.

Police later spoke with the defendant, who appeared to be "very laid back, very calm." Trial tr. vol. II, p. 18, lines 5–11. When they

apprehended him, the defendant asked the officers: "Is this just for an assault or what?" Trial tr. vol. II, p. 17, lines 14–19.

The injuries

Kristen explained at trial that some of the blows to her face caused scarring. Trial tr. vol. I, p. 139, lines 11–25. Kristen recalled that her ribs were bruised after the attack, and that her injuries ultimately caused her to miss several days of work. Trial tr. vol. I, p. 139, lines 11–25. Also, Kristen was pregnant when the defendant attacked her, although she did not know it at the time. Trial tr. vol. I, p. 141, lines 1–8.

The defendant's permission to enter the house

The fighting issue at trial was over whether the defendant had permission to enter Kristen's house. *See* trial tr. vol. II, p. 36, lines 6–11 (prosecutor noting in closing argument that the permission issue was "where the real argument is going to be today"). However, even during the affair, the defendant did not have unlimited access to Kristen's current residence: he did not have keys,[4] had not spent the

[4] Although Kristen once gave the defendant keys to a previous residence to let her dog out, the defendant never had a key to the residence where the burglary took place. Trial tr. vol. I, p. 161, lines 11–20. He had keys to the previous residence about a year before the burglary and assault. Trial tr. vol. I, p. 171, line 23 — p. 172, line 6.

night, did not keep any property there, and had not been in the residence when Kristen was not home. Trial tr. vol. I, p. 131, line 16 — p. 132, line 11. When the two were not seeing each other, the defendant was not permitted inside the residence at all. *See* trial tr. vol. I, p. 132, lines 19–24.

There was testimony that the defendant would sometimes enter the residence without knocking, but this only happened when Kristen knew he was coming over, while they were having the affair. *See* trial tr. vol. I, p. 160, line 16 — p. 161, line 3; p. 162, lines 7–11.

During her testimony, Kristen was emphatic that the defendant did not have permission to be in her home that day:

> **Q.** … Tell the jury about any permission that Mr. Mosley had to be at your residence on June 6.
>
> **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.**

Trial tr. vol. I, p. 145, line 21 — p. 146, line 1 (emphasis added). Further, while the defendant did have permission to come into Kristen's home with her knowledge during the course of their relationship, he did not have permission after they had agreed "to go

[their] own separate ways" that morning. Trial tr. vol. I, p. 146, line 18 — p. 147, line 4.

Kristen also explained that, while the assault was too frenetic for her to verbalize that the defendant did not have permission to be in her home, she was telling him to leave non-verbally by fighting him off and trying to "kick him in the balls to get him to drop down and leave [her] alone." *See* trial tr. vol. I, p. 149, lines 6–15.

ARGUMENT

I. The State Presented Sufficient Evidence the Defendant Did Not Have Permission to Enter Kristen's Home and that He Remained Past the Revocation of Any Arguable Permission.

Preservation of Error

The State does not contest error preservation.

Standard of Review

When evaluating a sufficiency challenge, evidence is viewed in the light most favorable to the State and all reasonable inferences are drawn to uphold the verdict. *State v. Leckington*, 713 N.W.2d 208, 212–13 (Iowa 2006). "A jury is free to believe or disbelieve any testimony as it chooses to give as much weight to the evidence as, in its judgment, such evidence should receive." *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996).

Merits

In his brief, the defendant levies two sufficiency challenges. First, he complains that there was insufficient evidence that he did not have permission to enter Kristen's house after the breakup on June 6, 2016. *See* Defendant's Proof Br. at 26–36. As explained below, this claim fails because the defendant's permission to enter Kristen's house ended when the affair ended, and the jury reasonably concluded that any permission to enter was revoked following the text-message fight on the morning of June 6. Second, the defendant claims there was not enough evidence that, if he still had some arguable permission to enter Kristen's home, he unlawfully remained over. *See* Defendant's Proof Br. at 36–49. This claim fails in light of controlling case law, the weight of authority from other jurisdictions, and the facts of this case: Kristen revoked any arguable permission to remain when she resisted the assault, begged the defendant to stop attacking her, yelled for help, and eventually summoned the police. The guilty verdict was supported by substantial evidence.

A. The State presented substantial evidence that the defendant did not have permission to enter Kristen's residence on June 6, 2016.

Contrary to the defendant's argument, the issue regarding permission to enter Kristen's home is not very complicated. It does not take a law degree to understand that, while a paramour may have permission to enter a home during the course of a relationship, that permission ends when the relationship ends. No reasonable person thinks that, after a breakup, a spurned lover can traipse through the home of his former mistress to commit an assault and ransack the place. This common-sense understanding disposes of the defendant's sufficiency argument regarding permission: he and Kristen broke up on the morning of June 6, revoking any permission he may have had to enter Kristen's home, rendering his subsequent invasion of her home an unlawful burglary within the meaning of Iowa Code section 713.1.

