IN THE SUPREME COURT OF IOWA
Supreme Court No. 16–0900

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES MICHAEL COLEMAN,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
THE HON. STEPHEN C. CLARKE, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

Coleman asks for retention. *See* Def's Br. at 19. The State agrees that Coleman raises questions of statutory construction that have not been resolved regarding section 692A.105, which makes retention by the Iowa Supreme Court appropriate. *See* Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

Nature of the Case:

James Michael Coleman was charged with failing to notify the sheriff of a change in his temporary lodgings as a sex offender (with a prior sex offender registry violation and as a habitual offender), an enhanced Class D felony, in violation of Iowa Code sections 692A.105, 692A.111, 902.8, and 902.9 (2016). A jury found him guilty as charged.

In this direct appeal, Coleman challenges the State's reading of section 692A.105—he argues that it gives him five business days to notify the sheriff *after* his fifth day spent in temporary lodgings. Coleman also asserts the jury instructions were flawed and the law is unconstitutionally vague. Coleman claims the prosecutor committed misconduct in closing arguments. He also challenges the factual basis for his second registry offense and habitual offender enhancements. Finally, he claims that the sentencing court prematurely assessed payment obligations related to the costs of any subsequent appeal.

Course of Proceedings:

The State generally accepts the defendant's description of the course of proceedings. *See* Iowa R. App. P. 6.903(3).

Statement of Facts:

In August 2015, Coleman was a registered sex offender and was under monitoring as a condition of probation.[1] TrialTr.V1 p.134,ln.18–p.137,ln.7. On Saturday, August 15, Coleman's probation officer spoke with him about a problem with his electronic monitoring and notified Coleman of "the steps he need[ed] to take to get back into compliance." *See* TrialTr.V1 p.137,ln.8–p.138,ln.7. Shortly thereafter, that officer was reassigned; he transferred Coleman's file to another officer. *See* TrialTr.V1 p.138,ln.8–11; TrialTr.V1 p.148,ln.5–15.

The new probation officer, Mark Blatz, repeatedly tried to make contact with Coleman—but to no avail. *See* TrialTr.V1 p.148,ln.16–p.150,ln.21. He went to Coleman's primary residence and spoke with Coleman's father, Michael Coleman ("Michael"). *See* TrialTr.V1 p.150,ln.22–p.151,ln.18. Coleman was not present.

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[1] Outside the presence of the jury, the parties confirmed that "monitoring" referred to electronic GPS monitoring, and that the problem with Coleman's monitoring compliance was that he was not charging his GPS monitor's battery, as he was required to do. *See* TrialTr.V1 p.139,ln.14–p.146,ln.14.

Other law enforcement officers were asked to help track down Coleman. *See* TrialTr.V1 p.152,ln.2–14. On Thursday, August 27, they went to Coleman's residence on Hammond Avenue in Waterloo, Iowa. TrialTr.V2 p.206,ln.5–p.207,ln.10; TrialTr.V2 p.261,ln.14–p.263,ln.11. Michael told them he had not seen Coleman in more than a week (since Sunday, August 16) and said he had become concerned about Coleman's protracted absence. *See* TrialTr.V2 p.207,ln.14–p.211,ln.6; TrialTr.V2 p.243,ln.10–p.245,ln.10; TrialTr.V2 p.263,ln.12–p.265,ln.13. Michael told them it was "very abnormal for [Coleman] to be gone for so long without having any communication with his [father]." *See* TrialTr.V2 p.276,ln.11–23.

Michael (defendant Coleman's father) testified at trial. He said four people lived in the house on Hammond Avenue: himself, his wife, his daughter, and Coleman. *See* TrialTr.V1 p.156,ln.6–p.157,ln.10. Michael and his wife had gone to Mississippi to visit family; they returned on either Sunday, August 16 or on Saturday, August 17. *See* TrialTr.V1 p.157,ln.11–p.159,ln.20. When Michael spoke with the investigating officers on Thursday, August 27, he told them he had not seen Coleman since he returned from Mississippi. *See* TrialTr.V1 p.163,ln.9–p.168,ln.11; TrialTr.V1 p.183,ln.20–p.184,ln.17.

There were some voicemails for Coleman that had been left on the answering machine in Michael's house. TrialTr.V1 p.168,ln.12–p.169,ln.3. The officers listened to them; one message for Coleman was from a woman who said she was waiting for him at a Motel 6. *See* TrialTr.V2 p.211,ln.7–p.212,ln.9; TrialTr.V2 p.265,ln.6–24. They went to that Motel 6, found Coleman sleeping in a motel room, and placed him under arrest. *See* TrialTr.V2. p.212,ln.10–p.217,ln.15; TrialTr.V2 p.265,ln.25–p.269,ln.12. The charger for Coleman's GPS monitor had been missing from his house; it was found in the motel room. *See* TrialTr.V2 p.273,ln.25–p.274,ln.25; TrialTr.V2 p.277,ln.23–p.278,ln.7.

The next day, Coleman asked to speak with those officers. *See* TrialTr.V2 p.218,ln.8–p.219,ln.11. They went to speak with Coleman, who claimed he had been taken to various locations in Cedar Rapids, Marion, and Hiawatha against his will by people trying to collect on a debt that "some other people out of his past had apparently owed." TrialTr.V2 p.228,ln.16–p.229,ln.7; TrialTr.V2 p.246,ln.5–p.248,ln.3; TrialTr.V2 p.269,ln.13–p.270,ln.19. The officers tried to verify that, but were utterly unable to corroborate any part of Coleman's story. *See* TrialTr.V2 p.229,ln.8–p.231,ln.9; TrialTr.V2 p.270,ln.1–19.

Additional facts will be discussed when relevant.

ARGUMENT

I. The Evidence Was Sufficient to Establish that Coleman Failed to Notify the Sheriff Within Five Business Days of Changing His Current Residency/Location from His Permanent Residence to a Temporary Lodging.

Preservation of Error

Coleman moved for judgment of acquittal on this specific issue. *See* TrialTr.V1 p.287,ln.18–p.290,ln.7. The court denied that motion. *See* TrialTr.V1 p.290,ln.8–13. That preserved error for this appeal. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review

"Sufficiency of evidence claims are reviewed for a correction of errors at law." *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012) (citing *State v. Keopasaeuth*, 645 N.W.2d 637, 639–40 (Iowa 2002)). "[M]atters of statutory construction" are reviewed for errors at law. *See State v. Johnson*, 528 N.W.2d 638, 640 (Iowa 1995).

