IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	S.CT. NO. 17-1901
	)	
KENNETH L. LILLY,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR LEE COUNTY
HONORABLE MARY ANN BROWN, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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FINAL

CERTIFICATE OF SERVICE

On the 23rd day of May, 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 Kenneth Lilly, No. 6078899, Iowa State Penitentiary, 2111 330th Avenue PO Box 316, Fort Madison, IA 52627.

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SLK/lr/04/18
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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because one issue raised involves a case presenting fundamental and urgent issues of broad public importance requiring prompt and ultimate determination by the supreme court. Also, this case presents a substantial question that requires the enunciation of changing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(d), (f).

This court in State v. Plain addressed the question of a person's Sixth Amendment right to an impartial jury. 898 N.W.2d 801 (Iowa 2017). The court did not address whether the Iowa constitutional right to an impartial jury protection is the equivalent to the federal right. Id. at 821 n.6. See Iowa Const. Art. I, sec. 10. Plain set forth a three-part test to determine whether the accused has established a prima facie violation of the fair-cross section of the community requirement. To establish the second prong, the accused must show the proportion of group members in the jury pool is underrepresentive of the proportion of the group members in

the community. This court held that multiple statistical analyses could be used that are appropriate to the circumstances of each case. Id. at 826-27. However, the court does not answer the question of how to utilize the three statistical tests – particularly in minority populations that are extremely small in the community.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by the Defendant-Appellant, Kenneth L. Lilly, from the judgment and sentence following appellant's conviction for the offense aiding and abetting a robbery in the first degree in violation of Iowa Code sections 711.1(a), 711.2 (2015). The Honorable Mary Ann Brown presided at trial and sentencing in Lee County District Court.

Course of Proceedings in the District Court: On November 4, 2016, Lilly was charged by trial information with the offense robbery in the first degree, aiding and abetting, in violation of Iowa Code sections 711.1(a) and 711.2. (Trial Information, 11/4/2016)(App. pp. 5-6).

Prior to trial Lilly moved to dismiss the jury pool for failing to have any African-Americans. (Challenge to Jury Pool, 9/14/17; 9/22/17 transcript)(App. pp. 7-12). The district court denied his motion. (Order Denying Defendant's Challenge to Jury Pool, 9/25/17)(App. pp. 24-32). Lilly renewed his motion at the beginning of jury selection and it was denied. (Vol.1 p.7 L.2-20).

A jury trial commenced September 26, 2017. Following the State's case-in-chief, Lilly moved for judgment of acquittal arguing the State failed to prove Lilly aided and abetted Evans in the robbery because it failed to prove identity of Lilly as the driver or that Lilly knew of, approved of, and actively participated in the robbery. (Vol.3 p.54 L.1-13). The district court denied the motion. (Vol.3 p.55 L.22-p.56 L.11). Lilly renewed his motion for judgment of acquittal at the close of the evidence and the district court again denied the motion. (Vol.3 p.160 L.17-p.161 L.4). The jury found Lilly guilty of robbery in the first degree. (Order RE: Presentence Investigation, 9/29/17)(App. pp. 40-42).

Lilly filed a handwritten motion for mistrial challenging his conviction on the grounds of (1) ineffective assistance of counsel for failure to present exculpatory evidence, (2) juror misconduct, and (3) prosecutorial misconduct for failing to turn over exculpatory evidence. (Pro se Motion for Mistrial, 11/9/17; Sent. tr. p.4 L.15-p.10 L.6)(App. pp. 43-44). The district court treated the motion as a motion for new trial and denied the motion. (Order Denying Defendant's Motion Pro Se Motion for New Trial, 11/22/17)(App. pp. 45-47).

On November 22, 2017, Lilly appeared in open court, with counsel, and was adjudged guilty of robbery in the first degree in violation of Iowa Code sections 711.1(a) and 711.2. (Judgment Entry, ¶1, 11/22/17)(App. p. 48). Lilly was sentenced to 25 years with a 17 ½ years mandatory. (Judgment Entry, ¶2)(App. p. 48).

Notice of appeal was timely filed. (Notice, 11/22/17) (App. p. 51).

Facts: On June 29, 2016, just after 10:20 a.m., Lafayette Evans was fatally shot by law enforcement after he robbed Ft.

Madison Bank and Trust[1] and fled. (Vol.2 p.6 L.3-p.31 L.19, p.52 L.14-p.53 L.15, p.94 L.13-p.97 L.1; Ex. 17 (diagram)). When Evans attempted to leave the bank he realized law enforcement was already on the scene, so he fled through the back door and fired his handgun at law enforcement. (Vol.2 p.31 L.9-p.33 L.14).

Law enforcement was notified of the robbery by Joseph Hardin who, as he was about to go through the drive-through, saw a man with long sleeves get out of a "light" SUV/van which was blocking Hardin's way. (Vol.1 p.218 L.4-p.219 L.6, p.220 L.3-9). The man also had a red and black "thing...that he pulled down...over his face." (Vol.2 p.220 L.12-25). The vehicle moved and Hardin proceeded to the drive-through. (Vol.1 p.219 L.21-24). As Hardin was driving up to the window he heard a gunshot. (Vol.1 221 L.21-p.222 L.2). When he reached the window he was waived on by clerk Kathleen Boddeker. (Vol.1 p.222 L.13-p.223 L.5). Hardin could see a

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[1] At the time of trial the bank had changed its name to Connection Bank. (Vol.2 p.3 L.17-25).

man with the red and black hood and, realizing the bank was being robbed, called 911. (Vol.1 p.223 L.6-18).

Even though the vehicle was blocking his way to the drive-through window, Hardin remembered little about the vehicle. When interviewed on June 29th immediately after the robbery, Hardin described the vehicle as "light-colored." (Vol.1 p.230 L.23-p.231 L.9). But he did not remember anything else about the vehicle. (Vol.1 p.231 L.10-p.232 L.1). Nor could Hardin remember anything about the driver of the vehicle. (Vol.1 p.233 L.7-23).

Kelly Bergman testified that on June 29th, around 10:08 a.m., she was attempting to turn left out of the drive-through when she got blocked by an older Suburban/Bronco type of vehicle. (Vol.1 p.248 L.10-p.249 L.16, p.252 L.19-p.253 L.2). Bergman testified it was "a two-toned vehicle, a dark color and like a silver, light and dark." (Vol.1 p.249 L.17-19). Bergman noticed there was a black fan clipped to the rearview mirror. (Vol.1 p.249 L.20-24). She testified the driver was "a large black man who kind of filled the seat [and] had sunglasses on."

(Vol.1 p.250 L.3-5). Bergman testified that she watched the younger, smaller passenger exit the vehicle. (Vol.1 p.250 L.5-6). She described the passenger as wearing a short-sleeved white t-shirt, had something red around his neck, and carrying a dark-colored cinch bag. (Vol.1 p.250 L.7-20, p.259 L.20-p.260 L.1). After the passenger got out, the vehicle drove off. (Vol.1 p.251 L.16-p.252 L.9). Bergman could not remember seeing the make of the vehicle, the license plate, or any rust on the vehicle. (Vol.1 p.259 L.5-19).

Ft. Madison Patrolman Brent Gibbs arrived on the scene to observe officers Doyle and Brown slowly approaching a man lying face-down. (Vol.2 p.53 L.5-16). Gibbs removed from Evans' pocket a handheld CB radio, signifying to officers that someone else might be involved. (Vol.2 p.54 L.13-18).

DCI Special Agent Ryan Herman was called to assist the investigation of the two officer involved shootings. (Vol.2 p.85 L.6-14). At the scene was found the hand held radio ("walkie-talkie"), a handgun, a red snowmobile mask, sunglasses, and a Chicago Cubs bag filled with money. (Vol.2

p.86 L.2-21, p.88 L.7-24). The gun was traced to Carlos Pickett, Jr., in Birmingham, Alabama. (Vol.2 p.105 L.10-19). Special Agent Joseph Lestina went to the hospital where Evans was taken. Lestina noticed Evans had latex gloves on his hands and on his left hand was electrical tape covering tattoos on his knuckles. (Vol.2 p.162 L.1-25).

It was eventually discovered that Evans' mother sent a money order for Evans to Amber Sawyer's address: 2005 Avenue E. (Vol.2 p.97 L.5-8, p.99 L.15-17, p.168 L.1-2, p.199 L.25-p.200 L.15). Sawyer is Lilly's fiancé and father of her children, Kenden and Maliqu.[2] (Vol.2 p.97 L.5-10, p.168 L.9-23, p.188 L.1-9). Officers also discovered that there was a suburban associated with Sawyer's address. (Vol.2 p.97 L.13-17).