The record evidence is sufficient to support the conviction because a reasonable jury hearing the evidence regarding Kristen and the defendant's breakup would conclude that the defendant did not have permission to enter her home after the final text messages were exchanged. After an extended fight in which they traded insults (and

the defendant suggested Kristen kill herself), the conversation ended with the defendant telling Kristen "now dew us both a favor lose my number bitch" and Kristen responding "lol will do. peace out douchelord." *See* State's Exhibit 29: Texts, p. 13; App. 29. Telling someone "do us both a favor and lose my number, bitch" is a colloquial (albeit colorful) way of saying "our relationship is over, do not contact me again." *Cf. LMN*, definition #3, Urban Dictionary, https://www.urbandictionary.com/define.php?term=lmn (last accessed Mar. 16, 2016) ("If someone you really don't want to talk to, ever again, keeps calling or texting you and blowing up your phone, Tell them LMN (lose my number)!").[5] Telling someone "peace out" is a colloquial way of saying "goodbye" or "I'm finished." *Cf. Peace Out*, definition #1, Urban Dictionary, https://www.urbandictionary.com/define.php?term=Peace%20Out (last accessed Mar. 16, 2016) ("A

[5] For other examples of the phrase "lose my number" in the context of breakups and the termination of relationships, see *United States v. Thomson*, 634 F. App'x 100, 107 (4th Cir. 2016) ("[L]ose my number, lose my name, don't call me again."); *MacDonald v. Moose*, 710 F.3d 154, 157 (4th Cir. 2013) ("[T]his has got to stop, lose my number, I'm married, don't call me anymore."); *People v. Davis*, No. H022223, 2002 WL 1980695, at *2 (Cal. Ct. App. Aug. 28, 2002) ("Don't talk to me, just lose my number and don't call me.").

slang term telling someone good-bye…").[6] A reasonable jury would view this communication as Kristen did: to her, any relationship she had with the defendant "was over." Trial tr. vol. I, p. 134, lines 15–22.

The defendant's claims in this subdivision are really a closing argument masquerading as an appellate sufficiency challenge: his complaint is essentially that the thinks the jurors should have drawn different inferences from the evidence, or understood the text messages differently, in his favor. *See* Defendant's Proof Br. at 33–36. That is not the standard of review. *See, e.g.*, *Leckington*, 713 N.W.2d at 212–13 ("[W]e view the evidence in the light most favorable to the State…"). Nor is the defendant entitled to relief because the jurors credited different evidence than he wishes. *See, e.g, Liggins*, 557 N.W.2d at 269 ("A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive."). The

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[6] For other examples of "peace out" as a farewell or termination of a relationship, see *Wallar v. State*, 403 S.W.3d 698, 701 (Mo. Ct. App. 2013) ("[The defendant] flipped the driver off; said, 'peace out, bitch'; and drove away."); *People v. Carter*, No. 1-10-1378, 2012 WL 6949811, at *4 (Ill. Ct. App. Aug. 27, 2012) ("Then he received a phone call and said he was going to leave. Ms. Odom told him 'peace out or good riddance.'"); *Com. v. Osborne*, No. 99-P-1900, 2001 WL 856265, at *1 (Mass. App. July 27, 2001) ("The victim replied, 'No thanks' and the defendant said 'Okay, peace out' and drove off.").

defendant's argument on appeal is limited to a claim that no reasonable juror could conclude he did not have permission to enter Kristen's residence at the time of the burglary, and that argument is refuted by the record.

The Iowa Supreme Court has held that even a person who has a general right of entry to a residence can be guilty of burglary "if he exceeds his rights either with respect to the time of entering or the place into which he enters." *See State v. Peck*, 539 N.W.2d 170, 174 (Iowa 1995); *accord State v. Hagedorn*, 679 N.W.2d 666, 670 (Iowa 2004) ("Neither the fact the defendant had *previously* resided in the duplex with his family nor the fact his children were still in the home gave him an irrevocable license to enter against the wishes of his wife, the current occupant."). At most, the record in this case establishes that the defendant had permission to be in the house during the course of the affair for purposes of sexual relations—not permission to enter the home whenever he wanted for whatever purpose he desired. *Cf. State v. Lane*, 2015 WL 8388361, at *7 (Iowa Ct. App. Dec. 9, 2015) (affirming a burglary conviction when the evidence showed the defendant "did not have a general right of entry to the residence, except when he was specifically invited over").

The evidence at trial was sufficient to prove the defendant did not have permission to enter Kristen's house, and the jury reasonably relied on the fight, the breakup, and the text messages to conclude any previous permission to enter the residence had been terminated. To hold otherwise would grant all philanderers carte blanche access to the home of their former mistresses, even after one party to the affair has called it off. The law does not tolerate such a conclusion, as the Supreme Court has recognized in evaluating permission to enter a house following a marital separation:

> To allow the existence of a marital relationship to immunize a defendant from the consequences of a burglary hearkens back to the day when the law provided no protection to the victims of domestic assault under the misguided view that it was a private matter between husband and wife. Surely a spouse who stays in the marital residence after the other spouse has moved out should be able to enjoy the security and sanctity of his or her home without the necessity of obtaining a restraining order.

Hagedorn, 679 N.W.2d at 671. Similar principles are in play here.

Finally, the defendant's complaint that "[t]he record does not demonstrate that both parties believed the relationship to be over" must be cast aside as a red herring. Defendant's Proof Br. at 34. As the Court of Appeals has recognized, "at best such evidence is relevant

to [a] mistake of fact defense." *State v. Williams*, No. 00-0488, 2001 WL 709460, at *4 (Iowa Ct. App. June 13, 2001) (affirming burglary conviction where "evidence on consent" was conflicting). This defendant did not raise a mistake-of-fact defense and this argument is therefore irrelevant, as the permission inquiry does not turn on the offender's subjective state of mind.

The jury's verdict regarding permission to enter the residence is supported by substantial evidence.

B. The State also presented substantial evidence that, even if the defendant did have some limited permission to enter Kristen's residence, that permission expired when she resisted the assault, begged him to stop, called for help, and summoned the police.