Merits

Here, this Court must determine whether section 692A.105 required Coleman to notify the sheriff within five business days of changing to temporary lodgings, or (as Coleman argues) within five business days of the fifth day he spent at his temporary lodgings. *See* Def's Br. at 36–50. If Coleman's interpretation were correct, it would

be necessary to vacate this conviction; the State presented sufficient evidence to demonstrate Coleman was absent from his residence from Sunday, August 16 until his eventual arrest on Thursday, August 27—which would only be *four* full business days following the running of an initial five-day grace period. *See* TrialTr.V1 p.156,ln.6–p.165,ln.25; TrialTr.V2 p.206,ln.5–p.211,ln.6; TrialTr.V2 p.261,ln.14–p.265,ln.13; State's Ex. B; App. 25. Conversely, if the State's view is correct, this evidence is unassailably sufficient to establish the charged offense—Coleman's argument to the contrary required the jury to speculate that he returned home (unnoticed by his father or any other occupant who would have told his father to stop worrying about where he was) and then fabricated an excuse about being kidnapped for a drug debt when no explanation of his absence would have been necessary. *See* Def's Br. at 62–63 & n.8; *see also* TrialTr.V2 p.228,ln.16–p.231,ln.9; p.269,ln.13–p.270,ln.19; *accord State v. Blair*, 347 N.W.2d 416, 422 (Iowa 1984) (quoting *State v. Odem*, 322 N.W.2d 43, 47 (Iowa 1982)) ("A false story told by a defendant to explain or deny a material fact against him is by itself an indication of guilt."). The State submits that this Court should affirm this conviction because both the language and the intent of section 692A.105 support the State's interpretation.

A. The plain language of section 692A.105 requires notification within five business days of the *change*—which was Coleman's move from his primary residence to temporary lodgings.

Section 692A.104 sets out most of the registration requirements that apply to all sex offenders in Iowa. Section 692A.105 states:

> In addition to the registration provisions specified in section 692A.104, a sex offender, *within five business days of a change*, shall also appear in person to notify the sheriff of the county of principal residence, of any location in which the offender is staying when away from the principal residence of the offender for more than five days, by identifying the location and the period of time the offender is staying in such location.

Iowa Code § 692A.105 (emphasis added). As used in chapter 692A, "'[c]hange' means to add, begin, or terminate." *See* Iowa Code § 692A.101(5). This resolves the dispute: Coleman needed to notify the sheriff of Black Hawk County, in person, within five business days of when he *began* to stay somewhere other than his primary residence, if he was going to be away for more than five days.

Coleman argues this language "seeks to strike a balance" by providing five business days "*after* the triggering condition is satisfied within which to register or notify—something which must be done in person." *See* Def's Br. at 47–48. But section 692A.105 specifically includes that "appear in person to notify" requirement; by its plain

language, section 692A.105 clearly contemplates that sex offenders traveling to faraway places must notify their local sheriff *in advance*—the specific inclusion of that requirement undermines any argument that section 692A.105 attempts to "strike a balance" or provide any extraordinary accommodation for sex offenders who decide to take spur-of-the-moment vacations without notifying local authorities. Instead, section 692A.105 clearly envisions that effective monitoring will necessarily limit the bounds of permissible spontanaeity.

Additionally, section 692A.105 uses the present participle to require notification of the location where the offender "is staying." *See* Iowa Code § 692A.105. As applied to temporary lodgings, this would become nonsensical if Coleman could go to Cedar Rapids for nine days and notify Black Hawk County upon his return—he would have only notified them of a location where he *had stayed*. Instead, section 692A.105 requires timely notification; although it does not necessarily require future notification of where the offender *will stay*, it plainly aims to compel notification *during* an offender's stay in any temporary lodgings (at the very latest). Construing section 692A.105 to extend any penumbral grace period would ignore the plain language requiring timely notification regarding an offender's present location.

B. Coleman's interpretation undermines the particularized intent of section 692A.105 and the broader intent that animates chapter 692A.

Coleman notes the ultimate purpose of statutory interpretation is to give effect to legislative intent. *See* Def's Br. at 38 (citing *State v. Bower*, 725 N.W.2d 435, 442 (Iowa 2006)). "The paramount purpose of the sex offender registry requirement is to protect society from sex offenders after they have been released back into society following the disposition of their case." *In re A.J.M.*, 847 N.W.2d 601, 604 (Iowa 2014) (citing *In re S.M.M.*, 558 N.W.2d 405, 408 (Iowa 1997)).

Coleman argues "[c]hapter 692A does not act as a mechanism for providing around-the-clock monitoring or curfew." *See* Def's Br. at 46–47. That is inaccurate; section 692A.124 provides for supervision "by an electronic tracking and monitoring system in addition to any other conditions of supervision" when deemed necessary based upon "a validated risk assessment . . . and also upon the sex offender's criminal history, progress in treatment and supervision, and other relevant factors." *See* Iowa Code § 692A.124(1)–(2). Coleman had one of those electronic tracking/monitoring systems; the initial contacts in this case were precipitated by his failure to keep his GPS tracker's battery charged (though he took the charger with him when he left).

See TrialTr.V1 p.137,ln.3–p.138,ln.7; TrialTr.V1 p.141,ln.24–p.146,ln.14; TrialTr.V2 p.273,ln.25–p.274,ln.25; TrialTr.V2 p.277,ln.23–p.278,ln.7. For Coleman, chapter 692A *was* intended to supplement the ordinary authorization for conditions of probation/supervision with additional measures that would enable around-the-clock monitoring. Moreover, the existence of that electronic monitoring does not obviate the need for prompt notification regarding new temporary lodgings—note that chapter 692A contains multiple redundant methods for verifying that sex offenders are complying with notification/residency requirements, to ensure that convicted sex offenders never slip through the cracks of this comprehensive post-release supervision program. *See, e.g.*, Iowa Code § 692A.108 (requiring annual, semi-annual, or quarterly visits to verify accuracy of "relevant information" provided to registry); Iowa Code § 692A.104(3) (requiring offenders to notify sheriff's office "within five business days of a change in relevant information").

More importantly, chapter 692A evinces an unequivocal intent: changes in a sex offender's residency, employment, school enrollment, or any other "relevant information" must be brought to the attention of the local sheriff's office within five business days of the change, *not* within five business days of an event making that change permanent.

See Iowa Code § 692A.104(1)–(3); Iowa Code § 692A.109(1)(c)–(e). And to dispel any remaining doubt, note that section 692A.101(23)(a) lists "[t]emporary lodging information, including dates when residing in temporary lodging" within its definition of "relevant information"—evincing a clear intent to require sex offenders to provide notification "within five business days of a change" from a permanent residence to temporary lodgings, without any additional grace period. *See* Iowa Code § 692A.101(23)(a)(18); Iowa Code § 692A.104(3).

