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 APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED OCTOBER 24, 2018

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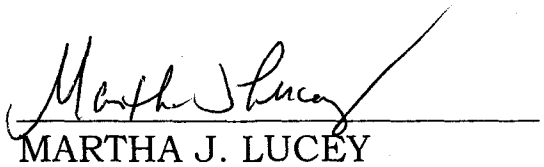
CERTIFICATE OF SERVICE

On November 6, 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.

APPELLATE DEFENDER'S OFFICE



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QUESTIONS PRESENTED FOR REVIEW

I. SHOULD THIS COURT REEXAMINE STATE V. WALKER, 600 N.W.2d 606 (IOWA 1999) BECAUSE IT'S HOLDING IS NOT LIMITED TO FACTUAL SITUATIONS WHERE A VICTIM RESISTS THE DEFENDANT'S ACTIONS WHICH EXCEEDED THE PERMISSIBLE SCOPE OF CONSENT THEREBY ELEVATING EVERY INDOOR ASSAULT INTO A BURGLARY?

II. MUST THE DISTRICT COURT CONSIDER A DEFENDANT'S REASONABLE ABILITY TO PAY COSTS PRIOR TO THE ENTRY OF SUCH AN ORDER AND NOT REQUIRE THE DEFENDANT TO SEEK MODIFICATION OF THE ORDER?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

This case presents a substantial question of enunciating or changing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(f). 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. State v. Walker, 600 N.W.2d 606, 610 (Iowa 1999). However, the application of Walker's broad holding has elevated every indoor assault into a burglary.

The Court of Appeals determined that Mosley's challenge to the criminal restitution order was premature because neither court costs nor attorney fees had been accessed and a plan of restitution filed. Opinion p. 6-7. The Court of Appeals decision conflicts with this Court's decision in State v. Coleman,

907 N.W.2d 124, 149 (Iowa 2018). Iowa R. App. P. 6.1103(b)(1). In the present case, the district court shifted its responsibility to determine Mosley's reasonable ability to pay the cost to him to request a hearing and demonstrate he did not have the ability to pay those fees in the future. In Coleman, this Court stated "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." Id. The Court of Appeals decision is contrary to this Court's precedent. Additionally, this Court will hear oral arguments in State v. Headley, # 18-0594 on November 13, 2018, on a similar criminal restitution issue.

STATEMENT OF THE CASE

Jerry Mosley seeks further review of the Court of Appeals decision affirming his conviction for burglary in the first degree in violation of Iowa Code sections 713.1 and 713.3 (2015).

ARGUMENT

I. THIS COURT SHOULD REEXAMINE STATE V. WALKER, 600 N.W.2d 606 (IOWA 1999) BECAUSE IT'S HOLDING IS NOT LIMITED TO FACTUAL SITUATIONS WHERE A VICTIM RESISTS THE DEFENDANT'S ACTIONS WHICH EXCEEDED THE PERMISSIBLE SCOPE OF CONSENT THEREBY ELEVATING EVERY INDOOR ASSAULT INTO A BURGLARY.

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.

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).[1] 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. * * *

---

1 Also referred to as Davis v. State.

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 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.

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.

II. THE DISTRICT COURT MUST CONSIDER A DEFENDANT'S REASONABLE ABILITY TO PAY COSTS PRIOR TO THE ENTRY OF SUCH AN ORDER AND NOT REQUIRE THE DEFENDANT TO SEEK MODIFICATION OF THE ORDER.

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 judgment 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)[2](App. p. 49). The box for the reasonable ability determination was not marked.

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").

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

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; State v. Dudley, 766 N.W.2d 606, 614-615 (Iowa 2009). "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, 907 N.W.2d 124, 149 (Iowa 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 grant his application for further review and 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. Lastly, Mosley respectfully requests this Court vacate his sentence and remand for consideration of his reasonable ability to pay the cost of his legal assistance.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $3.46, and that amount has been paid in full by the Office of the Appellate Defender.

MARK C. SMITH
State Appellate Defender

MARTHA J. LUCEY
Assistant Appellate Defender

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

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

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 3,881 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

Dated: 11/1/18

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IN THE COURT OF APPEALS OF IOWA

No. 17-1087
Filed October 24, 2018

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JERRY DARNELL MOSLEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Clay County, Carl J. Peterson, Judge.

Jerry Mosley appeals his convictions and sentence for first-degree burglary and assault causing bodily injury following a jury trial. **CONVICTION AFFIRMED, SENTENCE VACATED, AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Tyler J. Buller, Assistant Attorney General, for appellee.

Considered by Vaitheswaran, P.J., Potterfield, J., and Blane, S.J.*

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* Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2018).

VAITHESWARAN, Presiding Judge.

Jerry Mosley appeals his judgment and sentence for first-degree burglary and assault causing bodily injury. He contends (1) the record lacks sufficient evidence to support the jury's finding of guilt on the first-degree burglary charge, (2) his trial attorney was ineffective in failing to object to certain testimony as being outside the scope of the minutes of testimony, (3) the district court should have merged the assault causing bodily injury conviction with the first-degree burglary conviction, and (4) the district court failed to assess his reasonable ability to pay restitution.

I. Sufficiency of the Evidence – First-Degree Burglary

The jury was instructed the State would have to prove the following elements of first-degree burglary:

> 1. On or about the 6th day of June, 2016, the defendant entered the residence of [a woman].
> 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 [the woman].

Mosley challenges the sufficiency of the evidence supporting the fourth element. Our review is for substantial evidence. *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012).

A jury could have found the following facts. Mosley had an affair with a woman. According to the woman, the relationship ended in late 2015 but, three months later, "just kind of picked right up where it left off." After several months, the woman accused Mosley of seeing other women. The couple engaged in a spirited text-message exchange, which culminated in a second break-up.