In addition to criminalizing burglaries committed when the offender enters an occupied structure without permission, the Iowa Code also criminalizes burglaries that take place when a person "remains" in an occupied structure "after the person's right, license or privilege to be there has expired[.]" Iowa Code § 713.1 (2015). The evidence here was also sufficient to support a conviction on this alternative because Kristen clearly revoked any permission the defendant may have had when she fought him off, yelled for help, told

him to stop hitting her, hid in the bathroom, and ultimately called 911 for police assistance.

In *State v. Walker*, the Iowa Supreme Court unanimously upheld a burglary conviction on this "remaining-over" alternative. *See State v. Walker*, 600 N.W.2d 606, 607 (Iowa 1999). There, the defendant entered the home of the victim, whom he knew through mutual friends. *Id.* at 607. After the victim made a friendly comment to him, the defendant, "without saying a word, jumped on [the victim], began choking her, and attempted to drag her up the stairs." *Id.* at 608. The victim "screamed" and "yelled for help" while struggling to escape from the defendant (who was armed with a hammer). *Id.* at 608. The victim did not explicitly tell the defendant to leave, though she did remember yelling for help and begging him to let her go. *See id.* at 608. The Supreme 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." *Id.* at 609. In other words, the Court held that staying past notice that one's permission to remain had expired was sufficient to establish unlawful presence for purposes of the burglary statute. *Id.* at 609. The Court

found that, on the facts of that case, the defendant "should have known from [the victim's] resistance to his assault and her begging of him to stop that he no longer had her permission to be in her home." *Id.* at 610.

Walker controls the resolution of the remaining-over question here. To the extent this defendant originally had some arguable permission to enter Kristen's home, that permission was extinguished at some point during the altercation in which the defendant ran up the stairs, slammed Kristen into the wall, stomped on her, punched her with a closed fist, and ransacked her house. Kristen's actions throughout the attack gave the defendant clear notice that any arguable permission to be in her home had been revoked: she begged him to stop, told him he was hurting her, screamed for her to children to help and call 911, tried to "kick [the defendant] in the balls to get him to drop down and leave [her] alone, " and eventually summoned the police. *See* trial tr. vol. I, p. 181, lines 3–5; p. 142, lines 14–18; p. 149, lines 6–15; p. 181, lines 14–22; State's Exhibit 1: 911 call. Each of those actions on their own provided sufficient notice to the defendant that his permission to be in the residence was revoked; the acts taken in the aggregate leave no doubt about whether the defendant had

unlawfully remained past expiration of any permission. *See Walker*, 600 N.W.2d at 610 (finding the victim's resistance to the assault and her begging the defendant to stop assaulting her were sufficient to establish the defendant's permission was revoked).

As the *Walker* court succinctly put it, the victim "did not have to scream 'Get out!' for [the defendant] to know that his right to be present had expired." *Walker*, 600 N.W.2d at 610. So too here. The circumstances of the attack in this case were undoubtedly chaotic, and Kristen was not required to utter the magic words "get out": it was enough that she fought the defendant off, begged him to stop hurting her, screamed for help, and called the police. These actions all gave the defendant clear notice that his permission had been revoked and that his presence was unlawful.

In his brief, the defendant tries ineffectively to distinguish *Walker* from this case. He argues that Walker was the boyfriend of the victim's friend and had been to the home only once before the burglary. *See* Defendant's Proof Br. at 39. These facts are irrelevant to *Walker*'s holding—that resisting an attack and begging an offender to stop the assault were sufficient non-verbal communications to give notice that an offender's permission to remain in the home was

revoked. *See Walker*, 606 N.W.2d at 610. Next, the defendant complains that—among the cries for help, the attempts to fight off the defendant, the begging for him to stop, and the eventual call to 911—Kristen tried to tell the defendant that she still loved him. Defendant's Proof Br. at 40. This does nothing undermine the applicability of *Walker*: that a woman loves a man does not give the man permission to enter her home, beat her, and vandalize her appliances. Moreover, Kristen told the jury why she said that to the defendant:

> **Q.** Did you say anything to [the defendant] while he was assaulting you?
>
> **A.** I know I was screaming for my babies. I told him to stop, and I told him I loved him to try and make him stop.

Trial tr. vol. I, p. 142, lines 14–18. These attempts to distinguish *Walker* are unpersuasive at best. Reasonable people faced with this evidence would have concluded what this jury did: that, even if the defendant had some arguable permission to enter the home, Kristen revoked that permission by fighting him off, yelling for help, begging him to stop beating her, and calling the police.

The defendant's brief next tries to argue that *Walker* should be overturned or narrowed based on his reading of case law, including

cases cited by the *Walker* court. Defendant's Proof Br. at 41–48 (collecting cases). But nearly all of these cases support the State's position, not the defendant's:

- In *Davis v. State*, the Alabama Supreme Court found the defendant had remained unlawfully and thus committed a burglary when the defendant entered the home with permission but then killed the victim "by a less-than-instantaneous technique of strangulation and by his use of three nonfatal stab wounds to the victim's lower back." *Davis v. State*, 737 So. 2d 480, 484 (Ala. 1999). "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 [the] home with the intent to commit a crime." *Id.* at 484 (brackets original). The facts here are actually more indicative of an unlawful remaining over than the facts in *Davis*: we know Kristen fought off the defendant, begged for him to stop, yelled for help, and called the police, all of which provide explicit notice that permission had been revoked. *Davis* provides the defendant no help.

