IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-0784

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TRAVIS RAYMOND WAYNE WEST
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE ROBERT J. BLINK, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

The State agrees the Court should transfer this case to the Iowa Court of Appeals. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

The defendant was convicted by jury in Polk County District court of involuntary manslaughter and delivery of a controlled substance, Class "D" and "C" felonies, respectively. *See* Iowa Code §§ 124.401(1)(c)(1), 707.5(1) (2013).

The Honorable Robert J. Blink presided.

Course of Proceedings

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

Facts

Travis West knew Bailey Brady from when they worked at the Funny Bone Comedy Club. St. Ex. 24. At roughly 1:00 am on June 5, 2015, she invited him and his brother to come to her West Des Moines apartment. Tr. Vol. 1, p. 142, l. 21-p. 143, l. 10. Bailey concluded one of her several calls with West at 2:49:20 am. St. Ex. 25; Conf. Ex. App. 4. Eight seconds later, West commenced a series of phone calls to "Snap," his heroin supplier. St. Ex. 24, 25;

Conf. Ex. App. 4. West and Bailey went to a Kum & Go near her apartment at 4:16 am. St. Ex. 27, 28; Tr. Vol. 1 p. 142, l. 21-p. 143, l. 10. At 5:16:21 am, West called 911. St. 25; Conf. Ex. App. 4. Bailey would eventually be pronounced dead from a heroin overdose. Tr. Vol. 2 p. 71, l. 23-p. 72, l. 1. "Snap" was the next person West dialed. St. Ex. 25; Conf. Ex. App. 4.

Bailey had worked at Wells Fargo full time and at the Draught House part time. Tr. Vol. 2, p. 87, ll. 1-4. On June 4, she went with her mother to the Draught House, where she consumed two beers, one before dinner and one with. *Id.* p. 97, ll. 18-25. Twice she complained about feeling hot, but her mother thought she felt "clammy." *Id.* p. 98, ll. 9-18. Her mother did not think she appeared intoxicated. *Id.* p. 97, ll. 18-25. Neither did her father notice any signs of intoxication, drowsiness, or other odd behavior when she left the family home around 9:30 pm. *Id.* p. 89, ll. 13-24, p. 99, ll. 2-8.

Later, Bailey had two "shots" of liquor at one bar with friends. *Id.* p. 118, l. 19-p. 124, l. 9. She had another two at a second bar. *Id.*,

In a police interview, Travis West would later claim that Bailey contacted him around 1:00 am, inviting him and his brother to "hang out" with her. St. Ex. 24. They drove two hours from his home in

Villisca to Des Moines. *Id.* He claimed that she appeared "drunk" and "messed up" when they arrived. *Id.*

At 4:16 am a Kum & Go surveillance camera captured images of her and West buying food. St. Ex. 27, 28, Tr. Vol. 2, p. 92, l. 18-p. 93, l. 7; St. Ex. 28.

West told police that he helped her clean out a cat litter box. St. Ex. 24. Then, he returned to a couch while she rinsed the box in the bathroom tub. *Id.* Some minutes later, West's brother woke him up with the news that Bailey was not breathing. *Id.* They removed her from the bathroom, attempted CPR, and called 911. *Id.*; Tr. Vol. 1, p. 143, l. 14-p. 144, l. 11.

In the interview, West denied providing Bailey with heroin. Ex. 24. He did tell police of another person, a neighbor named Scott, who would give her drugs. *Id.* In general, he could describe some of her interactions with drugs. *Id.* And he could describe the physical indications of impairment and overdose. *Id.*

An autopsy would later reveal a "below…legal limit" of alcohol in her system as well as a fatal amount of heroin. Tr. Vol. 2, p. 73, ll. 3-13. "[W]ithout the heroin she would have been fine. She would have been like most people out on Court Avenue on a Friday or

Saturday night. Without the alcohol, she would have most likely died from the heroin." *Id.* p. 77, l. 14-p. 78, l. 7. The heroin that killed her was likely ingested within 30 minutes of death. *Id.* p. 79, ll. 11-25.