Evans was married to Latrice Lilly [hereinafter "Latrice"] who was Lilly's niece. (Vol.2 p.172 L.15-3). Latrice was in federal prison for bank robbery. (Vol.2 p.173 L.23-p.174 L.4).

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[2] At the time of trial Kenden was ten and Maliqu was six. (Vol.2 p.188 L.4-6).

Around June 13, 2016, Evans asked to come to Ft. Madison and stay with Lilly and Sawyer. (Vol.2 p.173 L.10-13; Vol.3 p.101 L.1-12). Evans arrived on a bus and Lilly picked him up at the gas station. (Vol.3 p.101 L.13-p.102 L.6). Sawyer testified that Evans said he needed to get away and clear his mind. (Vol.2 p.173 L.14-22). Sawyer testified that Evans told her he was depressed about his wife Latrice being in federal prison and about his general situation in Alabama. (Vol.2 p.173 L.10-20, p.192 L.18-p.193 L.16). Lilly testified Evans was suicidal. (Vol.3 p.128 L.11-12). Lilly would find Evans up in the middle of the night crying. (Vol.3 p.104 L.7-19). Evans told Lilly he was upset about Latrice and he was in trouble with some people such that he was afraid to return to Alabama. (Vol.3 p.104 L.22-p.105 L.2, p.128 L.3-10).

Sawyer testified that on June 26th she, Lilly, Evans, and her children drove to Illinois to make funeral arrangements for a friend. (Vol.2 p.175 L.17-22). They all returned the next day, June 27th. (Vol.2 p.176 L.5-13). Evans left after they returned. (Vol.2 p.177 L.14-22). Lilly testified that Evans left

on June 28th because he had plans to go to Rockford. (Vol.3 p.110 L.10-16). He said Evans left around 10:30 or 11:00 p.m. and told Lilly he was going to see his friends before the bus left at 9:00 a.m. (Vol.3 p.111 L.6-17). The next day was the bank robbery.

Lilly and his children went to Rockford on June 29 and returned to Ft. Madison July 7th. (Vol.3 p.114 L.14-22). Brian Lilly [hereinafter "Billy"] confirmed Lilly came to Rockford sometime before July 4th to help put a battery cord on a Camaro. (Vol.3 p.74 L.1-17). Lilly testified he found out about Evans' death from a family member. (Vol.3 p.117 L.7-p.119 L.14; Ex. Q (text message)).

Officers executed a search warrant on July 7th when they observed his suburban outside of Sawyer and Lilly's residence. (Vol.2 p.98 L.2-19). A search was conducted on his home, suburban, and an S10 pickup. (Vol.2 p.99 L.4-24). In the suburban was a CB radio. (Vol.2 p.100 L.25-p.101 L.15). Hanging from the review mirror was black fan. (Vol.2 p.101 L.18-20). The handheld radio found on Evans was later

determined to be on Channel 14. (Vol.2 p.220 L.13-23). Lilly's CB radio was defaulted to Channel 0 or 1 when it was turned off. (Vol.2 p.220 L.23-25).

Law enforcement was unable to find any of Evans' belongings in Lilly's residence. (Vol.2 p.102 L.3-7, p.133 L.14-18).

Lilly was also interrogated July 7th at the Ft. Madison Police Department by Lestina and Ft. Madison Police Officer Stacey Weber. (Vol.2 p.165 L.9-p.166 L.4, p.212 L.19-25). Lilly explained that Evans arrived in Ft. Madison by bus from Alabama around June 13th or 14th and then called Lilly from a gas station to pick him up. (Vol.2 p.214 L.11-18). Lilly told law enforcement Evans had been depressed and suicidal. (Vol.2 p.117 L.1-6, p.214 L.2-8). Lilly speculated Evans may have committed suicide by cop. (Vol.2 p.117 L.7-9, p.213 L.8-10). Lilly said that while in Ft. Madison Evans had been associating with some people from California. (Vol.2 p.117 L.10-13). Lilly told the officers he had seen two black males and one black female in a white Ford Taurus with California

plates. (Vol.2 p.215 L.8-15, p.216 L.19-20; Vol.3 p.10 L.14-p.11 L.8). Evans once invited them over to Lilly's house, but Lilly would not allow them into his house. (Vol.2 p.216 L.11-15).

Lilly told police Evans left his residence on June 28th. (Vol.2 p.214 L.19-p.215 L.1). Lilly said he and Evans spent the day fishing. (Vol.2 p.214 L.2-5). While fishing Evans continued to make suicidal comments. (Vol.2 p.214 L.5-7). Lilly also told police that Evans said he planned to leave June 29th around 9:00 a.m. and return to Alabama. (Vol.2 p.215 L.16-25). Lilly himself planned to leave, and did leave, June 29th for Rockford, Illinois to work at his brother's auto repair shop. (Vol.2 p.217 L.1-5). He said he returned July 6th. (Vol.2 p.219 L.14-16).

Lilly also told officers he thought he woke up around 10:30 or 11:00 on June 29th and went to Casey's General Store and Kempker's Ace True Value store. (Vol.2 p.129 L.17-25, p.217 L.20-p.218 L.17). However, surveillance videos would later show Lilly's timing to be off. (Ex. 35 (DVD Casey's); Ex. 34

(DVD Kempker's)).

Lilly was again interrogated on October 25th. Special Agent Joseph Lestina told Lilly they knew he drove Evans to the bank. (Vol.2 p.131 L.9-22; Vol.3 p.27 L.5-10). Lilly continually denied dropping Evans off at the bank. (Vol.2 p.223 L.17-p.224 L.9; Vol.3 p.27 L.11-18). Lilly restated his belief that Evans was suicidal and likely committed suicide by cop. (Vol.2 p.224 L.10-16).

A video from Casey's General Store showed Lilly and a passenger wearing a white shirt pulling into the store at approximately 8:38 a.m. (Vol.2 p.225 L.9-p.226 L.6; Ex. 35 (DVD Casey's). Because of the glare of the sun on the window, the passenger's face was not visible. (Vol.3 p.26 L.12-19; Ex. 36 (Casey's picture))(Ex. App. p. 59). Lestina admitted the passenger could have been a kid. (Vol.3 p.26 L.14-22). Lilly drove away at 8:41 a.m. (Vol.2 p.225 L.12-18). A video from Kempker's Ace True Value store showed Lilly in the store at 9:23 and 9:27 a.m. (Vol.2 p.228 L.22-p.229 L.19; Ex. 34 (DVD Kempker's). In addition to the surveillance evidence, law

enforcement discovered Evans had been involved in several other bank robberies, (Vol.2 p.222 L.16-20), and they had since interviewed Bergman who claimed she saw a fan hanging from the review mirror – consistent with what law enforcement found in the suburban. (Vol.2 p.222 L.21-25).

Law enforcement told Lilly they just wanted to know whether he *knew* Evans was going to rob the bank when he dropped Evans off. (Vol.2 p.131 L.23-p.132 L.1). Also, Lilly told Herman and Lestina he forgot to tell them he went to McDonald's the morning of June 29th, which was later confirmed by a McDonald's video. (Vol.2 p.132 L.2-22, p.223 L.2-11; Vol.3 p.19 L.18-p.20 L.5). Lilly initially said he was alone. (Vol.2 p.223 L.9-11). A video from the McDonald's showed an SUV-type vehicle entering at 10:14 a.m. that was very similar to Lilly's suburban. (Vol.2 p.229 L.20-p.231 L.25; Ex.27 (DVD McDonald's)). Lilly himself gave law enforcement his receipt from going through the drive-thru. (Vol.2 p.234 L.19-24; Ex. 32 (receipt))(Ex. App. p. 57).

At trial Lilly again denied he drove Evans to the Ft.

Madison Bank and Trust. (Vol.3 p.85 L.13-15). He further denied knowing that Evans was going to rob the bank. (Vol.3 p.86 L.1-2).

Any relevant facts will be discussed in the argument below.

ARGUMENT

I. LILLY'S ALL WHITE JURY POOL WAS NOT A FAIR CROSS-SECTION OF THE COMMUNITY, AND THEREFORE, A DENIAL OF HIS RIGHT TO AN UNBIASED JURY UNDER THE FEDERAL AND STATE CONSTITUTIONS.

Preservation of Error: Error was preserved by Lilly's challenge to the jury pool and the district's denial thereof. (Challenge to Jury Pool, 9/14/17; 9/22/17 transcript; Vol.1 p.7 L.2-20; Order Denying Defendant's Challenge to Jury Pool, 9/25/17)(App. pp. 7-12, 24-32).