Indeed, chapter 692A will never tolerate "grace periods" that jeopardize effective monitoring of sex offenders and their whereabouts. "When the department has a reasonable basis to believe that a sex offender has changed residence to an unknown location" or "has otherwise taken flight," chapter 692A requires the State to "make a reasonable effort to ascertain the whereabouts of the offender." *See* Iowa Code § 692A.118(11). The legislature cannot have intended to allow Coleman to flee to temporary lodgings for ten to twelve days and attempt to evade State efforts to track/locate him, then subsequently claim to be within section 692A.105's hypothetical "grace period" if investigators succeeded in locating him—that would penalize the State for taking swift action to minimize urgent dangers to the community.

Moreover, if that grace period existed, flagrant violations of Iowa's residence notification requirements could be explained away with "that apartment was temporary lodgings, not a permanent residence." *See* Iowa Code § 692A.104(2). The broad intent of chapter 692A is only served by construing this "within five business days of a change" requirement in section 692A.105 to mean precisely what it means elsewhere in chapter 692A, without any additional grace period.

Chapter 692A also implements a variety of measures to ensure Iowans can stay apprised of the identity/location of any sex offenders in their communities. *See* Iowa Code § 692A.108(4) ("A photograph of the sex offender shall be updated, at a minimum, annually . . . and the department shall post the updated photograph on the sex offender registry's internet site."); Iowa Code § 692A.109(2)(a) ("Probation, parole, work release, or any other form of release after conviction shall not be granted unless the offender has registered as required under this chapter."); Iowa Code § 692A.121(1) ("The department shall maintain an internet site for the public and others to access relevant information about sex offenders."). This demands up-to-date information on sex offenders' temporary lodgings, which Coleman's interpretation of section 692A.105 would make impossible.

If Coleman's original victim or her family wanted to "request relevant information from the registry" regarding Coleman, the county sheriff's office would be obligated to provide a specific array of relevant information—and they would need to provide Coleman's "[t]emporary lodging information, including the dates when residing at the temporary lodging." *See* Iowa Code § 692A.121(5)(b)(3). Additionally, Iowans who have more generalized concerns about *any* registered sex offenders living nearby (perhaps because their children walk to/from school) and subscribe to the "automated electronic mail notification system" are entitled to get "notice of addition, deletion, or changes to any sex offender registration," which encompasses notice of changes to "relevant information within a postal zip code" or in a "geopgraphic radius" they may specify. *See* Iowa Code § 692A.121(13). Those stakeholders' interests in effective monitoring and in disclosure of relevant information would be stymied by Coleman's interpretation of section 692A.105, which could shield him from penalties creating incentives to provide timely notification to local authorities as long as he returned to his permanent residence at least once every ten days.

Note that the "more than five days" requirement does not mean those stakeholders would never be notified of any four-day jaunts—

section 692A.104(3) would require that Coleman notify the sheriff of the change in "relevant information"—including temporary lodgings—even though he would not be required to appear in person to do so. *See* Iowa Code § 692A.104(3); *cf.* Iowa Code § 692A.101(23)(a)(18). Yet again, Coleman would need to provide timely notification "within five business days of a change" in that relevant information, with no additional grace period. *See* Iowa Code § 692A.104(3). It is clear that section 692A.105 cannot impose *less* stringent requirements relating to *longer* absences from an offender's primary residence; indeed, the "notify in person" requirement for long trips under section 692A.105 appears calibrated to give local sheriffs *advance* notice of sex offenders' longer trips, so they can ask for any additional information they need and remind offenders of any other pertinent registration obligations.

The California Court of Appeals recently reached a similar conclusion in construing California's sex offender registry laws:

> The reference in the statute to 'five working days' pertains to the time in which a sex offender must notify law enforcement of his location upon entering or leaving a jurisdiction or establishing a second or additional location. Here, the five-day notice period was triggered upon defendant establishing an additional location or residence. When the five-day notice period was triggered in defendant's case is a question of fact for the jury, which is not dependent upon whether he stayed at the residence five or more consecutive days.

People v. Poslof, 24 Cal.Rptr.3d 262, 269–70 (Cal. Ct. App. 2005). Just like in *Poslof*, Coleman's five-business-day notice period was triggered by *the change*: establishing new temporary lodgings. *See* Iowa Code § 692A.105. This Court should reach the same conclusion. *See also State v. Stickels*, No. 19086–2–III, 2000 WL 1854128, at *4 (Wash. Ct. App. Dec. 19, 2000) ("Mr. Stickels' designating of a registered address but living elsewhere at an undisclosed place defeats the registration statute's public protection purpose of law enforcement knowing where sex offenders reside.").

Finally, Coleman references the rule of lenity. *See* Def's Br. at 49–50. But "the rule of lenity does not apply if there is no ambiguity regarding the application of a statute to a given set of facts after examination of the text, the context of the statute, and the evident statutory purpose as reflected in the express statutory language." *See State v. Hearn*, 797 N.W.2d 577, 587 (Iowa 2011). This Court must "decline to narrow a broad legislative formulation by implying or constructing limitations not present in the statute and undercutting its obvious public purpose"—which, here, is preventing sex offenders from evading State efforts to monitor their whereabouts. *Id.* (citing *State v. Hagedorn*, 679 N.W.2d 666, 669 (Iowa 2004)).

"The state has a strong interest in preventing future sexual offenses and alerting local law enforcement and citizens to the whereabouts of those that could reoffend." *Doe v. Moore*, 410 F.3d 1337, 1348–49 (11th Cir. 2005) (rejecting challenge to temporary-residence-reporting requirement of Florida's sex offender registry). "Ensuring offenders are 'readily available for police surveillance' depends on timely change-of-address notification. Without it law enforcement efforts will be frustrated and the statutory purpose thwarted." *People v. Sorden*, 113 P.3d 565, 569 (Cal. 2005) (quoting *Barrows v. Municipal Court*, 464 P.2d 483, 486 (Cal. 1970)). Indeed, no other "change in relevant information" in chapter 692A requires any passage of time before triggering the reporting requirement, and for good reason. Sex offenders in temporary lodgings pose a nearly identical danger, and section 692A.105 should be read the same way: without any artificial "grace period" beyond five business days. Any other reading would reach an absurd result and undermine pursuit of chapter 692A's critical public safety objectives. *Cf.* Iowa Code § 4.4(3) (presuming "[a] just and reasonable result is intended" by all statutes).

Thus, Coleman's challenge to the State's interpretation of section 692A.105 must fail, and his conviction should be affirmed.

II. The Jury Instructions Accurately Conveyed the Applicable Law.

Preservation of Error

Coleman objected to the marshalling instruction—he raised the same argument about interpreting section 692A.105 that he raised as the sufficiency challenge in Division I. *See* TrialTr.V2 p.307,ln.5–p.309,ln.22. Error was not preserved for any of the other arguments raised in Division II of Coleman's brief. *See* TrialTr.V2 p.303,ln.25–p.313,ln.7; *cf. State v. Fountain*, 786 N.W.2d 260, 262–63 (Iowa 2010) ("[O]bjections to giving or failing to give jury instructions are waived on direct appeal if not raised before counsel's closing arguments.").