West Des Moines Police interviewed West. He told them that she "told us" that she had overdosed once before. St. Ex. 24. Then, he admitted that he had been the one to drive her to the hospital. *Id.*

That overdose occurred in early July 2014. Tr. Vol. 2, p. 87, ll. 12-21. Hospital records indicate she was found with some heroin hidden on her body. She subsequently underwent treatment. *Id.* p. 87, l. 22-p. 88, l. 20. Until the day of her death, she betrayed no indications of relapse. *Id.*

West initially acknowledged that he "experimented" with drugs before admitting he used a variety including heroin. St. Ex. 24. West revealed he purchased from a man named "Snap" in Des Moines. *Id.* But, he claimed he had not done so in three to four months. *Id.* West thought perhaps Bailey got heroin from "Snap," though he was not the one to give her "Snap's" number. *Id.* West said he had obtained heroin for Bailey, as well as cocaine, but "even longer ago." *Id.* He denied getting her heroin this time. *Id.*

There were nine actual or attempted calls from "Snap" to West on June 5. St. Ex. 26; Conf. Ex. App. 5. "Snap" was the first West called after his call to Bailey at 2:49:20 am. St. Ex. 25; Conf. Ex. App. 4. There were fourteen completed or attempted calls to "Snap" between 2:49:28 and 3:44:27 am. *Id.* Then, after the 911 call, there were six actual or attempted phone contacts between them. *Id.*

ARGUMENT

I. West had numerous contacts with his heroin dealer immediately after Bailey invited him to "hang out" with her; he was the first whom West called after her heroin overdose. He neglected to tell this to police. This, among other facts, provides sufficient evidence that he recklessly delivered heroin to her.

Preservation of Error

The State does not contest error preservation. Iowa R. App. P. 6.903(3); Tr. Vol. 2, p. 100, l. 5-p. 114, l. 21, Tr. Vol. 3 p. 7, l. 24-p. 9, l. 15.

Standard of Review

Due process requires that the State prove all the elements of a crime beyond a reasonable doubt. *State v. Wilkens*, 346 N.W.2d 16, 20 (Iowa 1984) *citing Jackson v. Virginia*, 443 U.S. 307, 316 (1979). "Substantial evidence" is evidence which "would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt."

Williams, 695 N.W.2d at 27-28; *see also Jackson*, 443 U.S. at 319; *State v. Vance*, 790 N.W.2d 775, 783 (Iowa 2010).

In reviewing challenges to the sufficiency of evidence supporting a guilty verdict, courts consider all of the record evidence "in the light most favorable to the State and make all reasonable inferences that may fairly be drawn from the evidence" to support the verdict. *State v. McPhillips*, 580 N.W.2d 748, 753 (Iowa 1998); *see also State v. Williams*, 695 N.W.2d 23, 27-28 (Iowa 2005); *State v. Bash*, 670 N.W.2d 135, 137 (Iowa 2003). In ruling on sufficiency challenges, courts do not resolve conflicts in the evidence, assess the credibility of witnesses, or weigh evidence. *State v. Nitcher*, 720 N.W.2d 547, 559 (Iowa 2006).

The factfinder decides which evidence to accept or reject. *State v. Laffey*, 600 N.W.2d 57, 59 (Iowa 1999). Evidence is not insubstantial merely because it would also support contrary inferences. *State v. Frake*, 450 N.W.2d 817, 818-19 (Iowa 1990); *State v. Helm*, 504 N.W.2d 142, 146 (Iowa Ct. App. 1993). Although "[d]irect and circumstantial evidence are equally probative," the evidence "must raise a fair inference of guilt" as to each element of the crime; "it must do more than create speculation, suspicion, or

conjecture." *State v. Schrier*, 300 N.W.2d 305, 308 (Iowa 1981) (citations omitted); *State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2002).

The Court on appeal reviews sufficiency challenges for correction of errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). A verdict of guilty is binding on appeal if supported by substantial evidence. *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011).