Scope of Review: The issue here invokes the defendant's rights under federal and state constitutions. Constitutional issues are reviewed de novo. State v. Plain, 898 N.W.2d 801, 810 (Iowa 2017).

Merits: Central to our system of justice is the right to be

judged by a fair and impartial jury of our peers. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* of the State and district wherein the crime shall have been committed.

U.S. Const. amend. VI (emphasis added). Our state constitution also guarantees the right to an impartial jury:

> In all criminal prosecutions, and in cases involving the life, or liberty of an individual the accused shall have a right to a speedy and public trial *by an impartial jury*; ....

Iowa Const. Art. I, sec. 10 (emphasis added). Lilly, however, was denied his right to an impartial jury of his peers due to the systematic exclusion of African-Americans from the jury pool in North Lee County. The current system of obtaining jury lists fails to pull sufficient numbers of minorities. The district court should have used its authority to use other current comprehensive lists of residents within the county to create a list more reflective of a fair cross-section of the community in North Lee County. See Iowa Code § 607A.22(2) (as amended 2017) ("A jury manager may use any other current

comprehensive list of persons residing in the county which the state court administrator or the jury manager determines are useable for the purpose of a juror source list."). The district court's refusal to create a new jury pool was a violation of Lilly's state and federal constitutional rights to a fair and impartial jury. Therefore, Lilly's conviction for robbery in the first degree must be reversed and the matter remanded for a new trial.

Minority defendants have long believed they cannot get a fair trial before Iowa's white juries. This court recently recognized there may be some truth to minority defendants' concerns.

> Empirical evidence overwhelmingly shows that having just one person of color on an otherwise all-white jury can reduce disparate rates of convictions between black and white defendants. For example, when researchers at Duke University compared data on conviction rates by race in over 700 criminal trials over a ten-year period, they found that where there was one or more black jurors, black and white defendants had roughly equal rates of conviction; however, all-white juries convicted African-American defendants 81% of the time and white defendants only 66% of the time.

Plain, 898 N.W.2d at 825-26 (citing Shamena Anwar, et al., The

Impact of Jury Race in Criminal Trials, 127 Q.J. Econ. 1017, 1027–28, 1032 (2012)). Obtaining a fair and impartial jury is of such a concern of this court that it created a committee to review the process for selecting jury pools and jurors in Iowa, which recently issued its report. See Recommendations of the Committee on Jury Section (March 2018), https://www.iowacourts.gov/collections/41/files/499/embedDocument/.

In the present case, there were no African-Americans in the jury pool. Lilly moved to dismiss the jury pool and requested a new jury pool be drawn. The district court denied Lilly's motion. The district court concluded that Lilly could not show there was a systematic exclusion of African-Americans by use of the current jury pool section process. (Order Denying Defendant's Challenge to Jury Pool, pp.5-8, 9/25/17)(App. pp. 28-31).

A. Background.

In North Lee County jury pools are drawn using a jury program set up by the Supreme Court Clerk's Office in Des

Moines. The North Lee County clerk types in the desired number for a two-month jury pool and the program produces a list of North Lee County residents for the jury pool. (9/22/17 tr. p.5 L.3-19). The names are drawn from lists of voter registrations and the department of transportation driver's licenses and nonoperator's licenses. (9/22/17 tr. p.7 L.4-8, p.17 L.19-24, p.24 L.17-22). See Iowa Code § 607A.22(1) (as amended 2017). Jury Specialist Dawn Willson testified that she thought that there were other lists that *could* be used, such as utility lists. (9/22/17 tr. p.7 L.4-9). However, Willson and the judicial branch IT Director Mark Headlee have never been aware of a third source being used. (9/22/17 tr. p.8 L.13-19, p.18 L.24-p.19 L.5). The Iowa Code provides for additional sources but does not require them. "A jury manager may use any other comprehensive list of persons residing in the county which the state court administrator or the jury manager determines are useable for the purpose of a juror source list." Id. § 607A.22(2) (as amended 2017).

Lilly challenged the jury pool because there were no jurors

who identified themselves as African-Americans. (Challenge to Jury Pool, 9/14/17; 9/22/17 tr. p.28 L.1-p.35 L.12; Vol.1 p.7 L.2-20)(App. pp. 7-12). Lilly argued that jury pool was not a fair cross-section of the community. (9/22/17 tr. p.28 L.1-6). The district court applied the three-part Duren test, to be discussed below, and concluded Lilly could not prove the third prong requiring proof that the underrepresentation was due to the systematic exclusion of African-Americans in the jury selection process. (Order Denying Defendant's Challenge to Jury Pool, 9/25/17)(App. pp. 24-32). See Duren v. Missouri, 439 U.S. 357, 364, 367-68 (1979). Lilly renewed his objection at the beginning of trial, noting that there were no African-American jurors on the panel. (Vol.1 p.7 L.1-14, p.185 L.14-22). The court denied the motion, but allowed Lilly to make a record that there were no African-Americans on the panel. (Vol.1 p.15-20, p.185 L.23-p.186 L.29).

B. Analysis under *State v. Plain*.

"The right to an impartial jury entitles the criminally accused to a jury drawn from a fair cross-section of the

community." Plain, 898 N.W.2d at 821 (citing Taylor v. Louisiana, 419 U.S. 522, 530 (1975)). The United States Supreme Court believed that a jury representing a cross-section of the community enables "the commonsense judgment of the community [to serve] as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." Id. (quoting Taylor, 419 U.S. at 530). The Court also found that such juries are "critical to public confidence in the fairness of the criminal judicial system." Id. (quoting Taylor, 419 U.S. at 530). And it encourages civic participation. Id.

In Plain this court applied the Duren three-part test for determining whether there was a violation of the fair cross-section requirement. Id. at 821-29.

> Under this three-part test, a defendant can establish a prima facie violation of the fair cross-section requirement by showing
>
> > (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the

> number of such persons in the community; *and (3) that this* underrepresentation is due to systematic exclusion of the group in the jury-selection process.
>
> If the defendant establishes a prima facie case, the burden shifts to the state to justify the disproportionate representation by proving "a significant state interest" is "manifestly and primarily advanced" by the causes of the disproportionate exclusion.

Id. at 821-822 (quoting Duren, 439 U.S. at 364, 367-68 (1979).

1. distinctive group

To qualify as someone from a distinctive group, the accused must show membership in "a community group with 'a definite, objectively ascertainable membership' that 'constitutes a substantial segment of the population' and has 'common and unique opinions, attitudes, and experiences' that cannot be adequately represented by members of the general population." Id. at 822 (quoting Thomas M. Fleming, Age Group Underrepresentation in Grand Jury or Petit Jury Venire, 62 A.L.R. 4th 859, 967 (1988)). Race is one such community group. Id.; see Iowa Code § 607A.2 (prohibiting exclusion from

jury based on race, creed, color, sex, national origin, religion, economic status, physical disability, or occupation).

The issue of whether Lilly, an African-American, was from a distinctive group was not in question.

2. representation of group is not fair and reasonable in relation to the number of such persons in the community

In order to establish the second prong the accused must show that "the proportion of group members in the jury pool is underrepresentive of the proportion of group members in the community." Id. The question then becomes what levels of deviation are acceptable and what levels are unacceptable. Id. There are three statistical tests used to measure representation: (a) absolute disparity, (b) comparative disparity, and/or (c) standard deviation. Id. (citing United States v. Hernandez-Estrada, 749 F.3d 1154, 1160 (9th Cir. 2014)). Each test has its own advantages and short comings. Id. at 822-23.

a. absolute disparity test

The absolute disparity is measured by "taking the

percentage of the distinct group in the population and subtracting from it the percentage of that group represented in the jury panel." Id. at 822 (quoting State v. Jones, 490 N.W.2d 787, 793 (Iowa 1992)). "The lower the resulting percentage, the more representative the jury pool." Id. The problem with the absolute disparity test, however, is that it "does not account for the relative size of the minority group in the general population." Id. at 823. When there is distinctive group population lower than the allowed absolute disparity, then the distinctive group will be excluded. Id. In 2013 African-Americans made up 3.2 percent of Lee County. There were 0% African-Americans in the jury pool. Looking at the present case, a 0 percent deducted from 3.2 percent would result in 3.2 percent. (Exs. A (race reports), B (Iowa Black Population Percentage, 2013 by County))(Ex. App. pp. 4-36). Such a low percentage would be unlikely to be sufficient to establish a prima facie case of a violation of the fair

cross-section requirement.[3] See State v. Jones, 490 N.W.2d at 793.