Standard of Review

"We review alleged error regarding the submission of or refusal to submit jury instructions for correction of errors at law." *State v. Rains*, 574 N.W.2d 904, 915 (Iowa 1998). "Unless the choice of words results in an incorrect statement of law or omits a matter essential for the jury's consideration, no error results." *See Stringer v. State*, 522 N.W.2d 797, 800 (Iowa 1994).

Claims of ineffective assistance of counsel are reviewed de novo. *See State v. Showens*, 845 N.W.2d 436, 440 (Iowa 2014).

Merits

Coleman's instructional challenges mostly fall by the wayside once the statutory construction issue is resolved.

A. The marshalling instruction matched the language of section 692A.105.

Coleman argues the jury should have been instructed on the proper way to determine when the five-business-day period should have started; he believes this includes that five-day grace period. *See* Def's Br. at 56–60. If he were right, the remedy would be to remand for retrial with correct instructions if the State's evidence at trial was sufficient to support conviction had the jury been instructed correctly. *See, e.g.*, *State v. Tyler*, 873 N.W.2d 741, 753–54 (Iowa 2016). The State notes retrial would not be required because the evidence did not establish a violation under Coleman's "grace period" interpretation. However, for all the reasons set out in Division I, Coleman's reading of section 692A.105 is incorrect. The trial court was correct to refuse to give an instruction that misstated the applicable law.

Coleman also claims that, if the *State's* interpretation is right, his counsel was ineffective for failing to request a jury instruction stating that there was no five-day grace period. *See* Def's Br. at 60.

To establish ineffective assistance of counsel, "a defendant must typically show that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *State v. Keller*, 760 N.W.2d 451, 452 (Iowa 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Both elements must be proven, and failure to prove a single element is fatal to the claim. "If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently." *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

Here, Coleman can show neither breach nor prejudice. It was smart trial strategy not to request instructions that would preclude an argument that, if believed, would have provided a route to acquittal. *See* TrialTr.V3 p.344,ln.12–p.348,ln.9; *cf. State v. Ondayog*, 722 N.W.2d 778, 785–86 (Iowa 2006). He cannot show prejudice for the same reason—Coleman could not conceivably benefit from any jury instruction foreclosing the "instruction construction" argument that he was somehow permitted to make to the jury. *See, e.g.*, *State v. Tejeda*, 677 N.W.2d 744, 754–55 (Iowa 2004).

Coleman tries to show prejudice by arguing that an instruction should require proof "that Coleman knew or intended, at the time he left the residence, that he would be away for more than five days." *See*

Def's Br. at 60. Nothing in section 692A.105 contains or supports any "specific intent to be away" requirement or any other special/elevated mens rea. Even though section 692A.105 seems to prefer compliance through advance notification, Coleman could have complied by coming back to Black Hawk County after being gone for four business days, notifying the sheriff of his location (in person), and then going back to Cedar Rapids without ever returning to his primary residence. To the extent Coleman's claim is that counsel was ineffective for failing to request inclusion of a *general* intent element, the jury was instructed that Coleman could not be convicted of any criminal act unless he "was aware he was doing the act and he did it voluntarily, not by mistake or accident." *See* Jury Instr. 12; App. 21. "Jury instructions are not considered separately; they should be considered as a whole." *See State v. Fintel*, 689 N.W.2d 95, 103–04 (Iowa 2004). Moreover, at trial, Coleman did not assert and his counsel did not argue that his absence from his primary residence was unintentional or involuntary—so there is no possibility that additional instruction on general intent could have impacted the jury's verdict or the trial's ultimate outcome. As such, Coleman is unable to prove breach or prejudice on any claim of instructional error on the requisite general intent element.

Any claimed "instructional error was of little consequence here because the court included the language of the [charged] statute in the marshalling instruction." *State v. Hall*, No. 11–1524, 2012 WL 4900426, at *6 (Iowa Ct. App. Oct. 17, 2012) (citing *State v. Keeton*, 710 N.W.2d 531, 534 (Iowa 2006)). Moreover, "[w]hether the court attached the label of general or specific intent was of little importance when the jury was accurately informed of the elements." *Id.* (citing *Keeton*, 710 N.W.2d at 534). Thus, Coleman's claim cannot succeed.

B. Declining to request a jury instruction setting out the statutory provision that excludes the first partial day from length-of-time intervals was not a breach and was not prejudicial.

Coleman argues section 4.1(34) should guide any determination on the length of his absence; he also raises two alternative arguments. *See* Def's Br. at 60–67. Section 4.1(34) states, "[i]n computing time, the first day shall be excluded and the last included." *See* Iowa Code § 4.1(34). The State agrees this principle should apply in computing time under section 692A; as such, it is unnecessary to address Coleman's alternative arguments because they pertain to instructions that would not have correctly stated the applicable law. On the merits, declining to request a section 4.1(34) instruction was arguably not a breach—and if it was, it was certainly not prejudicial.

On breach, "not every right to insist that a particular instruction be given need be availed of by counsel in order to satisfy the standard of normal competency." *See State v. Blackford*, 335 N.W.2d 173, 178 (Iowa 1983). Instead, the issue of breach "must be determined with regard to the theory of defense which is being employed in the case." *See State v. Broughton*, 450 N.W.2d 874, 876 (Iowa 1990).

In his closing argument, Coleman's counsel asked the jury to consider whether a more thorough investigation of Coleman's room on Thursday, August 27 would have disclosed any signs that Coleman had been there more recently. *See* TrialTr.V3 p.335,ln.8–p.339,ln.14. Additionally, Coleman's counsel argued that the law gave Coleman an additional more-than-five-day grace period before the obligation to register within five business days even arose. TrialTr.V3 p.344,ln.12–p.351,ln.2. Instructing on section 4.1(34) would not make enough of a difference in any calculation for it to be an essential component of that trial strategy. And all of the potential clues Coleman's counsel speculated about—like wet towels and footprints—would only be present/detectable/helpful if Coleman had been back at the house *very* recently; Coleman's counsel may have concluded that, if the jury picked a fixed date to count business days, Coleman had already lost.