- In *Hambrick v. State*, the defendant entered the home of an elderly relative in the context of a friendly visit, and subsequently attempted to rob the elderly relative, who resisted the attack. *Hambrick v. State*, 330 S.E.2d 383, 386 (Ga. Ct. App. 1985). The Georgia Court of Appeals reasoned that "there was sufficient evidence, including testimony of the victim's struggle with [the defendant], to create a jury question regarding whether the authority to remain ceased at the time the offensive, aggressive behavior began." *Id.* at 386. In other words, "When [the defendant's] ulterior purpose beyond the bounds of a friendly visit became known to [the 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." *Id.* " [The victim] did not have to shout

'Get out!' for this to be so." *Id.* Again, the facts in this case actually are even stronger proof of revoked permission than the facts in *Hambrick*: Kristen not only resisted the defendant's attack, but also yelled for help, begged him to stop, and called the police.

- In *State v. Felt*, the defendant and the victim were ex-lovers, and one night after they broke up the defendant entered the victim's home ostensibly to use the phone. *State v. Felt*, 816 P.2d 1213, 1213 (Or. Ct. App. 1991). The defendant asked the victim for a hug, which she provided, but she denied his subsequent request for a kiss. *Id.* The defendant kissed the victim anyway, she pushed him away, and then he beat her, threatened her, and raped her. *Id.* The Oregon Court of Appeals unanimously rejected the defendant's argument that the victim "never told or asked [him] to leave." *Id.* at 1214. The Oregon court affirmed the conviction, reasoning that "the circumstances of this case would support the inference that, when [the victim] reacted against defendant, she impliedly revoked her permission that he remain on the premises." *Id.* at 1214. Again, the facts in this case meet or exceed those present in *Felt*: while the *Felt* victim only pushed the defendant away, Kristen tried to kick the defendant, begged him to stop hitting her, cried out for help, and summoned the police.

- In *State v. Collins*, two elderly women invited the defendant into their home so that he could make a phone call. *State v. Collins*, 751 P.2d 837, 838 (Wash. 1988). After the defendant dialed but did not receive an answer, he assaulted the victims and digitally penetrated one of them. *Id.* The Washington Supreme Court affirmed the burglary conviction, concluding in part that, "Once [the defendant] grabbed the two women and they resisted being dragged into the bedroom, any privilege [the defendant] had up to that time was revoked." *Id.* at 841. Again, the facts in this case meet or exceed those in *Collins*: Kristen resisted, begged the defendant to stop, yelled for help, and called 911.

These cases, which the defendant champions in his brief, all support the proposition at the heart of *Walker*: that conduct (like resisting an assault or demanding the offender stop the attack) is sufficient to revoke any existing permission and support a burglary conviction. Kristen's conduct here was more than sufficient to clearly communicate to the defendant that his permission to remain in her home (if it existed at all on June 6, 2016) had been revoked.

The defendant also relies in his brief on a New York case, but that reliance is misplaced. First, while the defendant asserts "New York also limits the application of the 'remaining' language," his only citation is to a trial court order: *People v. Hutchinson*, 477 N.Y.S.2d 965, 965 (N.Y. Sup. Ct. 1984. *See* Defendant's Proof Br. at 4–48. Appellate cases in New York come to the opposite conclusion, in line with the case law cited above and the State's position in this appeal. In *People v. DeLarosa*, the First Department Appellate Division held that, even if the defendant had been permitted entry to the residence, "the evidence ma[de] clear that the victim unequivocally withdrew any license to remain" when the victim "persistently asked [her] friend to call police." *People v. DeLarosa*, 568 N.Y.S.2d 47, 48–49 (N.Y. App. Div. 1991). In *People v. Burnett*, the Second Department

Appellate Division found that, even though an elderly victim had invited the defendant into her apartment, "[t]he defendant's authorization to lawfully remain in the apartment terminated … when [the defendant] took the victim's money, and then hit her in the face with a shoe and tied her up with electrical cord when the victim threatened to call the police." *People v. Burnett*, 614 N.Y.S.2d 34, 35 (N.Y. App. Div. 1994). The New York appellate cases, like case law from other jurisdictions, accept that nonverbal conduct can terminate permission to enter a residence. New York's law, contrary to the defendant's assertions, supports affirming the burglary conviction here.

Florida is the only state cited by the defendant with appellate cases that arguably support his position, and Florida has—at best—a checkered history on the issue. In *Ray*, a Florida appellate court relied on *Hambrick*, 330 S.E.2d 383, to conclude that resisting an assault terminated permission to remain in a structure for purposes of the state's burglary statute. *See Ray v. State*, 522 So. 2d 963, 966 (Fla. Dist. Ct. App. 1988). *Ray* was later abrogated in part by *Delgado*, a Florida Supreme Court decision that limited the remaining-over alternative to situations where the offender remains

"surreptitiously." *Delgado v. State*, 776 So. 2d 233, 240 (Fla. 2000). The *Delgado* decision was wrong on its face, as evidenced by the swift legislative response, which overturned *Delgado* and reinstated the *Ray* rule. *Bradley v. State*, 33 So. 3d 664, 681 (Fla. 2010) ("Shortly after the decision in *Delgado,* the Florida Legislature enacted legislation abrogating that decision, and clarifying that 'for a burglary to occur, it is not necessary for the licensed or invited person to remain in the dwelling, structure or conveyance surreptitiously.'"). Pointedly, the Florida Legislature made the following findings:

> (1) The Legislature finds that the case of *Delgado v. State*, 776 So. 2d 233 (Fla. 2000), was decided contrary to legislative intent and the case law of this state relating to burglary prior to *Delgado v. State*. The Legislature finds that in order for a burglary to occur, it is not necessary for the licensed or invited person to remain in the dwelling, structure, or conveyance surreptitiously.
>
> (2) It is the intent of the Legislature that the holding in *Delgado v. State*, 776 So. 2d 233 (Fla. 2000) be nullified. It is further the intent of the Legislature that s. 810.02(1)(a) be construed in conformity with *Raleigh v. State*, 705 So. 2d 1324 (Fla. 1997); *Jimenez v. State*, 703 So. 2d 437 (Fla. 1997); *Robertson v. State*, 699 So. 2d 1343 (Fla. 1997); *Routly v. State*, 440 So. 2d 1257 (Fla. 1983); and *Ray v. State*, 522 So. 2d 963 (Fla. 3rd DCA, 1988). This subsection shall operate retroactively to February 1, 2000.

Fla. Stat. Ann. § 810.015 (2015). The Florida cases provide the defendant little help: there is no reasonable construction of Iowa Code section 713.1 that involves the word "surreptitiously," and the Florida decision was clearly erroneous. Reading "surreptitiously" into Iowa's burglary statute, as the defendant perhaps invites, would violate separation of powers and require this Court to usurp the legislative function. *See Klouda v. Sixth Judicial Dist. Dep't of Corr. Servs.*, 642 N.W.2d 255, 261 (Iowa 2002) ("[T]he legislature has the sole power to prescribe certain acts as crimes and to provide penalties for the commission of such acts."); *State v. Robbins*, 257 N.W.2d 63, 67 (Iowa 1977) ("In defining crimes, as in all other legislation, the legislature is its own lexicographer."). This Court must decline the defendant's invitation to re-write section 713.1.

From the cases discussed above, the defendant seems to pull at another thread of the case law with his assertion that some decisions turn on whether the defendant exceeded the scope of the permission offered by the victim. Defendant's Proof Br. at 48–49. Yet that analysis also demonstrates that he is guilty of burglary on a remaining-over theory. Even if one were to generously assume that the defendant's permission on June 6, 2016, was the same as it had

been at the height of his affair with Kristen, his permission to enter her home was limited to doing so with her knowledge for purposes of sexual liaisons (or perhaps conversation). Under no circumstances, past or present, did the defendant's permission to enter the home include license to savagely beat Kristen, shatter her cell phone, or ransack her kitchen appliances. Plainly the defendant exceeded the scope of any permission he may have once had.

Finally, while the defendant suggests in his brief that *Walker* is an unusual or aberrant decision, he cites no support for that proposition. *See* Defendant's Proof Br. at 49 (urging the Court "to reexamine *Walker* and overrule it"). At least one survey of modern burglary statutes notes that a majority of states criminalize some form of "remaining unlawfully" or "remaining" in their burglary crimes. *See* Helen A. Anderson, *From the Thief in the Night to the Guest Who Stayed Too Long: The Evolution of Burglary in the Shadow of the Common Law*, 45 Ind. L. Rev. 629, 645 n.13 (2012). The above survey of case law also demonstrates that *Walker* is in the mainstream of judicial decisions. Notably, it is not clear that the defendant has found a single precedential case—from any jurisdiction—that would warrant reversing his conviction.

In light of *stare decisis*, the weight of authority across the country, and the facts of this case, the defendant's conviction should be affirmed. To the extent he had any permission to be in Kristen's home on June 6, 2016, that permission was extinguished by Kristen resisting the assault, begging the defendant to stop attacking her, yelling for help, and calling the police. The jury's verdict withstands the defendant's attack.

II. Counsel Was Not Ineffective. Objecting to D.I.'s Testimony May Not Have Been Warranted and Would Not Have Changed the Outcome.

Preservation of Error

Ineffective-assistance claims are an exception to the general rules of error preservation. *See State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005).

Standard of Review

Constitutional claims, including ineffective-assistance claims grounded in the Sixth Amendment, are reviewed de novo. *Wills*, 696 N.W.2d at 22.

Merits

The defendant next claims that trial counsel was ineffective for not objecting to a portion of D.I.'s testimony when he relayed a threatening statement he heard the defendant make inside Kristen's

home. Defendant's Proof Br. at 50–58. The defendant is not entitled to relief. He cannot prove breach of an essential duty, as the record does not clearly establish whether the State provided fair notice of the testimony during discovery but outside the minutes of testimony. And the defendant cannot show prejudice because there is no reasonable probability that objecting to this evidence would have resulted in acquittal.

To demonstrate he received ineffective assistance, a criminal defendant bears the burden to prove "(1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice." *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006) (citing *Strickland v. Washington*, 466 U.S. 688, 687–89 (1984)). The defendant must prove the facts underlying his claim by a preponderance of the evidence and affirmatively prove both elements. *State v. Madsen*, 813 N.W.2d 714, 724 (Iowa 2012). Failure to prove either element is fatal. *See Strickland*, 466 U.S. at 700.

To establish a breach of duty, the defendant is required to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. "[C]ounsel's performance is measured

against the standard of a reasonably competent practitioner." *State v. Begey*, 672 N.W.2d 747, 749 (Iowa 2003). There is a strong presumption of counsel's competence. *See Strickland*, 466 U.S. at 689.