The same day, Mosley entered the woman's duplex. The woman testified she was confused to see Mosley there because they had just agreed they "weren't going to be talking anymore." Mosley ran up the stairs, grabbed the woman, and pushed her against a wall, leaving a "body print" on the wall. He hit her in the face "multiple times," causing bleeding and scarring. The woman screamed to stop and screamed to a child to call 911. The woman subsequently called 911.

The woman testified she "didn't give [Mosley] permission to come over." She stated he had permission to come to her home "[d]uring the relationship" but that permission ended when they agreed to go their "own separate ways." After Mosley began assaulting her, she wanted "him to leave." Although she did not expressly tell him to leave, she "kick[ed] at him to get him off" her. She also noted he never had keys to the duplex.

A reasonable juror could have found that Mosley lacked permission to enter the woman's home by virtue of the severance of their relationship earlier in the day. A reasonable juror also could have found that Mosley lacked authority to remain in the duplex after he entered. *See State v. Walker*, 600 N.W.2d 606, 609 (Iowa 1999).

In *Walker*, the court addressed the identical issue raised here: "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." *Id.* at 607. The court concluded:

> [A] 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.

Id. at 609. We are not at liberty to overrule this authority, as Mosley requests. Substantial evidence supports the fourth element of the jury instruction and the jury's finding of guilt on the first-degree burglary charge.

II. Ineffective Assistance – Scope of Minutes of Testimony

The State elicited testimony from a child in the home. The child stated Mosley "threatened to burn down the house and kill everybody who was in it, including [the woman] and her kids and me and my brother." Mosley claims the testimony exceeded the scope of the minutes of testimony and his trial attorney was ineffective in failing to object to the testimony on this ground. To prevail, Mosley must show (1) deficient performance and (2) prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The Iowa Supreme Court recently discussed precedent on pretrial disclosures in criminal cases. *See State v. Shorter*, 893 N.W.2d 65, 79–81 (Iowa 2017). The court stated, "[T]he question of the scope of proper disclosure by the prosecution of minutes of evidence prior to trial has been hotly contested." *Id.* at 81. The court characterized the advent of Iowa Rule of Criminal Procedure 2.5(3) governing the scope of minutes as an effort to "promote greater disclosure." *Id.*

Addressing whether the State was obligated to disclose that a witness would make an eyewitness identification of the defendant, the court stated, "Ordinarily, we think it incumbent upon the State to disclose in the minutes of testimony if a witness will identify a defendant as engaging in criminal conduct." *Id.* at 82. The court found the record "not entirely clear" on what defense counsel knew and found "no clear picture regarding prejudice to the defendant." *Id.* The court concluded, "Because of the factual uncertainties surrounding the claimed ineffective assistance of counsel arising out of the deficient minutes, we conclude that this claim cannot be resolved on direct appeal and should be addressed in an action for postconviction relief." *Id.* at 83.

Here, both sides agree the record may be inadequate to address the issue. With this concession in mind and with the benefit of *Shorter*, we preserve the claim for postconviction-relief proceedings.

III. Illegal Sentence – Merger

Mosley contends the district court should have merged his assault causing bodily injury conviction with his first-degree-burglary conviction. *See* Iowa Code § 701.9 (2016) ("No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted."); *see also* Iowa R. Crim. P. 2.6(2) ("Upon prosecution for a public offense, the defendant may be convicted of either the public offense charges or an included offense, but not both."); *State v. Peck*, 539 N.W.2d 170, 175 (Iowa 1995) ("We conclude that it would be impossible to commit first-degree burglary by 'intentionally or recklessly' injuring another without also committing assault or assault causing injury because all of these crimes involve general intent."). The

State counters that merger was not warranted because there was sufficient evidence "to establish a break in the action and support at least two separate assaults." But as Mosley accurately points out, "The instructions submitted did not ask the jury to engage in the fact-finding necessary to support separate acts of assault." *Cf. State v. Lambert*, 612 N.W.2d 810, 816 (Iowa 2000) (rejecting the State's argument that merger of offenses did not occur because "no special interrogatories were submitted and we therefore have no way of knowing the alternative upon which the jury based its decision").

We conclude the assault causing bodily injury conviction merged with the first-degree burglary conviction. We vacate the sentence and remand for merger. *See id.*

IV. Restitution of Attorney Fees and Court Costs

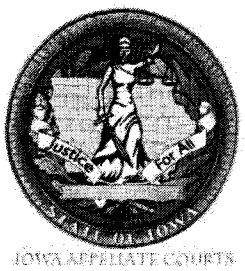
The district court ordered Mosley to make restitution for court costs and attorney fees. Mosley asserts, "The district court failed to consider [his] reasonable ability to pay the cost of his legal assistance prior to the order entering judgment for reimbursement of the court-appointed attorney fees." The State counters that the 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." We agree with the State. *See State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999) (stating until a plan of restitution[1] is completed, "the court is not required to give consideration to the defendant's ability to pay"); *State v.*

[1] A "plan of restitution" "sets out the amounts and kind of restitution in accordance with the priorities established in section 910.2." *State v. Kurtz*, 878 N.W.2d 469, 471 (Iowa Ct. App. 2016).

Swartz, 601 N.W.2d 348, 354 (Iowa 1999) (same). Mosley's restitution concerns are premature.

We affirm Mosley's conviction for first-degree burglary. We preserve for postconviction relief his ineffective-assistance claim grounded on testimony arguably beyond the scope of the minutes. We vacate his sentence and remand for merger of the assault conviction with the burglary conviction.

CONVICTION AFFIRMED, SENTENCE VACATED, AND REMANDED FOR RESENTENCING.



State of Iowa Courts

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17-1087	State v. Mosley

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