Merits

A constellation of facts provides strong circumstantial evidence that West provided Bailey with the heroin that killed her. There was sufficient evidence to convict him of involuntary manslaughter and delivery of a controlled substance.

In the first charge here, the State was required to prove that West recklessly delivered of a controlled substance unintentionally causing her death. Jury Instr. No. 18; App. 15; Iowa Code § 707.5 (2013); *State v. Conner*, 292 N.W.2d 682, 686 (Iowa 1980); *State v. Miller*, 874 N.W.2d 659, 662 (Iowa Ct. App. 2015). The second charge required the State to prove he delivered a controlled substance and knew it was heroin. Jury Instr. No. 22; App. 17; Iowa Code §§ 124.101(7), 124.401(1)(c)(1), (2013); *State v. Moore*, 529 N.W.2d 264,

265-67 (Iowa 1995); *State v. Grady*, 215 N.W.2d 213, 214 (Iowa 1974).

In short, West contends that the State failed to prove he delivered heroin to Bailey because: 1) the medical examiner could not determine the method of ingestion; 2) no drugs or paraphernalia were found in the apartment or on him; 3) no one witnessed him give her heroin; 4) there was no evidence of the contents of his communications with "Snap;" and 5) his prior involvement with her drug use cannot be used to show he delivered here. Appellant's Pr. Br. p. 24-30. The circumstantial evidence and common-sense inferences show otherwise.

The jury could agree there was no romantic relationship between West and Bailey. His knowledge of her use of drugs with him and others suggest that their relationship was tied to drug use. That was the likely reason he drove two hours in the middle of the night from Villisca, Iowa. Moreover, the fact that "Snap" was the first person he called after a conversation with Bailey indicates he was proceeding with a drug encounter. Finally, given the half-life of heroin, she likely died within 30 minutes of ingesting it. If she had been using heroin earlier in the day, that does nothing to change the

fact that what she ingested around five in the morning killed her and that West provided it.

It is true that he did not appear impaired during his police interview. It is true he denied supplying her heroin or removing evidence of drug use. And, it is true no drug paraphernalia was found on him or in the apartment.

But West was also not forthcoming with police. First, he was misleading about his knowledge of her previous overdose; saying first he was "told" about it and then admitting he drove her to the hospital. St. Ex. 24. Second, he gradually revealed the extent of his own drug use, heroin use, and prior deliveries to her. *Id.* Third, he never did reveal that he was in continual communication with "Snap." St. Ex. 25; App. 4. Neither did West disclose that "Snap" was the first person he called after Bailey's heroin overdose.

A jury can infer guilt from false exculpatory statements. *See State v. Cox*, 500 N.W.2d 23, 24 (Iowa 1993) ("A false story told by a defendant to explain or deny a material fact against him is relevant to show that the defendant fabricated evidence to aid in his defense."). The fact and timing of West's contacts with "Snap" imply he arranged acquisition of heroin. Then, he was talking with "Snap" about what

happened. That he kept this to himself, implying he last had contact with "Snap" three or four months earlier, is all the more damaging.

The jury's verdict enjoys substantial evidence.

II. Evidence that West was present at the victim's prior overdose and supplied her heroin in the past was necessary to prove "recklessness" in this delivery. That he was in communication with his heroin dealer during the night's events was inextricably intertwined with the offense. Alternatively, it was admissible as an exception to the prior bad-act rule.

Preservation of Error

The State does not contest error preservation inasmuch as the district court allowed the evidence following rejection of the defendant's motion *in limine*. *See* Tr. Vol. 1 p. 3, l. 1-p. 17, l. 24 (considering motion *in limine*); p. 126, l. 22-p. 127, l. 9 (stating it would not prohibit the State from commenting on these topics in open court); Tr. Vol. 2, p. 50, ll. 7-12 (allowing testimony over objection); p. 54, ll. 5-10 (same).