As to the second element, "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. Under this prong, the defendant is required to show "that counsel's errors were so serious as to deprive the defendant of a fair trial[.]." *Id.* at 687. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

As relevant background for evaluating the ineffective-assistance claim, the Iowa Supreme Court has held that the purpose of the minutes of testimony "is to alert the defendant *generally* to the source and nature of the evidence against him." *State v. Lord*, 341 N.W.2d 741, 743 (Iowa 1983) (emphasis original). The minutes fulfill their function so long as the defendant is "put on notice of the necessity of further investigation of the witness' probable testimony."

Id. at 743. Minutes of testimony "need not detail each circumstance of the testimony, but they must be sufficient—fully and fairly—to alert [the] defendant generally to the source and nature of the evidence against him." *State v. Walker,* 281 N.W.2d 612, 614 (Iowa 1979); *see State v. Wells*, 522 N.W.2d 304, 307 (Iowa Ct. App. 1994) ("The obligation to provide a 'full and fair statement' does not require the State to use precision in composing the expected testimony of each witness named in the minutes."). A general description of expected testimony is sufficient. *See State v. Bennett*, 503 N.W.2d 42, 47 (Iowa Ct. App. 1993) (holding that a minute stating a doctor would testify to "external appearance and internal appearance during the course of the autopsy" was sufficient notice as to the particular findings resulting from the examination).

Even if the State altogether fails to minute a witness, the remedy is not necessarily exclusion of the witness's testimony. Iowa R. Crim. P. 2.19(3). The district court "may order the state to permit the discovery of such witnesses, grant a continuance, or enter such other order as it deems just under the circumstances," reserving the exclusion of testimony as a remedy of last resort, available only when "no less severe remedy is adequate." Iowa R. Crim. P. 2.19(3). In

interpreting this and similar rules of criminal procedure, Iowa' s appellate courts have recognized that not every failure to provide adequate notice in the minutes requires the severe remedy of excluding evidence, generally only approving exclusion of testimony when its admission would unfairly and prejudicially surprise the defendant or necessitate a material and substantial delay to allow for defense counsel's preparation. *See State v. Musso*, 398 N.W.2d 866, 868 (Iowa 1987); *State v. Bedwell*, 417 N.W.2d 66, 69 (Iowa 1987); *State v. LeGrand*, 501 N.W.2d 59, 62 (Iowa Ct. App. 1993). Ordinarily, offering the defense a continuance and opportunity for further investigation is a sufficient remedy. *Bedwell*, 417 N.W.2d at 69.

As to the first prong of *Strickland*, the record is not sufficient for the defendant to affirmatively prove that trial counsel was deficient. The record is silent as to whether D.I. was deposed or made the challenged statement to the police or in any other fashion whereby the defense would have been apprised, through discovery, of his expected testimony regarding the threat. It appears at least some witnesses were deposed, though it is unknown whether D.I. was. *See* 7/18/2016 Application for Depositions; App. 15. It is not possible for

this Court to find counsel not objecting was professionally unreasonable without knowing exactly what information was disclosed during discovery. The defendant necessarily cannot prove breach of an essential duty for this discovery issue on a direct-appeal record, and this is fatal to his claim.

Second, the defendant cannot prove prejudice, even if he could prove breach of an essential duty. In his brief, the defendant essentially chooses not to conduct a prejudice analysis. Instead, he baldly asserts—with little to no explanation—that "confidence in the outcome is undermined." Defendant's Proof Br. at 57. This assertion of prejudice is facially insufficient. *See State v. Tate*, 710 N.W.2d 237, 241 (Iowa 2006) (noting that "conclusory claims of prejudice" are not sufficient to satisfy the prejudice inquiry). Contrary to the defendant's abbreviated summary, to show prejudice he must prove the "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In the context of a jury trial, a different outcome is an acquittal. The defendant has not remotely carried his burden to prove the reasonable probability he would have been acquitted.

Even if one makes a number of unwarranted assumptions in the defendant's favor—assuming the evidence was not disclosed in discovery, assuming an objection was made at trial, and assuming the objection was not overruled—the defendant still cannot show the evidence would have been excluded, let alone that he would have been acquitted. Ordinarily, a deficiency in the minutes is sufficiently remedied by offering the defense a continuance and opportunity for further investigation. *Bedwell*, 417 N.W.2d at 69; *cf. State v. Sevcik*, 239 N.W.2d 571, 573 (Iowa 1976). There is no reason to think a very brief continuance, or perhaps a lunchtime deposition or interview, would be insufficient to cure any alleged surprise. This record does not prove that the admission of D.I.'s testimony was such a severe and prejudicial surprise that the district court would have had no option but to impose the sanction of last resort and exclude the evidence. *See* Iowa R. Crim. P. 2.19(3); *Musso*, 398 N.W.2d at 868; *LeGrand*, 501 N.W.2d at 62; *Bedwell*, 417 N.W.2d at 69. This is particularly so because the minutes gave the defense fair notice that additional discovery of D.I. was appropriate (and may well have been conducted in this case). *See* Minutes, pp. 1–2; Conf. App. 4–5; *Lord*, 341 N.W.2d at 743.