In order for any breach to be prejudicial, the jury would have needed to assume (incorrectly) that Coleman's first day absent from his primary residence counted against his five-business-day deadline to notify the sheriff under section 692A.105 *and* conclude Coleman's absence did not begin until Thursday, August 20. *See* State's Ex. B; App. 25. But absolutely no evidence was presented to support that speculative inference—all of the evidence demonstrated that Coleman was absent from Monday, August 17 (at the latest), continuing through Thursday, August 27. *See* TrialTr.V3 p.326,ln.1–p.330,ln.4 ("Even if we said the 17th is when he came back, that's from the testimony that he said, then he hadn't seen his son for this entire period of time until the 27th."). So even if there were a duty to request an instruction that explained section 4.1(34), and even if the jury incorrectly applied the calculation of time in assessing whether Coleman was absent from his primary residence for five business days, it is overwhelmingly unlikely that any prejudice resulted. Moreover, anything that could have given rise to an inference that Coleman returned to the house on Thursday, August 20 would *also* give rise to an equally strong inference that he returned on Friday, August 21—so the absence of that instruction could not possibly impact any rational evaluation of the evidence.

To show prejudice, Coleman would need to show a "substantial, not just conceivable" likelihood of a different result if his counsel had requested this instruction. *See King v. State*, 797 N.W.2d 565, 572 (Iowa 2011) (citing *Strickland*, 466 U.S. at 693–94). He cannot do so. As such, his claim must fail.

III. Section 692A.105 Is Not Unconstitutionally Vague.

Preservation of Error

Coleman admits error was not preserved. *See* Def's Br. at 67. The State agrees; no argument/ruling on vagueness was made before trial. *See State v. Dawson*, No. 13–0792, 2015 WL 1546353, at *5 & n.4 (Iowa Ct. App. Apr. 8, 2015) (noting void-for-vagueness attack "would have been untimely at trial" pursuant to Rule 2.11(2)).

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *See Showens*, 845 N.W.2d at 440 (quoting *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011)).

Merits

Coleman claims his trial counsel was ineffective for failing to challenge section 692A.105 as void for vagueness "because it provides insufficient guidance on when the obligation to notify arises, and how long an individual has to comply with notification requirements." *See*

Def's Br. at 69. This primarily restates all of the arguments raised in the previous divisions of Coleman's brief. *See* Def's Br. at 69–72. But Coleman cannot prove breach or prejudice for this claim because the statute is not unconstitutionally vague.

A statute will survive a vagueness challenge if its meaning is "fairly ascertainable by reference to similar statutes, prior judicial determinations, reference to the dictionary, or if the questioned words have a common and generally accepted meaning." *State v. Millsap*, 704 N.W.2d 426, 436 (Iowa 2005) (quoting *State v. Aldrich*, 231 N.W.2d 890, 894 (Iowa 1975)). The State's argument in Division I shows that section 692A.105's meaning is readily ascertainable—and Division I.B, in particular, demonstrates that section 692A.105 is a perfect example of a statute that is best understood *in pari materia*, "by reference to other similar statutes or other statutes related to the same subject matter." *State v. Nail*, 743 N.W.2d 535, 540 (Iowa 2007) (citing *Branch v. Smith*, 538 U.S. 254, 281 (2003)). "[W]e necessarily operate on the objective assumption that the legislature strives to create a symmetrical and harmonious system of laws." *See id.* at 541 (citing *State v. Iowa Dist. Ct.*, 616 N.W.2d 575, 581 (Iowa 2000)). This provides further impetus for rejecting Coleman's interpretation

of section 692A.105—this Court should reject Coleman's attempts to inject uncertainty into chapter 692A by reading section 692A.105's "within five business days of a change" terminology as if it means something different than it means in other statutes throughout the registration/notification provisions in chapter 692A. *See Formaro v. Polk County*, 773 N.W.2d 834, 841 (Iowa 2009) (rejecting vagueness challenge after finding reading of the statutory language that would have created vagueness problems was "contrary to its plain meaning and contrary to legislative intent").

Section 692A.105 attaches the obligation to appear in person and notify the local sheriff to a definite time requirement: within five business days of when the sex offender changes location from his/her primary residence to temporary lodgings. *See* Iowa Code § 692A.105. Section 4.1(34) specifies the precise parameters for calculating the amount of days that pass, under Iowa law, in any given time interval. *See* Iowa Code § 4.1(34). And multiple witnesses testified about their own understanding of the relevant requirements; they all managed to understand what compliance with section 692A.105 entailed. *See* TrialTr.V2 p.198,ln.20–p.203,ln.25; TrialTr.V2 p.215,ln.1–p.217,ln.15. This is far more than is usually needed to establish that "the statute

gives fair warning of the prohibited conduct and does not violate the void-for-vagueness doctrine." *See Millsap*, 704 N.W.2d at 436.

Even if Coleman did not subjectively understand the law that he had violated or did not comprehend the language of section 692A.105, "vagueness challenges are determined on the basis of statutes and pertinent case law rather than the subjective expectations of particular defendants based on incomplete legal knowledge." *See Nail*, 743 N.W.2d at 540 (citing *Kolender v. Lawson*, 461 U.S. 352, 370 (1983)). Moreover, the Iowa Court of Appeals has repeatedly "refused to excuse non-compliance based on an offender's subjective misunderstanding of the [sex offender registry] requirements." *See State v. Wiles*, No. 14–1459, 2015 WL 7077337, at *3 (Iowa Ct. App. Nov. 12, 2015); *see also State v. Dawson*, No. 13–0792, 2015 WL 1546353, at *7–8 (Iowa Ct. App. Apr. 8, 2015). Any other outcome would undermine pursuit of chapter 692A's legitimate objectives—Coleman cannot be allowed to violate registration requirements and then escape the prescribed penalty just by shrugging his shoulders.

Because no void-for-vagueness challenge could have succeeded, Coleman cannot establish that his counsel was ineffective for failing to raise such a challenge. Therefore, his claim must fail.

IV. None of the Excerpts That Coleman Identifies Are Examples of Prosecutorial Misconduct; None of Them Require Reversal or Establish Ineffective Assistance.

Preservation of Error

Coleman lodged timely objections to the alleged misconduct discussed in subdivision IV.A, which preserved error for those claims on appeal. *See* TrialTr.V3 p.357,ln.13–22; TrialTr.V3 p.362,ln.16–p.363,ln.8. The rest of his claims were not preserved by timely objection, and can only be reached as ineffective-assistance claims. This record may not be sufficient to address those claims because defense counsel may have identified prosecutorial misconduct but declined to object for reasons that constitute reasonable trial strategy. *See, e.g.*, *Rosales-Martinez v. State*, No. 10–2078, 2011 WL 6740152, at *8 (Iowa Ct. App. Dec. 21, 2011) (noting that it may have been "reasonable trial strategy" for defense counsel not to object to questioning that violated *Graves* "because he wanted the jury to hear that [the defendant] denied the charge from the beginning"). As such, this claim can only be resolved on direct appeal if this Court finds that no prosecutorial misconduct occurred, or that no prejudice resulted. Any other result would require preserving this claim for a PCR action. *See, e.g.*, *State v. Maxwell*, No. 15–1392, 2016 WL 6652361, at *8

(Iowa Ct. App. Nov. 9, 2016) ("Because we cannot on this record assess whether counsel had reasonable strategic reasons for not objecting and even developing the grooming testimony at trial, this claim must be preserved for postconviction-relief proceedings where counsel will be given an opportunity to explain his conduct."); *see also State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978) ("Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned."). The State proceeds with that caveat.