No Iowa counties have a greater than 10 percent. Therefore, using the absolute disparity test, it would be extremely difficult to impossible for any Iowa minority to establish a prima facie case of a violation of the fair cross-section requirement. Plain, 898 N.W.2d at 825 (the seven Iowa counties with the highest African-American

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[3] The Jones court noted cases with absolute disparities as high as 10% and were not found to establish a prima facie case of under representation. See Swain v. Alabama, 380 U.S. 202, 208–09, 85 S.Ct. 824, 829, 13 L.Ed.2d 759, 766 (1965) (underrepresentation of as much as 10% as calculated by the absolute disparity concept, was insufficient to establish a prima facie case); United States v. Clifford, 640 F.2d 150, 155 (8th Cir.1981) (Eighth Circuit held that an absolute disparity of 7.2% did not represent a substantial underrepresentation of native Americans on the jury panel.). "Other federal circuit cases arising in districts where the distinct group is a small percentage of the general population have reached a similar conclusion." Jones, 490 N.W.2d at 793 (citing United States v. Sanchez–Lopez, 879 F.2d 541, 547-49 (9th Cir.1989)(Hispanic 2.8% absolute disparity); United States v. Armstrong, 621 F.2d 951, 956 (9th Cir.1980) (African–American 2.8% absolute disparity); United States v. Kleifgen, 557 F.2d 1293, 1297 (9th Cir.1977) (African–American 1.9% absolute disparity); United States v. Whitley, 491 F.2d 1248, 1249 (8th Cir.1974) (African–American 2.05% absolute disparity)).

population are Black Hawk (8.9%), Scott (7.4%), Polk (6.5%), Des Moines (5.7%), Johnson (5.5%), Linn (4.3%), and Webster (4.1%)); (Ex. B (Iowa Black Population Percentage, 2013 by County)). As this court noted "an African-American could not establish a racially unrepresentative jury using the absolute disparity model under the Sixth Amendment even if the exclusion of African-Americans was total and systematic." Id.

b. comparative disparity test

The comparative disparity tests looks at the relation of the percentage of the designated group in the jury pool and compares it to the percentage of the designated group in the community. Plain, 898 N.W.2d at 823. "Comparative disparity is calculated by dividing the absolute disparity by the percentage of the population represented by the group in question." Id. (quoting United States v. Sanchez, 156 F.3d 875, 879 n.4 (8th Cir. 1998). The higher the comparative disparity percentage, the less representative the jury pool. Id. In the present case 3.2% would be divided by 3.2%, resulting in 100% representation.

Clearly, when there are no African-Americans on the jury panel and there are African-Americans in the community, there is not 100% representation on the panel. And that is the problem with the comparative disparity test. "[I]t can overstate underrepresentation for groups with a small population percentage." Id. (citing United States v. Hernandez-Estrada, 749 F.3d at 1163). To compound matters the comparative disparity tests with large group populations tends to validate deviations that are not produced by chance even though that can alter the representativeness of the average jury significantly. Id.

As seen above, the comparative disparity test completely overstates the underrepresentation of African-Americans in Lilly's case.

c. standard deviation

"Standard deviation is calculated by analyzing a sample taken from the voter wheel and analyzing it for randomness and fluctuations." Id. Plain does not even explain how to calculate standard deviation. Standard deviation also has

problems. "Measures of standard deviation presume randomness; however, the chances of drawing a particular jury composition are not random, in part because 'the characteristics of the general population differ from pool of qualified jurors.' " Id.

d. adopting the use of multiple tests

Prior to Plain this court endorsed the absolute disparity test and rejected the comparative disparity test. Id. at 824; Jones, 490 N.W.2d at 792-93. But as has been shown, the absolute disparity test would never result in establishing a violation of an accused's right to a fair cross-section of the community where the group population is so small. The use of the absolute disparity test left African-Americans in Iowa without protection. "A test without teeth leaves the right to an impartial jury for some minority populations without protection." Plain, 898 N.W.2d at 825. So the Plain court overruled Jones' exclusive use of the absolute disparity test. Id. at 826-27. Instead, this court held courts may use "multiple analyses to be used that are appropriate to the

circumstances of each case." Id. at 827. By allowing multiple analytic models courts can take into account the strengths and weaknesses of each test and apply them appropriately to the facts of the individual case. Id. The conclusion appears to be that using multiple tests will avoid the pitfalls of a test understating or overstating a statistical disparity when working with low percentage numbers.

However, the present case seems to represent all the problems with these statistical tests. The actual disparity test understates the disparity because of the low percentage population of African-Americans in North Lee County. The comparative disparity overstates the results because of the low percentage of the African-American population. And the standard deviation test also is imperfect for assessing disproportional minority representation.

What is clear that in a community with a 3.2 percent African-American population, no African-Americans were selected for the jury pool of 125 people. For the last five years eighteen out of thirty jury pools had no African-Americans in

North Lee County. (Ex. A (race reports))(Ex. App. pp. 4-33).

3. systemic exclusion of African-Americans

The third Duren prong necessary to make a prima facie showing that Lilly's right to a fair cross-section of the community has been violated is that he must show there has been a systematic exclusion of African-Americans which caused the underrepresentation of the group in the jury pool. Plain, 898 N.W.2d at 823-34. An accused "must establish the exclusion is 'inherent in the particular jury-selection process utilized' but need not show intent." Id. at 824 (citing Duren, 439 U.S. at 366). In order to make such a showing the accused must "show evidence of a statistical disparity over time that is attributable to the system for compiling juries." Id. If certain groups continue to be underrepresented through the years, "it stands to reason that some aspect of the jury-selection procedure is causing that underrepresentation." Id.

Plain was unable to make the necessary showing because the jury manager denied his request for access to the necessary information to compile data regarding jury composition over the

years. Id. at 827-28. This court held that jury managers were required to allow access to the jury pool information necessary to prove a prima facie violation of an accused's right to a cross-section of the community. Id. at 828. The court went on to conditionally affirm Plain's conviction, but remanded the matter to the district court so that Plain could develop a record for the jury pool challenge. Id. at 829.

In the present case, Lilly has offered the necessary records to establish a systematic exclusion of African-Americans from the jury pool. The North Lee County jury manager created race reports from October 2012 to August 2017. (9/22/17 tr. p.6 L.13-25; Ex. A (race reports))(Ex. App. pp. 4-33). In 2013 Lee County had a 3.2% African-American population. (Ex. B (Iowa Black Population Percentage, 2013 by County))(Ex. App. pp. 34-36). There were 30 reports. Of those 30 reports only 12 jury pools included an African-American. Eleven reports contained one African-American. One report contained two African-American in the jury pool.

Willson testified she usually has 125 people in a

two-month jury pool. (9/22/17 tr. p.5 L.6-12). If only one African-American is in the jury pool, that represents only .8 percent of the jury pool population (1 divided by 125). That number is far less than the 3.2 percent of African-Americans reported to be living in Lee County in 2013. The county only achieved the .8 percent 11 times. The majority of the time (18) there were no African-Americans in the jury pool. Clearly, this is a situation where a certain group continues to be underrepresented through the last five years and "it stands to reason that some aspect of the jury-selection procedure is causing that underrepresentation." Plain, 898 N.W.2d at 824.

This should be of no surprise to this court. In the recommendations of the committee on jury selection, the committee made recommendations to enlarge the number of those who serve on the jury. In particular, the third recommendation was to use additional comprehensive source lists. Recommendations of the Committee on Jury Selection, p. 10 (March 2018). The committee recognized that section 607A.22 allows state court administrators and jury managers to

receive lists from applicable lists from government officials, upon request, as no cost. Id. "The inclusiveness of the master list directly increases with the use of multiple source lists." Id. There are numerous other sources available that are not utilized, such as income tax filers and persons receiving unemployment compensation. Id. Further, these latter two lists have been shown to contain more current juror addresses. Id. In addition, the committee suggested the supreme court administrator investigate the availability of lists from housing authorities and the Child Support Recovery Unit. Id. pp. 10-11.

C. Conclusion.

In the end it is clear that failure to obtain even one juror in the jury pool was not a fair cross-section of the community. Lilly's conviction should be reversed and the matter tried anew. At no point did the percentage of African-Americans called to serve on the jury pool come close to the 3.2 percent of African-American living in North Lee County. Lilly's conviction for robbery in the first degree should be reversed and remanded

for a new trial.

II. THE STATE'S EVIDENCE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT LILLY AIDED AND ABETTED LAFAYETTE EVANS IN ROBBING THE BANK.

Preservation of Error: Error was preserved by Lilly's motion for judgment of acquittal and the district court's denial thereof. (Vol.3 p.54 L.1-13, p.55 L.22-p.56 L.11, p.160 L.17-p.161 L.4).