Standard of Review

The State accepts the defendant's statement of the nature of review. Iowa R. App. P. 6.903(3). The Court will review the admission of this evidence for abuse of discretion. *State v. Cox*, 781 N.W.2d 757, 760 (Iowa 2010); *State v. Helmers*, 753 N.W.2d 565, 567 (Iowa 2008).

Merits

West contends that the district court improperly allowed prior bad-act evidence. The district court allowed the jury to hear his interview with police as well as see records of his phone contact with "Snap." This supplied evidence that he was present at Bailey's previous overdose, that he had provided Bailey with heroin in the past, and that he had been in contact with his heroin supplier around the time of her death. The evidence was relevant and admissible.

Iowa Rule of Evidence 5.404(b) prohibits evidence of other wrongs or acts to prove the person acted in conformity with character unless for a non-character purpose such as motive, opportunity, plan, preparation, knowledge, identity, or absence of mistake or accident. Iowa R. Evid. 5.404(b).

The rule prohibits evidence which has no purpose but to show the defendant is a bad person and therefore more likely to have committed the crime. *State v. Reynolds*, 670 N.W.2d 405, 414 (Iowa 2003); *State v. Cott*, 283 N.W.2d 324, 326 (Iowa 1979). "[W]hen a prosecutor seeks to introduce evidence of a defendant's prior misconduct, the evidence must be probative of "'some fact or element in issue other than the defendant's criminal disposition.'" *State v.*

Taylor, 689 N.W.2d 116, 123 (Iowa 2004) (citations omitted). The court should "require the prosecutor to 'articulate a tenable noncharacter theory of logical relevance.'" *State v. Sullivan*, 679 N.W.2d 19, 28 (Iowa 2004).

When evidence is relevant and material to a legitimate issue in the case, however, it is *prima facie* admissible, notwithstanding its tendency to demonstrate the defendant's bad character. *State v. Mitchell*, 633 N.W.2d 295, 298 (Iowa 2001); *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988); *State v. Richardson*, 400 N.W.2d 70, 72-73 (Iowa Ct. App. 1986).

The courts employ a multi-part test to gauge the admissibility of bad acts evidence. There must be "clear proof" that the defendant committed the other acts, such as by direct, eyewitness testimony. *State v. Brown*, 569 N.W.2d 113, 117 (Iowa 1997). The court decides whether the evidence is "relevant" to a factual dispute in the case. *Mitchell*, 633 N.W.2d at 298. Then, the court determines whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Id.*; *see* Iowa R. Evid. 5.403.

"When acts are so closely related in time and place and so intimately connected that they form a continuous transaction, the

whole transaction may be shown to complete the story of what happened [even though they may incidentally show the commission of another uncharged crime.]" *State v. Nelson*, 791 N.W.2d 414, 422 (Iowa 2010) (quoting *State v. Oppelt*, 329 N.W.2d 17, 19 (Iowa 1993) (editorial marks in original).

Here, the evidence that West was present when Bailey overdosed previously and had supplied heroin to her was relevant to show he acted with recklessness. Involuntary manslaughter by commission of a public offense such as delivery of a controlled substance requires it. *Miller*, 874 N.W.2d at 664-75. The State must show West appreciated that his act would make it more likely than not that death would result. *Id.* There is no "safe dose" of heroin, *Commonwealth v. Catalina*, 556 N.E.2d 973, 980 (Mass. 1990), but West's presence at her earlier overdose diminishes the probability that he could fail to appreciate the risk of death this time.[1]

[1] As discussed by one federal court, the "heroin and opioid crisis is a cancer that has grown and metastasized in the body politic of the United States." *United States v. Waker*, Crim. Act. No. 2:17-cr-00010, 2017 WL 2766452, *3 (S.D. W.Va. June 26, 2017). Providing a range of national and local statistics on the scourge, the court rejected a guilty plea involving a heroin overdose, noting its recreational use was "too often deadly." *Id.*

Nelson controls the admissibility of West's contacts with his heroin supplier. *Nelson* allows evidence of other crimes as "inextricably intertwined" where (without them) the "narrative of the crime" would be "unintelligible, incomprehensible, confusing, or misleading." 791 N.W.2d at 424. West was in continual contact with "Snap" after Bailey invited him to West Des Moines. In this sense, West's actions were not "prior" for purposes of the "prior bad-act" rule. They were the actions that formed the crime itself.