Standard of Review

If an objection challenging prosecutorial misconduct is ruled upon by the trial court, that ruling is reviewed for abuse of discretion. *See State v. Greene*, 592 N.W.2d 24, 30 (Iowa 1999).

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Thorndike*, 860 N.W.2d 316, 319 (Iowa 2015) (citing *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012)).

Merits

None of this amounts to prosecutorial error/misconduct.

A. The timely objections did not target misconduct.

"To prevail on a claim of prosecutorial misconduct, the defendant must show both the misconduct and resulting prejudice." *See State v. Neiderbach*, 837 N.W.2d 180, 209 (Iowa 2013).

"Prosecutorial misconduct only warrants a new trial when the conduct is 'so prejudicial as to deprive the defendant of a fair trial.'" *State v. Bowers*, 656 N.W.2d 349, 355 (Iowa 2002) (quoting *State v. Anderson*, 448 N.W.2d 32, 33 (Iowa 1989)).

The prosecutor argued that Coleman's defense was "to blow a lot of smoke around that law" and its five-business-days requirement. *See* TrialTr.V3 p.357,ln.13–p.358,ln.12. Coleman cites to *Graves*, but this is very different from the prosecutorial misconduct in *Graves*—the State did not argue that Coleman was lying. *See State v. Graves*, 668 N.W.2d 860, 875–76 (Iowa 2003) (holding "Iowa follows the rule that it is improper for a prosecutor to call the defendant a liar, to state the defendant is lying, or to make similar disparaging comments"). Moreover, arguing that "the defendant's theory of the case was smoke and mirrors" is not misconduct when those statements "were directed to the theory of the defense and not at defense counsel." *See State v. Schneider*, No. 14–1113, 2015 WL 2394127, at *7 (Iowa Ct. App. May 20, 2015) (citing *United States v. Ruiz*, 710 F.3d 1077, 1086 (9th Cir. 2013)). Characterizing an idea/argument is not the same thing as characterizing the speaker. "A lawyer is entitled to characterize an *argument* with an epithet as well as a rebuttal." *Id.* (emphasis added)

(citing *Williams v. Borg*, 139 F.3d 737, 745 (9th Cir. 1998)). Indeed, any holding to the contrary would unduly constrain the latitude afforded to prosecutors in responding to bad arguments; in this case, this was an accurate characterization of Coleman's strategy in arguing competing interpretations of the law/instructions to the jury. *See* TrialTr.V3 p.343,ln.12–p.348,ln.9. Prosecutors have considerable latitude in arguments; even comments that are "sarcastic and snide" do not automatically constitute misconduct. *See State v. Carey*, 709 N.W.2d 547, 555 (Iowa 2006).

The same principle disposes of Coleman's claim of misconduct arising from comments that "the defense will hide behind a cloud of assumption." *See* TrialTr.V3 p.362,ln.16–p.363,ln.8. It is absurd that Coleman's counsel objected, considering his own closing was full of assertions that *the State* was relying on assumptions. *See* TrialTr.V3 p.335,ln.8–p.341,ln.25; *Wycoff v. State*, 382 N.W.2d 462, 468 (Iowa 1986) (quoting *State v. Wright*, 309 N.W.2d 891, 893 (Iowa 1981)) ("We allow a prosecutor some leeway when his remarks 'are provoked and are offered in retaliation to arguments for the accused.'"). But even if this rhetorical device were employed unilaterally, it would not be misconduct because "the prosecutor's statement was a comment

on the defense's theory and the evidence, which is permissible." *See State v. Walter*, No. 14–1339, 2015 WL 8388296, at *9 (Iowa Ct. App. Dec. 9, 2015); *see also State v. Campos*, 309 P.3d 1160, 1175 (Utah Ct. App. 2013) (noting that "referring to defense counsel's theory as a red herring would not be inappropriate so long as the reference could be classified as a comment on the strength of the evidence and the inferences and deductions arising therefrom"); *United States v. Bernard*, 299 F.3d 467, 487–88 (5th Cir.2002) (no misconduct when prosecutor argued the defense was trying "to get someone on this jury to follow down a rabbit trail and take a red herring and somehow say 'Oh, I've got a doubt'"). This argument was fair game, and it did not deprive Coleman of a fair trial.

B. Coleman's counsel was not ineffective for declining to object to any other comments as prosecutorial misconduct.

To establish ineffective assistance of counsel, "a defendant must typically show that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *Keller*, 760 N.W.2d at 452 (Iowa 2009) (citing *Strickland*, 466 U.S. at 687). Both elements must be proven, and failure to prove a single element is fatal to the claim.

Coleman argues that it was misconduct to argue that defense counsel had told the jury they should award/reward Coleman with an acquittal because it was possible that he returned home during the period in question. *See* Def's Br. at 77 (citing TrialTr.V3 p.351,ln.10–15).

This is an argument *about* the facts, not an attempt to inject broader issues into the trial. The prosecutor was not cautioning jurors against acquitting Coleman based on a normative/moral imperative or because convicting him was "the right thing to do." *Contra State v. Musser*, 721 N.W.2d 734, 756 (Iowa 2006). Instead, the prosecutor's argument focused on the concept that a *possibility* that Coleman returned home is not enough to create a reasonable doubt as to his failure to register while absent. *See State v. Boggs*, 741 N.W.2d 492, 509 (Iowa 2007) (no misconduct from "references to the community" which were "largely related to the intent-to-distribute element of the crime, not the need for the jury to convict to protect the community"). Indeed, as the prosecutor noted in response to a subsequent objection: "I'm only talking about the evidence that's been presented in this case, and the defense asked the jury to speculate of a possibility of what would have happened." *See* TrialTr.V3 p.352,ln.19–p.353,ln.7. This is proper argument centered around disputed facts, not misconduct.

Coleman argues that the prosecutor committed misconduct by telling the jury they must exercise "[t]he power to do justice." *See* Def's Br. at 78 (citing TrialTr.V3 p.362,ln.9–15). This cannot qualify as misconduct because it accurately restates the jury instructions. *See* Jury Instr. 19; App. 23 ("Remember, you are judges of the facts. Your sole duty is to find the truth and do justice."). Unlike *Musser*, this was not an argument that "inappropriately diverted the jury from its duty to decide the case solely on the evidence." *See Musser*, 721 N.W.2d at 756. Indeed, just before the segment Coleman quotes, the prosecutor expressly framed this as a question about the evidence:

> The only relevant evidence was was he complying with what he was meant to be doing at that point? Was he at home at that point, at his principal residence? And all the evidence points to he wasn't.