Scope of Review: A motion for judgment of acquittal is a means for challenging the sufficiency of the evidence. This court reviews sufficiency of evidence claims for a correction of errors at law. Iowa R. App. 6.907; State v. Sanford, 814 N.W.2d 611, 615 (Iowa 2012). The jury's finding of guilt will not be disturbed if there is substantial evidence to support the finding. State v. Torres, 495 N.W.2d 678, 681 (Iowa 1993). Substantial evidence is evidence that would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. State v. McCullah, 787 N.W.2d 90, 93 (Iowa 2010) (quoting State v. Jorgensen, 758 N.W.2d 830, 834 (Iowa 2009)). The evidence must at least raise a fair inference of guilt as to each

element of the crime. Id. at 93. The ultimate burden is on the State to prove every fact necessary to constitute the crime with which a defendant is charged. State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976) (citing In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1075, 25 L.Ed.2d 368, 375 (1970)). The record is viewed in the light most favorable to the State. Torres, 495 N.W.2d at 681. This court considers all the evidence in the record, not just the evidence supporting the finding of guilt. Id. Evidence which merely raises suspicion, speculation, or conjecture is insufficient. McCullah, 787 N.W.2d at 93; State v. Thomas, 561 N.W.2d 37, 39 (Iowa 1997).

Merits: The issue here is whether the State proved beyond a reasonable doubt that Lilly aided and abetted in the commission of the robbery by showing (1) that Lilly was the driver who dropped off Evans at the bank, and (2) that Lilly knew of Evans' intent to commit a theft. Lilly denied being the person who dropped Evans off and he denied knowing Evan had intended to rob the bank June 29th.

The jury was instructed that the State had to prove beyond

a reasonable doubt each of the following elements of robbery in the first degree:

> On or about June 29, 2016, the defendant *aided and abetted* Lafayette Evans, who:
>
> 1. Had the specific intent to commit a theft;
>
> 2. In carrying out his intention or to assist him in escaping from the scene, with or without the stolen property, Lafayette Evans committed an assault or Kathleen Boddeker[;]
>
> 3. Lafayette Evans was armed with a dangerous weapon.

(Jury Instr. No. 15 (marshaling robbery first)(App. p. 37). The jury was instructed "aiding and abetting" was defined as follows:

> All persons involved in the commission of a crime, whether they directly commit the crime or knowingly "aid and abet" its commission, shall be treated in the same way.
>
> "Aid and abet" means to *knowingly approve and agree to the commission of a crime*, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed. Conduct following the crime may be considered only as it may tend to prove the defendant's earlier participation. Mere nearness to, or presence at, the scene of the crime, without more

> evidence, is not "aiding and abetting". Likewise, mere knowledge of the crime is not enough to prove "aiding and abetting".
>
> The guilt of a person who knowingly aids and abets the commission of a crime must be determined only on the facts which show the part he has in it, and does not depend upon the degree of another person's guilt.
>
> If you find the State has proved the defendant directly committed the crime, or knowingly "aided and abetted" other person(s) in the commission of the crime, then the defendant is guilty of the crime charged.

(emphasis added)(Jury Instr. No. 14 (aiding and abetting))(App. p. 34).

The issue for the jury was whether Lilly aided and abetted Evans in the commission of the robbery. "To sustain a conviction under a theory of aiding and abetting, 'the record must contain substantial evidence the accused assented to or lent countenance and approval to the criminal act by either actively participating or encouraging it prior to or at the time of its commission.' " State v. Hearn, 797 N.W.2d 577, 580 (Iowa 2011)(quoting State v. Ramirez, 616 N.W.2d 587, 591–92 (Iowa 2000), overruled on other grounds by State v. Reeves, 636

N.W.2d 22, 25–26 (Iowa 2001)); see also State v. Shorter, 893 N.W.2d 65, 74-75 (Iowa 2017)("To sustain a conviction on the theory of aiding and abetting, the record must contain substantial evidence the accused assented to or lent countenance and approval to the criminal act either by active participation or by some manner encouraging it prior to or at the time of its commission."). Knowledge of the criminal offense is "essential, however, neither knowledge nor presence at the scene of the crime is sufficient to prove aiding and abetting." Hearn, 797 N.W.2d at 580 (quoting State v. Barnes, 204 N.W.2d 827, 828 (Iowa 1972)). "A defendant's participation may, however, be proven by circumstantial evidence." Id.

A. Identity.

Lilly adamantly denied being the person who dropped off Evans at the bank. The State's evidence to the contrary was extremely weak.

1. Eyewitness Identification.

The main piece of evidence which the State offered was the

testimony of Bergman who saw the vehicle drop off Evans when it blocked her exit for an extended amount of time. The only other witness of the vehicle was Hardin. Hardin described the vehicle as "light-colored," which definitely does not fit the description of Lilly's suburban. (Vol.1 p.230 L.23-p.231 L.9).

Lilly's suburban is maroon with a metal strip to prevent door dings. (Ex. J (passenger side))(Ex. App. p. 60). Bergman described the vehicle as a suburban/Bronco type vehicle. (Vol.1 p.249 L.15-16). While Lilly does drive a suburban, Bergman's description did not match Lilly's vehicle. Bergman testified the vehicle was two-toned dark color and silver. (Vol.1 p.249 L.17-19). However, in her statement to law enforcement and in her deposition Bergman described the vehicle as black and silver. (Vol.1 p.256 L.2-14). In addition, in earlier statements, Bergman said the silver was in the middle of the vehicle and the rest was black. (Vol.1 p.256 L.25-p.257 L.8). Even when shown pictures of Lilly's suburban, Bergman could not identify it as the vehicle she saw on June 29, 2016. (Vol.1

p.255 L.7-24; Ex. J (passenger-side[4])(Ex. App. p. 60). In fact when shown the picture of Lilly's suburban, she described it as maroon, not black. (Vol.1 p.263 L.6-19).

Bergman also said the vehicle had jacked up tires. (Vol.1 p.257 L.9-16). Lilly's suburban did not have jacked up tires. (Ex. J)(Ex. App. p. 60). Bergman also did not remember seeing any rust on the vehicle. (Vol.1 p.259 L.18-19). However, the passenger side of Lilly's suburban, which would have been towards Bergman, has substantial rust around the front tire. (Ex. J)(Ex. App. p. 60).

Bergman testified that a black fan was clipped to the review mirror. (Vol.1 p.249 L.20-24). However, car fans are not uncommon especially in older vehicles. Lilly testified he had a fan in the front to cool off the air for the passengers because the air conditioner was not working in the back. (Vol.2 p.178 L.1-p.179 L.4; Vol.3 p.89 L.24-p.90 L.7). Car fans are readily available to the public. Having a fan clipped to the

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[4] The vehicle's passenger side was facing Bergman when it dropped off Evans. (Ex. 6 (DVD 6-29-16.avi (1:05))).

review mirror is not such a unique occurrence particularly in older vehicles.

Bergman described the driver as "a larger black man who kind of filled the seat [and was wearing] sunglasses." (Vol.1 p.250 L.3-4). However, even sitting before Lilly at trial, Bergman could not identify him as the person who was driving the vehicle that morning. (Vol.1 p.254 L.13-20).

What Bergman did not describe were other notable details of Lilly's suburban. The GMC suburban had Illinois license plates, (Vol.2 p.114 L.2-4), a CB antenna on top and a rack on top, (Vol.2 p.114 L.8-12; Vol.3 p.9 L.10-16), and "GMC" in big letters on the front grill. (Vol.2 p.114 L.13-15; Vol.3 p.9 L.17-19; Ex. G (photo suburban)).

Therefore, the eyewitness identifications failed to prove beyond a reasonable doubt that Lilly was the driver of the vehicle that dropped Evans off at the bank June 29th.

2. Circumstantial Evidence.

The circumstantial offered at trial also fails to prove beyond a reasonable doubt that Lilly aided and abetted Evans in

the robbery of the bank.

The State presents a video from L & L Storage which it claims shows Lilly's suburban dropping Evans off at the bank. However, the video fails to contribute anything to the case. It only shows that a person got out of a SUV type vehicle. (Ex. 6 (DVD L & L Storage). The video is so dark and blurry nothing else is discernable. And there is no dispute that Evans was dropped off by a SUV type vehicle. The only question is whether it was Lilly and Lilly's suburban.

The State also stressed that Lilly had a CB radio and that Evans was found with a handheld radio. But Evans did not have a working phone. (Vol.2 p.198 L.2-6; Vol.3 p.106 L.16-p.107 L.3). He could have been working with someone else who also had a hand held radio. There was nothing special or unique that about Lilly's CB radio that demonstrates Evans was communicating with Lilly. Such radios are a common item that can easily be found for purchase. Further, despite the opportunity, there were no fingerprint and DNA samples taken of the handheld radio to see whether Lilly had

been handling it. (Vol.3 p.12 L.1-15). The government claimed it did not have the resources to do fingerprint or DNA analysis. However, that does not excuse the State from it burden to prove its case.