Moreover, even if the objection was sustained and the testimony was excluded, this still would not have resulted in acquittal. The fighting issue at trial was plainly related to permission for the defendant to be in Kristen's house (*see* Division I), and the defendant admitted that he committed the assault (*see* trial tr. vol. II, p. 49, lines 1–5 ([Defense closing]: "… [A]n assault clearly took place. Once he got there and the argument resumes he committed assault against her, and he caused her bodily injury, and those we have no excuse for. He certainly did those things…."). To the extent the threatening statement might have been materially probative on any count at trial, it would have been on the harassment count—and the judge ruled from the bench that the State could not rely on the allegedly un-minuted statement as the basis for harassment. *See* trial tr. p. 31, lines 4–10.[7] D.I.'s testimony regarding the defendant's statement was largely background noise and had little or nothing to do with the jury's verdict on the counts for burglary and assault causing bodily injury. The defendant has not carried his burden to prove the reasonable probability any objection would have been sustained, let

[7] Also, the jury acquitted on the harassment count. *See* Verdict Form nos. 18 & 20; App. 35–36.

alone that the objection would have led to his acquittal. The defendant is not entitled to relief.

Finally, while the record is sufficient to reject the defendant's claim at this juncture, this Court could choose to preserve the claim for postconviction relief and further development of the record. *See* Iowa Code § 814.7 (2015); *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978) (on how "even a lawyer" deserves his day in court).

III. The Convictions for Burglary and Assault Causing Bodily Injury Do Not Merge Because There Was More than One Assault.

Preservation of Error

To the extent the defendant's complaint is truly grounded in the illegal-sentence doctrine, the State is unable to contest error preservation. Iowa R. Crim. P. 2.24(5)(a). However, to the extent the defendant's complaint could arguably veer into an argument that the jury instructions did not specify whether the jury found one or more than one assault took place, error was not preserved, and the complaint cannot be heard. *See, e.g., State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999) (on error preservation).

Standard of Review

Review is for correction of errors at law. Iowa R. App. P. 6.907.

Merits

Next, the defendant argues that his conviction for assault causing bodily injury should merge into his conviction for first-degree burglary. *See* Defendant's Proof Br. at 58–62. The defendant's argument might have some appeal if only one assault took place over the course of the burglary. But this record discloses that *at least* two assaults took place: the defendant tackled Kristen, knocked her to the ground (and onto a sleeping child), punched her in the face and body with a closed first, stomped on her ribs four or five times, and tried to throw her down the stairs. *See* trial tr. vol. I, p. 136, line 11 — p. 137, line 17p. 178, lines 11–14; p. 179, lines 1–9; p. 184, lines 13–22; p. 189, line 15 — p. 190, line 1.

The defendant did not lodge below, and has not levied on appeal, any argument that there was an insufficient break in the action to support two separate assaults taking place, nor did the defendant request more specificity in the marshaling instructions for the assault. To the extent his complaint could generously be interpreted to embrace those grounds, that error was not preserved and cannot be heard. Here, the failure to preserve error is not merely an academic complaint: had the defendant complained below that he

believed there needed to be more of a timeline for when and where each assaultive act took place, the State could have further developed that testimony.

Even without such a complaint below, however, Kristen's testimony establishes that one assault took place upstairs near the bedroom and then another assault took place downstairs or on the stairs. *See* trial tr. p. 142, lines 4–13. In addition, D.I.'s testimony established that the defendant assaulted Kristen upstairs, then ran downstairs to ransack the kitchen, then "ran back upstairs, [and] started hitting Kristen again." *See* trial tr. vol. I, p. 180, line — p. 183, line 21. This is sufficient to establish a break in the action and support at least two separate assaults. *See* trial tr. vol. II, p. 27, line 21 — p. 28, line 7 (the district court judge, in another context, referring to a "break in the assault"). On this record, and with these facts, burglary (Count I) and assault causing bodily injury (Count III) do not merge and the defendant is not entitled to relief.

IV. The Defendant's Restitution Challenge Is Procedurally Barred and Cannot Be Heard. The District Court Has Not Determined the Amount He Owes for Court Costs or Attorneys' Fees.

Motion to Dismiss/Failure To Exhaust

Under controlling Supreme Court precedent, the defendant has failed to exhaust his remedies for challenging his reasonable ability to pay, and his complaint cannot be heard:

> … Iowa Code section 910.7 permits an offender who is dissatisfied with the amount of restitution required by the plan to petition the district court for a modification. **Unless that remedy has been exhausted, we have no basis for reviewing the issue in this court.**

State v. Jackson, 601 N.W.2d 354, 357 (Iowa 1999) (internal citation omitted, emphasis added); *accord State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999).[8] No 910.7 motion has been litigated in the district court related to this issue, nor has a plan of restitution been entered.

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[8] There is one published Court of Appeals case at odds with *Jackson* and *Swartz*: *State v. Kurtz*, 878 N.W.2d 469, 472 (Iowa Ct. App. 2016). *Kurtz* is wrongly decided. It concluded the *Jackson*/*Swartz* exhaustion rule did not apply based on citation to a single legal authority: *State v. Janz*, 358 N.W.2d 547, 549 (Iowa 1984). *Jackson* (1999) and *Swartz* (1999) both post-date *Janz* (1984) and are controlling. Also, *Jackson* was recently re-affirmed in *State v. Richardson*, 890 N.W.2d 609, 626 (Iowa 2017) ("We have previously held that ability-to-pay challenges to restitution are premature until the defendant has exhausted the modification remedy afforded by Iowa Code section 910.7.").

See generally Docket Entries. Therefore, the defendant has not exhausted his remedies and cannot seek review.

Preservation of Error

As discussed above, the State does not agree that error was preserved. A challenge to the reasonable ability to pay is not an illegal-sentence challenge under the circumstances presented in this case. *See State v. Bullock*, No. 15-0982, 2017 WL 4049276, at *2 (Iowa Ct. App. Sept. 13, 2017) (citing *Jose v. State*, 636 N.W.2d 38, 45 (Iowa 2001)).