TrialTr.V3 p.362,ln.4–15. This urged jurors to focus on the evidence, not to disregard it. Therefore, there was no objectionable misconduct.

Coleman claims the prosecutor misstated the evidence by reminding the jury that Coleman's mother and younger sister lived in Michael's house, and might have seen Coleman if he had returned. *See* Def's Br. at 78–79 (citing TrialTr.V3 p.351,ln.24–p.352,ln.9). But this is not a misstatement of the evidence—the prosecutor argued that jurors "did not hear any evidence in this case that the Defendant went

back to his room with his key and opened the so-called back door with his keys," which is an accurate statement. *See* TrialTr.V3 p.351,ln.20–p.352,ln.14. The statement about other occupants of the house was also wholly accurate. *See* TrialTr.V1 p.156,ln.20–p.157,ln.10; TrialTr.V1 p.169,ln.25–p.170,ln.11. While Coleman had offered an explanation as to why Michael had not seen him, he offered no evidence as to whether his mother/sister had seen him—even though he was asking the jury to infer that he had returned home, and he would naturally want to call any witness who made observations that would help prove that claim. "A prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, so long as it is not phrased to call attention to the defendant's own failure to testify." *State v. Bishop*, 387 N.W.2d 554, 563 (Iowa 1986) (quoting *United States v. Soulard*, 730 F.2d 1292, 1306 (9th Cir. 1984)); *cf. State v. Hill*, No. 12–0860, 2013 WL 2370714, at *3–4 (Iowa Ct. App. May 30, 2013) (citing *State v. Hanes*, 790 N.W.2d 545, 557 (Iowa 2010)) (noting *Hanes* affirmed that "it is not improper for a prosecutor to generally reference an absence of evidence supporting the defense's theory of the case").

Coleman also claims the prosecutor misstated evidence about PO Harrington's testimony regarding monitoring compliance. *See*

Def's Br. at 79–80 (citing TrialTr.V3 p.354,ln.14–23; TrialTr.V3 p.356,ln.25–p.357,ln.4). The first italicized portions in Coleman's brief were specifically confirmed by PO Harrington's testimony. *See* TrialTr.V1 p.146,ln.5–14 (agreeing that initial call was prompted by Coleman "failing compliance," making probation officers unable to "locate him at where he was meant to be"). The second portion comes after a summary of all of the investigating officers' testimony, and speaks to the common thread uniting all of that evidence:

> [T]here's no testimony that you heard in this entire trial that the Defendant was living at that period of time in question on the residence of 523 Hammond. There's absolutely zero testimony to support that he was living there. The only testimony you've heard which is corroborated, not only by himself, but by other participants, is that he wasn't. The only corroborated testimony is we can't find him. We're trying to track him, stay where you need to be, we're trying to monitor you. The only testimony you heard is that he fails his monitoring because they can't find him where he needs to be.

TrialTr.V3 p.356,ln.19–p.357,ln.4. While PO Harrington did not look for Coleman and fail to find him, others (including his father) *did*—which means this argument was based in factual evidence and was not prosecutorial misconduct. *See Carey*, 709 N.W.2d at 554.

If Coleman successfully identified prosecutorial misconduct, he would still need to show prejudice resulted. *Graves* set out five factors to consider in evaluating prejudice:

> (1) the severity and pervasiveness of the misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other curative measures; and (5) the extent to which the defense invited the misconduct.

Graves, 668 N.W.2d at 877. All of this alleged misconduct happened in rebuttal argument, not during the evidentiary phase, which cuts against pervasiveness. *See Carey*, 709 N.W.2d at 559 (citing *Greene*, 592 N.W.2d at 32). Most of these challenges pertain to statements that were introductory or were rhetorical flourishes—not the State's substantive analysis of the evidence presented—which cuts against finding any misconduct was significant to the central issues presented. *E.g.*, *Bear v. State*, No. 06–1048, 2007 WL 1689434, at *4 (Iowa Ct. App. June 13, 2007) (no misconduct where "[t]he three statements of which Bear complains were a small part of a thorough and otherwise legitimate discussion of the evidence presented at trial"). And both the instructions and the prosecutor cautioned that closing arguments were not evidence, and could not be treated as such. *See* Jury Instr. 8; App. 20; TrialTr.V3 p.324,ln.4–9; TrialTr.V3 p.351,ln.20–24. That

minimizes any potential for prejudice from improper argument. *See Musser*, 721 N.W.2d at 756 (finding misconduct non-prejudicial when jury was instructed "to decide the defendant's guilt or innocence 'from the evidence and the law in these instructions,' and that evidence did not include '[s]tatements, arguments, and comments by the lawyers'").

Finally, note that the State's case was strong. Coleman had been gone from his primary residence for more than a week without notifying the Black Hawk County Sheriff's Office—even his father was left in the dark about his whereabouts, and was quite concerned. *See* TrialTr.V2 p.207,ln.14–p.211,ln.6; TrialTr.V2 p.243,ln.10–p.245,ln.10; TrialTr.V2 p.263,ln.12–p.265,ln.13; TrialTr.V2 p.276,ln.11–23. Then, when he was eventually found, Coleman did not deny being gone—instead, he fabricated a hazy story about being forcibly abducted. *See* TrialTr.V2 p.228,ln.16–p.231,ln.9; p.269,ln.13–p.270,ln.19; *see also Blair*, 347 N.W.2d at 422 (quoting *Odem*, 322 N.W.2d at 47) ("A false story told by a defendant to explain or deny a material fact against him is by itself an indication of guilt."). This minimizes the potential for any misconduct to have deprived him of a fair trial; thus, even if Coleman could show that misconduct occurred, it would not rise to the level where it could require reversal.

V. Whether Coleman Was Represented by Counsel During the Prior Criminal Proceedings Was Not an Element of His Stipulations to the Second Offense and Habitual Offender Enhancements. There Was No Affirmative Obligation to Establish Factual Basis.

Preservation of Error

This is another ineffective-assistance claim. The State believes the record is sufficient to enable resolution on direct appeal.

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *Thorndike*, 860 N.W.2d at 319.