The State also claims the car fan demonstrates that Lilly was the driver of the vehicle. However, as stated above, having car fan is not so unusual or unique especially in older vehicles that are not in the best working condition.

State also makes much of Lilly being at McDonald's at 10:15 a.m. shortly after the dispatch at 10:11:22. (Ex.32 (receipt), Ex.33 (service log))(Ex. App. pp. 57-58). But there was insufficient time for Lilly to get from the bank to McDonald's and Lilly entered the McDonalds from the east. The bank was west of the McDonald's such that a person going from the bank to McDonald's would be driving east. (Vol.3 p.22 L.9-16; Ex. 26 (google photo))(Ex. App. p. 52). The video from McDonald's shows that Lilly turned left into the McDonald's -- so he was driving west. (Ex.27 (McDonald's DVD)). Hardin called 9-1-1 within minutes of Evans being

dropped off. He watched Evans walk into the bank, then went through the drive-thru where he saw Evans robbing the bank, and immediately called 9-1-1. Three and a half minutes was not nearly enough time for Lilly to go to the bank, go past McDonald's such that it would be turning left in to the parking lot, and then go through the drive-thru. It was simply not possible.

The State also attempts to discredit Lilly for his claim that he did not hear any sirens. (Vol.3 p.138 L.6-13). However, Patrolman Gibbs testified that when approaching the robbery he had his sirens off just before the McDonald's so as not to alert the perpetrator. (Vol.2 p.62 L.5-20).

The State also attempts to discredit Lilly for getting his times wrong as to when he got up on June 29th. But confusion about the times was not that egregious since he was first interviewed eight days after the robbery. And he correctly told law enforcement that he went to Casey's and Kempker's Ace Hardware. Lilly had to know that law enforcement would attempt to verify his claims.

The State misstates the evidence when it claims Lilly's brother said he was not coming to Rockford for work on June 29th. Brian lives in Rockford, Illinois and runs an auto body shop called BML. (Vol.3 p.69 L.19-p.70 L.24). Lilly would work when needed on the auto mechanics. (Vol.3 p.71 L.2-24, p.94 L.3-21). Brian testified that Lilly was to put a battery cord on a Camaro and in addition celebrate the Fourth of July with family. (Vol.3 p.74 L.3-17, p.78 L.15-22).

The State also argued that it was strange that nothing was found of Evans' at Lilly's residence. (Vol.3 p.188 L.24-p.189 L.17). But Lilly and Sawyer both testified that Evans had left their residence. There was no reason for his belongings to be at the residence. The State also insinuates that it is suspicious that none of Evans' belongings were found at a hotel. (Vol.3 p.189 L.13-17). However, there was no reason to believe that Evans was staying at a hotel such that the police should have found his belongings at one.

Evans was an experienced serial bank robber using latex gloves and taping over his tattoos. He also had a working

knowledge of bank terminology such as "drop money" and "bait money." He was clearly tied to the Lilly residence and the Lilly family in general. It makes no sense that he would jeopardize being caught by having Lilly participate in a robber by using his own vehicle.

The circumstantial evidence does not rise to proof beyond a reasonable doubt.

B. Knowledge of Robbery.

Assuming, without conceding, that Lilly did drop Evans at the bank, there was still no evidence that Lilly knew or consented to Evans robbing the bank. The State argued in closing that there was no way Lilly could not have known Evans was about to rob the bank. (Vol.3 p.183 L.8-17). However, both Hardin and Bergman testified that they did not see either the handheld radio or the gun when they watched Evans get out of the vehicle and walk to the bank. (Vol.1 p.323 L.2-10, p.260 L.24-p.261 L.7). It is perfectly plausible that Lilly did not know of the robbery. Neither Hardin nor Bergman thought that Evans was going to rob the bank when they saw him. Hardin

did not realize it was a bank robbery until the clerk waived him through the drive-thru lane. Bergman did not realize she witnessed a person about to rob the bank until she heard about it later at the clubhouse. (Vol.1 p.252 L.13-18).

Therefore, assuming without conceding that Lilly dropped off Evans at the bank, there was insufficient proof that Lilly knew Evan was about to rob the bank.

III. THE STATE FAILED TO PROVE ROBBERY IN THE FIRST DEGREE BECAUSE THERE IS NO EVIDENCE LILLY KNEW A DANGEROUS WEAPON WOULD BE USED IN THE ROBBERY. LILLY WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL FOR NOT MOVING FOR JUDGMENT OF ACQUITTAL ON THE ROBBERY IN THE FIRST DEGREE CHARGE.

Preservation of Error: This court has held "'[t]o preserve error on a claim of insufficient evidence for appellate review in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal.'" State v. Brubaker, 805 N.W.2d 164, 170 (Iowa 2011)(quoting State v. Truesdell, 679 N.W.2d 611, 615 (Iowa 2004)). The motion for judgment of acquittal by Lilly's trial counsel did not challenge the sufficiency of evidence that Lilly

knew Evans would be using a dangerous weapon in the robbery. See id; Henderson, ___ N.W.2d at ___ (motion for judgment of acquittal did not mention the deficiency in proof of defendant's knowledge that a dangerous weapon would be used in the robbery).

Scope of Review: This court reviews claims of ineffective assistance of counsel de novo. State v. Harris, 891 N.W.2d 182, 185 (Iowa 2017). "However, when the claim is that counsel was ineffective in failing to move for judgment of acquittal, this implicates the question whether such a motion would have been meritorious, which turns on the sufficiency of the evidence." State v. Henderson, ___ N.W.2d ___, ___ (Iowa 2018). "[N]o reasonable trial strategy could permit a jury to consider a crime not supported by substantial evidence." Id. (quoting State v. Schlitter, 881 N.W.2d 380, 390 (Iowa 2016)). Substantial evidence is evidence that would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. State v. McCullah, 787 N.W.2d 90, 93 (Iowa 2010). The evidence must at least raise a fair inference of guilt as to each

element of the crime. Id. at 93. The ultimate burden is on the State to prove every fact necessary to constitute the crime with which a defendant is charged. State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976) (citing In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1075, 25 L.Ed.2d 368, 375 (1970)). The record is viewed in the light most favorable to the State. Torres, 495 N.W.2d at 681.

Merits: A person prosecuted for aiding and abetting in a first degree robbery under the dangerous weapon alternative cannot be convicted of such charge without proof that the accused knew that a dangerous weapon would be used in the robbery. Henderson, ___ N.W.2d at ___. So this issue on appeal is whether the State proved beyond a reasonable doubt that Lilly knew Evans would use a dangerous weapon during the commission of the robbery. Lilly respectfully submits that the State presented no evidence that Lilly actually knew there was a gun and that it would be used in the robbery. Therefore, his conviction for robbery in the first degree must be reversed.

Henderson and four of his friends planned to rob a local

Waterloo pharmacy. Id. at ____. Henderson drove an Oldsmobile to the parking lot with Dayton Nelson as his passenger. Id. at ___. Riley Mallett arrived in a BMW with Myles Anderson and Cody Plummer. Id. at ___. Henderson dropped off Nelson and then proceeded by himself to a location where he was to pick up Plummer and Mallett after the robbery. Id. at ___. *After* Henderson left Anderson produced a firearm. Id. at ___. Nelson testified everyone in the group knew that Anderson possessed a firearm, but he did not regularly have it on his person. Id. at ___. Nelson also testified he did not know the firearm was going to be used in the robbery until Anderson actually pulled it out. Id. at ___. Anderson handed the gun out the BMW window to either Mallett or Plummer. Id. at ___. The latter two then used the gun while robbing the pharmacy. Id. at ___.

Henderson's trial counsel did not challenge the sufficiency of the evidence as to whether Henderson knew a gun would be used in the robbery as was necessary to prove aiding and abetting in a robbery in the first degree. Id. at ___. However,

Henderson himself raised the issue in a pro so post-trial motion for new trial. Id. at ___. Henderson claimed he did not know there was going to be a weapon used in the robbery and no one brought up the issue at trial. Id. The motion was denied by district court. Id.

The court of appeals upheld the district court's ruling finding that Henderson was present when the co-defendants wrote the note threatening to "shoot this bitch up." Id. The court of appeals also found that "[w]hether Henderson knew or did not know a gun would be involved makes no difference." Id. This court then granted Henderson's application for further review on the issue of "whether there was sufficient evidence to conclude Henderson knew or intended a dangerous weapon would be used in the robbery." Id. at ___. Because matter was not preserved by a motion for judgment of acquittal, the court addressed through a claim of ineffective assistance of counsel.