Alternatively, under *Nelson*, the phone call evidence—particularly after the overdose—has a non-character theory. It shows knowledge of the nature of her overdose; that the amount was either too much or it was "bad." *See* St. Ex. 24 (West agreeing that it would be good to know who might be providing bad drugs).

The district court did not abuse its discretion to admit the evidence.

III. As charged here, delivery of heroin is not a lesser included offense of involuntary manslaughter by delivery of "a controlled substance."

Preservation of Error and Standard of Review

The State accepts the defendant's statement of error preservation and the nature of review. Iowa R. App. P. 6.903(3);

State v. Love, 858 N.W.2 721, 723 (Iowa 2015); *State v. Halliburton*, 539 N.W.2d 339, 343 (Iowa 1995).

Merits

The jury was instructed on involuntary manslaughter by commission of the crime of delivery of "a" controlled substance. It was also instructed on delivery of heroin, specifically. Because lesser-included offense analysis does not consider the facts of a case, delivery is not a lesser of involuntary manslaughter. Alternatively, it is not likely the Legislature "clearly" intended the convictions and judgments to merge. Otherwise, there would be no reason to charge involuntary manslaughter when people die of drug overdoses.

The district court imposed judgment on both offenses, but concurrent sentences for a total term of ten years. Order (filed May 18, 2017); App. 19. West, however, believes that his sentence for delivery of a controlled substance should merge into his conviction for involuntary manslaughter because it would be a lesser included offense.

West does not bring a Constitutional Double Jeopardy clause challenge. *See* U.S. Const. Amend. V, XIV; *see United States v. DiFrancesco*, 449 U.S. 117, 121 n.3 (1980); *Benton v. Maryland*, 395

U.S. 784, 794 (1969); *State v. Kramer*, 760 N.W.2d 190, 194 (Iowa 2009) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).[2]

Instead, Iowa Code section 701.9 governs the analysis. *State v. Hickman*, 576 N.W.2d 364, 368 (Iowa 1997). It provides that "[n]o person shall be convicted of a public offense which is *necessarily* included in another public offense of which the person is convicted." Iowa Code § 701.9 (emphasis added); *see also* Iowa Rs. Crim. P. 2.6(2), 2.22(3) (governing prosecution and conviction of lesser-included offenses).

Under this provision, a lesser-included offense merges into a greater offense and judgment may be entered only on the greater offense. Iowa Code § 701.9; Iowa R. Crim. P. 2.6(2); *Halliburton*, 539 N.W.2d at 343. The judgment and sentence for the conviction which merges is vacated. *Hickman*, 623 N.W.2d at 852.

Legislative intent determines whether one offense is a lesser of another, as shown primarily by the elements of the two offenses. *State v. Miller*, 841 N.W.2d 583, 587 (Iowa 2014); *State v. Lambert*,

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[2] Neither, incidentally, does the Iowa Constitution apply. Iowa's Double Jeopardy Clause is narrower than the Fifth Amendment. *Compare* U.S. Const. Amend. V *with* Iowa Const. Art. 1, § 12. It only pertains to prosecutions that follow an acquittal. *State v. Franzen*, 495 N.W.2d 714, 715 (Iowa 1993).

612 N.W.2d 810, 815 (Iowa 2000); *State v. Jeffries*, 430 N.W.2d 728, 736 (Iowa 1988). "Application of this test involves a comparison of the elements of both crimes to see whether it is possible to commit the greater offense without also committing the lesser." *Lambert*, 612 N.W.2d at 815; *see generally Blockburger v. United States*, 284 U.S. 299, 304 (1932). A lesser-included offense has some, but not all, of the elements of the greater. *State v. Jackson*, 422 N.W.2d 475, 478 (Iowa 1988). But, if it has an element that is not part of the "greater," it is not a lesser-included offense. *Jeffries*, 430 N.W.2d at 730. If it is a lesser-included offense, it merges into the "greater" unless further analysis reveals the legislature's intent to impose multiple punishments for a single transgression.