Merits

Coleman argues there was no factual basis for his stipulations to the second offense and habitual offender enhancements because the record did not affirmatively establish he was represented by counsel during any of the criminal proceedings that produced his convictions. *See* Def's Br. at 86–91. This is brought as a factual basis challenge, not a voluntariness challenge; if Coleman is correct, the remedy is to remand to allow the State to supply an appropriate factual basis and save the stipulations (if possible), rather than vacate them and undo the parties' negotiated agreement. *See* Def's Br. at 91 (citing *State v. Mitchell*, 650 N.W.2d 619, 621 (Iowa 2002)). Indeed, Coleman has already reaped benefits from that stipulation—it would be inequitable

to invalidate the bargain without giving the State an opportunity to provide whatever factual basis was missing. *See, e.g.*, *State v. Gines*, 844 N.W.2d 437, 441–42 (Iowa 2014).

Rule 2.19(9) provides that "[i]f the offender denies being the person previously convicted, sentence shall be postponed for such time as to permit a trial before a jury on the issue of the offender's identity with the person previously convicted"—but, in contrast, "[o]ther objections shall be heard and determined by the court, and these other objections shall be asserted prior to trial of the substantive offense in the manner presented in rule 2.11." Iowa R. Crim. P. 2.19(9). Rule 2.11 includes rules governing affirmative defenses, including alibi, insanity, and diminished responsibility, which must be asserted prior to trial—and which are not elements of the underlying offenses that must be disproven by any factual basis when taking a guilty plea.

Just like those affirmative defenses, "the State is not required to prove the prior convictions were entered with counsel if the offender does not first raise the claim." *See State v. Harrington*, No. 15–0308, 2017 WL 1291343, at *6 (Iowa Apr. 7, 2017). While the State had to (and did) establish a factual basis to find Coleman was the person previously convicted of these offenses, the State was not required to

prove that Coleman was represented by counsel or waived counsel because Coleman never raised that claim—which means the State was not required to establish a factual basis on that non-element issue. *See State v. Jerden*, No. 11–0013, 2011 WL 3925488, at *2 (Iowa Ct. App. Sept. 8, 2011) ("Because the dwelling exception is an affirmative defense and has been waived by Andrew's guilty plea, trial counsel did not render ineffective assistance by failing to challenge the factual basis of the guilty plea on this ground."); *cf. Harrington*, 2017 WL 1291343, at *7 ("If the records do not disclose if the defendant was represented by counsel or waived counsel, or show the defendant was represented or waived counsel, then the offender has the burden to introduce some evidence to support the claim.").

In all other respects, the colloquy regarding these stipulations complied with *Harrington*'s framework for ensuring voluntariness. *See* TrialTr.V3 p.368,ln.21–p.373,ln.7; PleaTr. (3/21/16) p.2,ln.5–p.11,ln.20. And both Coleman and his counsel affirmed there were no "defenses other than general denial that could affect the outcome"—which would include the affirmative defense that his prior convictions were obtained without vindicating his right to counsel. *See* PleaTr. p.4,ln.6–p.5,ln.1.

If *Harrington* truly intended to equate stipulations to prior convictions with guilty plea proceedings, than it follows that entering such a stipulation "waives all defenses and objections," with the exception of challenges that allege intrinsic irregularities. *See Castro v. State*, 795 N.W.2d 789, 792–93 (Iowa 2011). So Coleman's affirmative defense would be waived; the only question would be whether counsel's failure to raise the issue rendered his stipulation involuntary (which Coleman has not yet alleged).

The answer would be "largely tied to the prejudice element"—if Coleman was *not* represented by counsel for each conviction, raising the issue would certainly have affected his decision to stipulate. *See id.* at 793 (citing *State v. Carroll*, 767 N.W.2d 638, 644 (Iowa 2009)). If he *was* represented by counsel, this issue would have no impact. So, in the end, the State will ultimately need to provide records that establish that Coleman had/waived counsel for each prior conviction—if not on remand from this appeal, then on Coleman's inevitable PCR. Even though the State never had the burden of proof and was not required to establish a factual basis on this issue, the State ultimately accepts the fact that without proof that Coleman had/waived counsel, these stipulated enhancements are ultimately worthless. As a result,

if Coleman prefers to have the trial court receive that proof and resolve this issue on limited remand, the State does not resist.

VI. The Court Did Not Err in Notifying Coleman That He Would Be Assessed Financial Obligations Associated with Costs of This Appeal, Absent Future Action to Demonstrate He Was Not Reasonably Able to Pay *Before* Any Final Assessment of Costs.

Preservation of Error

Coleman may challenge a procedurally defective sentence on direct appeal without preserving error by objecting below. *See, e.g.*, *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994).

Standard of Review

A district court's restitution order is reviewed for errors at law. *State v. Jose*, 636 N.W.2d 38, 43 (Iowa 2001) (citing *State v. Watts*, 587 N.W.2d 750, 751 (Iowa 1998)). Constitutional issues are reviewed de novo. *State v. Dudley*, 766 N.W.2d 606, 626 (Iowa 2009).

Merits

Generally, "a court must determine a criminal defendant's ability to pay before entering an order requiring such defendant to pay criminal restitution pursuant to Iowa Code section 910.2." *See Goodrich v. State*, 608 N.W.2d 774, 776 (Iowa 2000). Coleman is correct that it would create constitutional problems if the court had required him to make payments without any pre-assessment chance

to make findings on Coleman's reasonable ability to pay. *See* Def's Br. at 94–96. But this language from the sentencing order is preliminary; it contemplates that Coleman *may* appeal, and it notifies Coleman of financial obligations that *may* attach if he does. *See* Order (4/29/16) at 3; App. 28. Because this is not a final restitution order regarding repayment of financial obligations associate with a potential appeal, there was no obligation to determine any reasonable ability to pay before entering this order. *See, e.g.*, *State v. Alexander*, No. 16–0669, 2017 WL 510950, at *2–3 (Iowa Ct. App. Feb. 8, 2017) (quoting *State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999)) ("[I]t does not appear in the present case that the plan of restitution contemplated by Iowa Code section 910.3 was complete at the time the notice of appeal was filed. Until this is done, the court is not required to give consideration to the defendant's ability to pay.").

"It is not fundamentally unfair to recoup court costs and attorney fees from those indigents who are reasonably able to pay or to perform a public service." *State v. Haines*, 360 N.W.2d 791, 796 (Iowa 1985). Coleman could have become employed during pendency of this appeal if he had complied with terms of his probation, and could have become able to pay some of the cost of his representation

on appeal. The court was correct to notify him of the possibility that he might become responsible for those expenses. Coleman cannot predicate error upon findings that were not yet made or upon any restitution plan that has not yet been drafted, finalized, or entered. *See Jackson*, 601 N.W.2d at 357 (citing *State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999)). Thus, his claim fails.

CONCLUSION

The State respectfully requests that this Court affirm Coleman's conviction and, if it chooses, remand for specific findings on whether Coleman had/waived counsel for his prior convictions.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. 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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