This court found Henderson was denied the effective assistance of counsel because had the motion been made on the proper basis it would have been meritorious. Id. This court

held that "in the context of a first-degree robbery prosecution under the dangerous weapon alternative, the State must prove the alleged aider and abettor had knowledge that a dangerous weapon would be or was being used." Id. This court found, contrary to the lower courts, that there was no evidence Henderson knew a gun was to be used in the robbery. Id.

This court rejected the argument that the use of a gun was foreseeable by Henderson. Id. Foreseeability is the test for joint criminal conduct, not aiding and abetting. Id. In aiding and abetting in an offense "[k]nowledge is essential; however neither knowledge or presence at the scene of the crime is sufficient to prove aiding and abetting." Id. (quoting State v. Neiderback, 837 N.W.2d 180, 211 (Iowa 2013)). Under aiding and abetting liability the accused "must have 'knowingly aided the principal' in committing the crime." Id. (quoting State v. Satern, 516 N.W.2d 839, 843 (Iowa 1994)). This court stated that when an aider and abettor does have not knowledge of a dangerous weapon being used, then "the aider or abettor may only have knowledge or intent to commit *a* robbery, but not

first-degree robbery." Id. (emphasis in original).

A. Breach.

Like Henderson, trial counsel in the present case was ineffective. The State failed to prove Lilly had knowledge or intent of the use of a gun so trial counsel should have made a motion for judgment of acquittal on the issue. Id. The State's focus was on whether Lilly knew there was going to be a robbery period.

The jury was instructed under the dangerous weapon alternative of robbery in the first degree. (Jury Instr. No. 15 (marshaling robbery first))(App. p. 37). See Iowa Code § 711.2 ("A person commits robbery in the first degree when, while perpetrating a robbery, the person purposely inflicts or attempts to inflict serious injury, or *is armed with a dangerous weapon.*"). So for Lilly to be guilty of aiding and abetting a robbery in the first degree, the State had to prove that Lilly had knowledge or intent of the use of the weapon in the robbery.

There was no evidence that Lilly even knew of a gun, let alone knowledge or intent of its use in the robbery. First, there

was no evidence that a gun was seen that morning before Evans entered the bank. Hardin and Bergman both testified they did not see Evans with a gun. (Vol.1 p.232 L.9-10, p.260 L.24-p.261 L.1). Hardin was particularly focused on Evans because he thought Evans must have had a sun sensitively because of the way he was dressed. (Vol.1 p.220 L.3-p.221 L.20). The gun was not large. (Ex. 11 (photo gun)). It could have easily been hidden by Evans either in his pants or the cinch bag.

Second, there was also no evidence that Lilly even knew Evans possessed at gun. (Vol.3 p.102 L.12-14). But even if he did, that would not be sufficient to prove Lilly had knowledge that a dangerous weapon would be used in the robbery. See id. In Henderson co-defendant Nelson testified that all the co-defendants were aware that co-defendant Anderson possessed a firearm. Id. However, the awareness that Anderson possessed a firearm was not proof that Henderson had knowledge that Anderson would use the gun in the robbery. Id.

Therefore, the State failed to prove Lilly had knowledge a gun would be used in the robbery. As such, trial counsel breached its duty to Lilly when counsel failed to move for judgment of acquittal on the issue of whether Lilly had knowledge or intent of use of a dangerous weapon.

B. Prejudice.

Also as in Henderson, a motion for judgment of acquittal on the question of whether Henderson had knowledge of intent of use of a gun would have been meritorious, therefore, Henderson was prejudiced by counsel's breach. Id. at ___.

C. Remedy.

Where this case differs from Henderson is the remedy. Unlike Henderson, Lilly's conviction should be reversed and the matter remanded to determine his guilt on the lesser included offenses. In Henderson the jury was instructed in one instruction that if they only found Henderson guilty of intent to commit a theft and assault, and not the dangerous weapon element, then they should find Henderson guilty of robbery in the second degree. Id.

The Henderson type of instruction was not used in the present case. Instead, the jury was instructed first as to the elements of robbery in the first degree. (Jury Instr. No.15 (marshaling robbery first))(App. p. 37). Then the jury was given a separate instruction for robbery in the second degree. (Jury Instr. No.16 (marshaling robbery second))(App. p. 38). The assault element for robbery first was as follows:

> 2. In carrying out his intention or to assist him in escaping from the scene, with or without the stolen property, Lafayette Evans committed an assault on Kathleen Boddeker.

(Jury Instr. No.15)(App. p. 37). However, the assault element for robbery in the second degree was:

> 2. In carrying out his intention or to assist him in escaping from the scene, with or without the stolen property, Lafayette Evans threatened Kathleen Boddeker with or purposely put Kathleen Boddeker in fear of immediate *serious injury*.

(emphasis added)(Jury Instr. No.16)(App. p. 38). Then for robbery in the third degree, the jury was instructed:

> 2. In carrying out his intention or to assist him in escaping from the scene, with or without the stolen property, Lafayette Evans assaulted Kathleen Boddeker.

(Jury Instr. No.17)(App. p. 39).

The jury clearly found Evans to have had the intent to commit a theft, but it is still to be determined what type of assault was committed upon Kathleen Boddeker. Therefore, the matter must be reversed and remanded for further proceedings.

IV. TRIAL COUNSEL'S FAILURE TO AVOID HEARSAY ISSUES AND TO PROPERLY PRESENT DESIRED TESTIMONY FROM THE DECLARANT OR THE RECORD KEEPER DENIED LILLY THE EFFECTIVE ASSISTANCE OF COUNSEL.

Preservation of Error: Claims of ineffective assistance of counsel are properly before this court on direct appeal. See State v. Kellogg, 263 N.W.2d 539, 543 (Iowa 1978). Where the record is clear and plausible strategy and tactical decisions do not explain counsel's action, this court may resolve the claim on direct appeal. See State v. Hopkins, 576 N.W.2d 374, 378 (Iowa 1989)(finding the record was clear and plausible strategy and tactical considerations did not explain counsel's actions); State v. Buck, 510 N.W.2d 850, 853 (Iowa 1994)("We will resolve

the claim on direct appeal... when the record adequately presents the issue.").

Scope of Review: Claims of ineffective assistance of counsel are reviewed de novo. Everett v. State, 789 N.W.151, 158 (Iowa 2010).

Merits: The problem here is that trial counsel wanted to present certain evidence that was barred by our rules of hearsay. Trial counsel breached his duty in not avoiding the hearsay issues by presenting testimony from the declarant and the record keeper of the hotel registry. Failure to know the law is a breach of duty. See Hopkins, N.W.2d at 379-80 (failure to recognize an instructional error is a breach of duty). Because the prohibited evidence was a substantial part of Lilly's defense, Lilly was prejudiced by counsel's breach.

A. Breach.

"Hearsay" is a statement made by a declarant but not while testifying at trial or hearing, and is offered by a party "into evidence to prove the truth of the matter asserted in the statement." Iowa R. Evid. 5.801(c). Hearsay is not admissible

unless it falls within one of several enumerated exceptions. Iowa R. Evid. 5.802.

During the investigation of the bank robbery Hogan presented photographs of Evans and Lilly to local hotels to see whether anyone recognized either man. Counsel wanted to show that people from Birmingham, Alabama, had checked into the Rivers Inn and Roselyn Saltmarch signed the log in. (Vol.2 p.140 L.11-20). Defense counsel argued that that the evidence was not offered for the truth of the matter asserted, but to show a failure on the part of law enforcement to follow up on the Rivers Inn information. (Vol.2 p.140 L.11-p.141 L.3). However, defense counsel tried to get this evidence in through the testimony of law enforcement. The State repeatedly objected on hearsay grounds.

The following exchange took place between defense counsel and Hogan:

Q. Okay. And you went to the Rivers Inn, also, correct?

A. Yes.

Q. Of all the hotels, did some not respond to you or they didn't recognize the deceased –

MR. PROSSER: I'm going – I'm going to object. I think the witness is into hearsay as to the content of what he was told and I want to be careful about that, and I think that the answer goes beyond the question.

THE COURT: Ask a new question.

Q. When you brought these photographs to these hotels, some of these hotels you got no response from?

A. Correct.

Q. Some of these hotels, workers did not identify these pictures as familiar?

MR. PROSSER: Objection, calls for hearsay.

THE COURT: Sustained.