Another perhaps overarching test is the "impossibility test" and controls when the elements test yields an idiosyncratic result. *State v. Miller*, 841 N.W.2d 583, 588 (Iowa 2014); *State v. McNitt*, 451 N.W.2d 824, 824-25 (Iowa 1990). Similar to the *Blockberger* test, it asks whether it is impossible to commit the greater offense without also committing the underlying (or lesser) offense. *State v. Webb*, 313 N.W.2d 550, 552 (Iowa 1981). Recently, the Court explained that

the strict-statutory elements test is the method for implementing the "impossibility test." *Miller*, 841 N.W.2d at 588.

Finally, if the Legislature has "clearly" expressed its intent that multiple punishments shall not be imposed, that intent controls. *State v. McKettrick*, 480 N.W.2d 52, 58 (Iowa 1992) (citing cases).

This analysis alters slightly if a statute defines a crime with specific alternative means for its commission. In that instance, the court may look to the alternative the State actually charged or the marshaling instruction. *State v. Anderson*, 565 N.W.2d 340, 343 (Iowa 1997); *State v. Aguiar-Corona*, 508 N.W.2d 698, 702 (Iowa 1993); *State v. Steen*, 464 N.W.2d 874, 875 (Iowa 1991); *Webb*, 313 N.W.2d at 552-53.

In all events, the facts of the case do not matter. The "factual test is contrary to logic and invades the province of the jury by allowing trial courts to weigh the evidence on lesser-included offenses." *Jeffries*, 430 N.W.2d at 741.

The "legal test for identifying lesser included offenses depends on the statutory definition of the greater offense rather than the evidence by which the offense may be proved in a particular case." *Webb*, 313 N.W.2d at 553. The two offenses "are to be examined in

the abstract, rather than with reference to the facts of the particular case under review." *Whalen v. United States*, 445 U.S. 684, 694 n.8 (1980).

Involuntary manslaughter is a "general" offense in that it applies when one "unintentionally causes the death of another person by the commission of a public offense other than a forcible felony or escape. Iowa Code § 707.5(1)(a). A wide range of "public offense[s]" would qualify. Here, the jury was instructed it could convict if it found West "recklessly committed the crime of delivery of *a* controlled substance." Jury Instr. No. 18; App. 15 (emphasis added). The instruction did not specify heroin or any of the other controlled substances listed in the Code.

West was also charged with delivery of a controlled substance under Iowa Code § 124.401(1)(c)(1). The instruction specified the jury must find the defendant "knew that the substance delivered was *heroin*." Jury Instr. No. 22; App. 17 (emphasis added).

Thus, even as instructed, one could commit involuntary manslaughter without also committing the offense of delivery of heroin. The involuntary manslaughter instruction and statutory crime is general while the putative lesser charged here is specific. For

example, a person could be convicted of involuntary manslaughter from the delivery of methamphetamine and also convicted of delivery of heroin. It is not impossible to commit the greater without committing the lesser.

West draws this Court's attention to *State v. York*, an unpublished Court of Appeals decision determining that involuntary manslaughter by commission of child endangerment was a greater of child endangerment causing bodily injury requiring merger. S.Ct. No. 08-1490, 2009 WL 4115310, *3 (Iowa Ct. App. Nov. 25, 2009). Leaving aside whether *York* was correctly decided, it is distinguishable. The court in this case instructed the jury more generally than *York* with respect to involuntary manslaughter.

Better authority suggests the Legislature did not "clearly" intend for involuntary manslaughter to subsume delivery of a controlled substance. The thought to keep in mind is involuntary manslaughter by commission of a public offense is a Class "D" felony, punished by five years in prison. Iowa Code § 707.5(1)(a), 902.9(1)(e). And delivery of a controlled substance as charged here is a Class "C" felony, punished by ten years in prison. *Id.* § 124.401(1)(c)(1), 902.9(1)(d).