Standard of Review

Review is for an abuse of discretion. *State v. Van Hoff*, 415 N.W.2d 647, 648 (Iowa 1987).

Merits

The defendant's reasonable-ability-to-pay challenge is premature because neither court costs nor attorneys' fees have actually been imposed in judgment against the defendant, as there is no plan of restitution on file. *See generally* Docket Entries.

The box for court costs on the judgment order provides that costs are ordered "in an amount that will be later certified by the Clerk of Court." Order of Disposition, p. 4; App. 49. No such

certification appears in the record, nor is such a certification entered in the judgment.

The box for court-appointed attorneys' fees indicates that such fees are ordered "in the amount approved by the State Public Defender." Order of Disposition, p. 4; App. 49. No amount approved or certified by the State Public Defender appears in the record, nor is any such amount entered in the judgment.

The Court of Appeals opinion in *State v. Hols* is instructive on how to handle a situation such as this, when the defendant challenges an order that does not yet impose an actual dollar amount of restitution subject to a statutory limitation (like the offender's reasonable ability to pay or a fee limitation):

> The State asserts that Hols's appeal, and the claims of error he makes, are premature and not properly presented for appellate review. It argues there was no order entered requiring him to pay restitution for any amount of court-appointed attorney fees, much less an amount in excess of any fee limitation established pursuant to section 13B.4.
>
> The State requests that we affirm the district court's judgment entry, pointing out that if at any time the court has entered or does enter an illegal order for restitution Hols may utilize section 910.7 (2011) to correct any such error. We agree with the State on these points.

State v. Hols, 10-1841, 2013 WL 750307, at *2 (Iowa Ct. App. Feb. 27, 2013).[9] Just like in *Hols*, the judgment here does not specify any amount due and owing as restitution for court costs or court-appointed attorneys' fees, nor have any such amounts been certified or approved as required by the judgment. *See* Order of Disposition, p. 4; App. 49. Just like in *Hols*, this Court cannot reach the question presented and should affirm the judgment in its current state. *Hols*, 2013 WL 750307, at *2–3. And just like in *Hols*, the defendant "may of course seek relief pursuant to section 910.7" if the district court later enters an unlawful restitution order. *Id.* at *3. In short, until a plan of restitution is completed, "the court is not required to give consideration to the defendant's ability to pay," no such plan is in

[9] Several other cases come to a similar conclusion. *See, e.g., State v. Brown*, No. 16-1118, 2017 WL 2181568, at *4 (Iowa Ct. App. May 17, 2017) ("[T]he trial court had not yet entered a plan of restitution that would trigger the trial court's obligation to determine Brown's reasonable ability to pay. Brown's appeal from the current order is premature."); *State v. Kemmerling*, No. 16-0221, 2016 WL 5933408, at *1 (Iowa Ct. App. Oct. 12, 2016) ("Because the total amount of restitution had not yet been determined by the time the notice of appeal was filed, any challenge to the restitution order in this case is premature."); *State v. Martin*, No. 11-0914, 2013 WL 4506163, at *2 (Iowa Ct. App. Aug. 21, 2013) ("We find, because no restitution order is yet in place, Martin's challenge is premature."); *State v. Wilson*, No. 00-0609, 2001 WL 427404, at *3 (Iowa Ct. App. Apr. 27, 2001) ("We cannot address this issue at this time because no plan of restitution was completed at the time Wilson filed his notice of appeal….").

place here, and no justiciable issue is presented. *See Jackson*, 601 N.W.2d at 357.

Also, even setting aside the holding of *Hols* and the other cases, logic and practicality also dictate that the defendant's challenge cannot be heard at this time. His complaint is that the district court did not adequately determine his reasonable ability to pay, yet we have no idea what dollar amounts for court costs or attorneys' fees will actually be imposed as restitution. It is impossible to evaluate whether the defendant is reasonably able to pay an unknown dollar amount.

However, if this Court disagrees and does find that a restitution amount was imposed for court costs an attorneys' fees, the defendant still would not be entitled to restitution. "A defendant who seeks to upset a restitution order … has the burden to demonstrate either the failure of the court to exercise discretion or an abuse of that discretion." *State v. Van Hoff*, 415 N.W.2d 647, 648 (Iowa 1987). A "silent record" does not indicate an abuse of discretion. *State v. Kaelin*, 362 N.W.2d 526, 528 (Iowa 1985). Further, to the extent the defendant argues or implies that a restitution order must include specific findings about the defendant's reasonable ability to pay, the

Supreme Court has already rejected that argument in a controlling case:

> Defendant argues that this court should require sentencing judges to state their reasons on the record for ordering restitution for court costs and attorney fees to assure that their discretion is exercised and provide a better record for review. Although we believe judges should state their reasons as defendant suggests, we refuse to hold that their failure to do so will invalidate a restitution order. A defendant has at least two opportunities to make an appropriate record on the issue. One is at sentencing. The other is through the provisions in chapter 910 for modification of the order.

Kaelin, 362 N.W.2d at 528. The defendant offers no compelling reason to revisit the issue, and certainly nothing so substantial as to warrant disturbing controlling case law in light of *stare decisis*. On this record, the defendant has failed to carry his burden to challenge the restitution order and the district court should be affirmed.

CONCLUSION

This Court should affirm the defendant's convictions and decline to disturb the partial restitution order entered at sentencing.

REQUEST FOR NONORAL SUBMISSION

Because resolution of the issues presented is foreclosed by controlling case law, oral argument will not assist the court. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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