Q. What information were you looking for at these hotels?

A. Identity, to be – see if anybody could identify the

individuals, had seen them in their hotel.

Q. And this was part of your investigation?

A. Correct.

Q. What other information did you get from those hotels?

MR. PROSSER: Again, I think it's calling for hearsay.

THE COURT: And I would also sustain it's a vague question.

Q. Do hotels usually keep logs of their guests?

A. Yes.

Q. Is that done in the regular course of their business?

A. Yes.

Q. Were you looking through hotel logs or guest lists at some of these hotels?

A. One of them.

Q. Okay. Which one was that?

MR. PROSSER: I -- Go ahead.

A. Three Rivers Inn.

Q. And something stood out at that Rivers Inn?

MR. PROSSER: Again, I think it's calling for hearsay.

THE COURT: Not that question, overruled.

MR. PROSSER: As long as he limits his answer to that question.

THE COURT: It's a yes or no question.

A. Yes.

Q. What stood out at the Rivers Inn that caught your attention?

MR. PROSSER: Objection, calls for hearsay.

THE COURT: Sustained.

Q. So Rivers Inn gave you some information about their guests, correct?

A. Yes.

Q. And something from that information created an investigative lead for you?

MR. PROSSER: Objection, the answer to that

question includes hearsay that hasn't been admitted.

MR. STENSVAAG: Your Honor, it's not –

THE COURT: Overruled.

A. Yes.

Q. And you passed that information to the Department of Criminal Investigation?

A. I did.

Q. And to your knowledge they did not follow up with that?

A. They did follow up with it. At the time I did my report –

MR. PROSSER: Whoa, whoa, whoa –

THE COURT: That's a yes or no question and you've answered it.

Q. When did they follow up with the investigative lead?

A. I have no idea.

(Vol.2 p.70 L.24-p.73 L.25). Defense counsel then questioned Hogan about other matters before returning to the investigation

of the local hotels.

Q. So the leads that you got from those hotels/motels, you forwarded that on to the Department of Criminal Investigations?

A. Yes.

Q. Would that have been Special Agent Lestina?

A. Some things I gave to him and it could have been – that could have been some of it.

Q. Did you actually look at the hotel logs yourself?

A. I did, I believe.

Q. Okay. So you observed those hotel logs?

A. I believe at the Rivers Inn.

Q. Okay. And you saw that investigative lead in the hotel log?

A. Yes.

Q. And, again, those logs are in the course of ordinary business at a hotel?

A. Correct.

Q. What information did you observe on that hotel

log?

MR. PROSSER: Objection, calls for hearsay.

THE COURT: Sustained.

Q. Do you know who followed up with that investigative lead?

A. Not positive, but I believe the agent seated next to you there.

Q. Special Agent Herman?

A. Yes.

...

Q. So you don't know when he followed up with that lead?

A. I – I don't.

(Vol.2 p.78 L.11-p.79 L.19).

Later during cross examination defense counsel attempted to question Herman about the information from Rivers Inn.

Q. Now, information was passed on about Rivers Inn, correct?

A. Correct.

Q. And did you follow up on that one?

A. Yes.

Q. You followed up with that on – The robbery was June 29, 2016. You made a call or you followed up on May 8, 2017, correct?

A. That sounds correct.

Q. And that's almost a year after the robbery?

A. Yes.

Q. What did you do to follow up that lead?

A. I placed a phone call to –

MR. PROSSER: Excuse me. Without stating what anyone told you during those calls or who you called.

THE COURT: That's an objection, I think?

MR. PROSSER: Yes, it is, please.

THE COURT: Asking – Indicating the witness – the question calls for hearsay, so – but I will caution you only to talk about what you did, not what you were told.

A. I made a phone call.

Q. To who?

MR. PROSSER: Objection, hearsay.

THE COURT: Sustained.

MR. STENSVAAG: Your Honor, may we approach?

(Vol.2 p.135 L.25-p.136 L.24).

There were two types of information that defense counsel was attempting to obtain. First, what the Rivers Inn employee told the officer. Second, that Roselyn Saltmarch signed the log for three people from Birmingham, Alabama – which was where Evans was from. (Vol.2 p.140 L.11-20). Defense counsel argued that he was not asking for the truth of the matter asserted, but to show that no leads were taken. However, it was the underlying assertion that one of these people from Alabama may have been the driver of the vehicle that dropped Evans off at the bank.

The statements made by Rivers Inn employee to Hogan were classic hearsay. A statement made by a declarant but not while testifying at trial or hearing, and is offered by a party "into evidence to prove the truth of the matter asserted in the

statement." Iowa R. Evid. 5.801(c). The importance of the State's response was based upon the veracity of the statements. The truth of the statements gave defense counsel the tools to argue that someone other than Lilly as the possible driver of the drop-off vehicle. See State v. Tompkins, 859 N.W.2d 631, 643 (Iowa 2015)(officer's testimony of out-of-court statement went beyond mere fact a conversation occurred into what the declarant actually said); see also State v. Plain, 898 N.W.2d 801, 812-13 (Iowa 2017)(same). In Tompkins and Plain the State argued the statements were necessary to explain the officers' subsequent conduct. However, in the present case Lilly's counsel is not offering the statements to explain subsequent conduct, but to critique a lack of conduct.

Counsel could have avoided the hearsay objection simply by calling and questioning the Rivers Inn employee.

The evidence on the log-in sheet was double hearsay. The log-in was an out-of-court statement that Roselyn Saltmarch signed the log for three people from Birmingham, Alabama. See State v. Musser, 721 N.W.2d 734, 751 (Iowa 2006)(lab

reports hearsay: the test results shown in the reports were conclusions of a lab technician who did not testify, and the results were offered to prove the truth of the matter asserted); State v. McCurry, 544 N.W.2d 444, 446 (Iowa 1996)(holding DNA reports were hearsay); State ex rel. Buechler v. Vinsand, 318 N.W.2d 208, 210 (Iowa 1982)(holding paternity blood test results were hearsay). And Hogan's testimony as to what the log-in stated was also hearsay. Iowa R. Evid. 5.801(c).

Defense counsel could have avoid the hearsay problem for the log-in by offering the log-in as evidence and having a Rivers Inn employee lay a foundation that the log-in was a business record of regularly conducted business. Records of regularly conducted business are admissible where the proponent establishes:

> A record of an act, event, condition, opinion, or diagnosis [is admissible] if:
>
> (A) The record was made at or near the time by—or from information transmitted by—someone with knowledge;
>
> (B) The record was kept in the course of a regularly conducted activity of a business, organization,

> occupation, or calling, whether or not for profit;
>
> (C) Making the record was a regular practice of that activity;
> (D) All these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with rule 5.902(11) or rule 5.902(12) or with a statute permitting certification; and
>
> (E) The opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Iowa R. Evid. 803(6). Defense counsel should have obtained a copy of the log-in and laid a foundation for its admission by testimony from a hotel employee with the necessary knowledge.

Defense counsel's decision to attempt to have Hogan and Herman testify as to the evidence from Rivers Inn was not a strategic decision. Cf. State v. Kone, 557 N.W.2d 97, 102 (Iowa Ct. App. 1996)(Failure to call Richardson as a witness was a strategical decision which we will not second-guess.). Defense counsel clearly wanted the evidence admitted, but either did not know how to get it admitted or failed to do the necessary preparation to get it admitted. Thus, defense counsel breached an essential duty to Lilly.

B. Prejudice. Inadmissible hearsay is considered to be prejudicial to the nonoffering party unless otherwise established. State v. Long, 628 N.W.2d 440, 447 (Iowa 2001). Defense counsel's breach prevented him from showing the jury that there were other highly likely suspects for the driver of the vehicle. Lilly's conviction was based upon purely circumstantial evidence. No witness was able to identify Lilly as the driver or the suburban as the vehicle that dropped Evans off at the bank. Evans was from Alabama and the people who registered at the hotel are very likely connected to Evans. Thus, counsel's breach was prejudicial to Lilly and undermines one's confidence in the outcome of the trial.

CONCLUSION

1. For the reasons stated in Division I, above, the defendant respectfully requests this court to reverse his conviction and remand for a new trial.

2. For the reasons stated in Division II, above, the defendant respectfully requests this court to reverse his conviction and dismiss with prejudice.

3. For the reasons stated in Division III, above, the defendant respectfully requests this court to reverse his conviction for robbery in the first degree and remand for a new trial on robbery in the second degree.

4. For the reasons stated in Division IV, above, the defendant respectfully requests this court to reverse his conviction for robbery in the first degree and remand for a new trial.

ORAL SUBMISSION

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $ 6.94, and that amount has been paid in full by the Office of the Appellate Defender.

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