It is true, in one sense, that punishment itself is not determinative for double jeopardy analysis, as stated in *State v. Gallup*, 500 N.W.2d 437, 442 (Iowa 1993). But in another sense, that statement imposes more than *Gallup* can bear. The level of punishment can reflect Legislative intent.

In *Gallup*, the Court considered whether a court could impose cumulative sentences for delivery of a controlled substance and failure to affix a drug tax stamp. *Gallup*, 500 N.W.2d at 442; *see* Iowa Code § 204.401(1)(b)(5) (1991) [now Iowa Code § 124.401(1)(b)(5)]; § 421A.12 [now Iowa Code § 453B.12]. The Court decided that delivery was a lesser-included offense of failure to affix a drug tax stamp under the impossibility test. *Gallup*, 500 N.W.2d at 442. "But the analysis does not stop there." *Id.* The Legislature did not intend the stamp act to immunize drug dealers and did intend that a conviction for both offenses be entered. *Id.* Without a judgment, a "conviction is meaningless." *Id.* at 443. So, to give effect to both statutes, the Court concluded it must allow judgment to enter on both crimes and impose cumulative punishment.

In *State v. Lewis*, the Court considered whether criminal gang participation under section 723A.2 was a "greater" offense of the

putatively "lesser" offense of terrorism (now called intimidation with a dangerous weapon) under section 708.6. 514 N.W.2d at 65. Criminal gang participation occurs when a person commits or aids in "any criminal act." Gang participation was a Class "D" offense. Iowa Code § 723A.2. Terrorism (or intimidation with a dangerous weapon) is a Class "C" offense. *Id.* 708.6. Given the charges, merging the Class "C" offense into the Class "D" offense would have lowered the punishment from ten to five years in prison.

But, the Supreme Court noted that for purposes of *McKettrick's* search for "clear indication" of legislative intent for merger, this made little sense. "[A] prosecutor would probably never charge criminal gang participation using most of the underlying criminal acts in section 723A.1." *Lewis*, 514 N.W.2d at 69. The sentence for the underlying offense would always merge. *Id.* "In most cases the resulting sentence would be the same as, or less severe than, the sentence for criminal gang participation." *Id.*

The same thinking supported the Court's reasoning in *Halliburton*. There, the court considered whether possession of an offensive weapon was a lesser of possession of an offensive weapon by a felon. *Halliburton*, 539 N.W.2d at 344; *see* Iowa Code §§ 724.3

(possession of an offensive weapon); 724.26 (felon in possession). To be sure, it was "impossible" to commit possession of an offensive weapon by a felon without committing possession of an offensive weapon. Both were Class "D" felonies. If the Legislature did not intend cumulative punishments, the Court wrote, "the offenses would always merge." 539 N.W.2d at 344. "[T]here would be no reason for the State to charge a defendant" with both. Thus, "[o]nly by imposing cumulative punishments can we give effect to the possession alternative of section 724.26." *Id.*

Likewise here. If West's argument prevails, there is no point to charging involuntary manslaughter when a person unintentionally kills another by recklessly providing heroin. It would have no effect if the State also charged delivery. Only by allowing conviction and sentence for both crimes can the Legislature's purpose intent prevail that both have effect.

West's position also implies the Legislature intended to punish less harshly those who recklessly cause death than those who simply deliver. The Court endeavors to avoid absurd or strained results. *See, e.g.*, *Sauls v. State*, 467 N.W.2d 1, (Iowa Ct. App. 1990) ("In

considering legislative enactments we should avoid strained, impractical, or absurd results.").

Delivery of a controlled substance under section 124.401(1)(c)(5) is not a lesser included offense of involuntary manslaughter by commission of a public offense under section 707.5(1)(a) as charged here.

CONCLUSION

The judgment should be affirmed.

REQUEST FOR NONORAL SUBMISSION

The State agrees this matter does not require oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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