ELECTRONICALLY FILED AUG 24, 2018 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff–Appellee,	)	
	)	
v.	)	S.CT. NO. 17–1806
	)	
JON ARTHUR DIECKMANN,	)	
	)	
Defendant–Appellant.	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
THE HONORABLE MARLITA A. GREVE, JUDGE

APPELLANT'S BRIEF AND ARGUMENT

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FINAL

CERTIFICATE OF SERVICE

On 24th day of August, 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 Jon Arthur Dieckmann, #1149353, Mount Pleasant Correctional Facility, 1200 East Washington Street, Mount Pleasant, IA 52641.

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ROUTING STATEMENT

The Court should transfer this case to the Court of Appeals because it raises issues that involve the application of existing legal principles. Iowa R. App. P. 6.903(2)(d) & 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case: Defendant–Appellant Jon Arthur Dieckmann appeals his convictions, sentences, and judgment following a jury trial and verdict finding him guilty of Attempted Burglary in the Second Degree and Possession of Burglar's Tools, in Scott County District Court Case No. FECR384873.

Course of Proceedings: On June 14, 2017, the State charged Dieckmann with Count I: Burglary in the Second Degree, a class "C" felony, in violation of Iowa Code section 713.5; and Count II: Possession of Burglar's Tools, an aggravated misdemeanor, in violation of Iowa Code section 713.7. (Trial Information) (App. pp. 4–6); see Iowa Code §§ 713.5, 713.7 (2017). The district court arraigned Dieckmann

in open court, and Dieckmann entered a plea of not guilty on June 15, 2017. (Arraignment Tr. p.2 L.4–p.6 L.3) (Order for Pretrial Conference) (App. pp. 9–11).

A jury trial commenced on August 21, 2017. (Trial Tr. p.1 L.4–12). On August 23, 2017, the jury returned a verdict finding Dieckmann guilty of Attempted Burglary in the Second Degree, a lesser-included of Count I, and Count II: Possession of Burglar's Tools. (Trial Tr. p.182 L.7–23) (Order Pre-Sentence Investigation) (App. pp. 20–22). The district court ordered a presentence investigation report. (Order Pre-Sentence Investigation) (App. pp. 20–22).

The presentence investigation report was filed on October 3, 2017. (PSI) (Confidential App. pp. 4–18). Sentencing was held on October 12, 2017. (Sentencing Tr. p.2 L.1–p.7) (Sentencing Order) (App. pp. 23–25). The district court ordered Dieckmann to indeterminate term not to exceed five years in prison on Count I and two years on Count II. (Sentencing Tr. p.15 L.21–p.16 L.10) (Sentencing Order) (App. pp. 23–25). The district court ordered the sentences to run

concurrently to one another. (Sentencing Tr. p.15 L.17–20, p.16 L.12) (Sentencing Order) (App. pp. 23–25). It also assessed the minimum fines of $750 and $625, but then suspended them. (Sentencing Tr. p.16 L.2–3, L.10–12) (Sentencing Order) (App. pp. 23–25). The court also ordered Dieckmann to pay court costs and surcharges, but it found Dieckmann did not have the ability to repay his attorney fees. (Sentencing Tr. p.16 L.14–15, p.17 L.11–p.18 L.2) (Sentencing Order) (App. pp. 23–25). Lastly, the court also ordered Dieckmann to submit a DNA sample. (Sentencing Tr. p.16 L.15–17) (Sentencing Order) (App. pp. 23–25).

Dieckmann timely filed a notice of appeal on November 2, 2017. (Notice) (App. pp. 26–27).

Facts: On the morning of May 15, 2017, Brenda Milam did not feel well so she decided to watch some television, try to take a nap on her couch, and go into work later than normal; she was home alone. (Trial Tr. p.20 L.15–p.21 L.4, p.30 L.12–19, p.32 L.7–8). Milam lived at 2421 Grand Avenue in Davenport. (Trial Tr. p.22 L.5–10). The house had a privacy

fence around the backyard. (Trial Tr. p.22 L.16–24, p.24 L.4–15). A sidewalk ran from the front of the house alongside the northern side of the house to a side door; the north side door was accessible without going through the fence. (Trial Tr. p.25 L.6–16) (Ex. 4) (App. p. 13). On the southern side of the house, the privacy fence started at the house's chimney stack, thereby enclosing part of the southern side yard along with the backyard. (Trial Tr. p.24 L.4–15, p.26 L.9–11) (Ex. 6, 7) (App. pp. 14–15).

While lying on the couch, Milam heard a knock on the front door, which was only a few feet away; she did not want to answer the door so she remained on the couch. (Trial Tr. p.30 L.14–24, p.32 L.9–12). The television was on, but not loud, the curtains were closed, and there were no cars in the driveway. (Trial Tr. p.33 L.1–14). Milam's dog barked at the sound of the knock and jumped to look out the front window, which was not unusual. (Trial Tr. p.28 L.1–11, p.30 L.19–p.31 L.1). However, the dog continued barking, walked down the hallway, and through the house on the south side to the den

where it barked and growled in a way that Milam had never heard before. (Trial Tr. p.30 L.25–p.31 L.18). Because of her dog's reaction, Milam got up from the couch and walked towards her den at the back of the house, which was attached to a three-season room. (Trial Tr. p.34 L.5–18).

As Milam went to the den, she noticed a man, later identified as Dieckmann, with his hands on the exterior door in the three-season room. (Trial Tr. p.34 L.10–18, p.35 L.25–p.36 L.11) (Ex. 13) (App. p. 16). The door was locked with a hook and eye latch. (Trial Tr. p.34 L.19–21, p.44 L.8–10). Milam testified she did not process what Dieckmann was doing, but believed "his hands were pushing on [the] door with the other hand towards the latch"; she also described the door as not flush with the wall. (Trial Tr. p.34 L.17–p.35 L.2). She testified she did not notice anything in Dieckmann's hands. (Trial Tr. p.37 L.22–24). Milam stated she screamed, "What the fuck are you doing?" at Dieckmann. (Trial Tr. p.35 L.2–5, p.39 L.13–14). Milam testified Dieckmann stated "Sorry,

ma'am," and he put his hands down and walked away. (Trial Tr. p.35 L.2–5, p.39 L.13–18).

Milam got her phone and called 911. (Trial Tr. p.35 L.5–6) (Ex. 1). Milam looked out the window and saw Dieckmann reaching over the fence, relocking the gate door, and walking to the front sidewalk, where he had left his bicycle. (Trial Tr. p.35 L.5–10). Milam testified that after their interaction, Dieckmann "looked very relaxed" and "like he belonged there." (Trial Tr. p.45 L.10–12, p.60 L.6–9). Milam testified she opened the door to describe what Dieckmann was doing to the 911 operator "because [she] wanted him caught." (Trial Tr. p.46 L.4–7). She testified she felt like a victim and was shaken by the incident. (Trial Tr. p.46 L.8–23).

Milam testified her front door had a sign that said, "Doorbell broke. Please knock" because her doorbell had been broken for four years. (Trial Tr. p.38 L.4–7, p.49 L.4–12, p.56 L.21–24). Regarding the sign, an officer testified: "When I looked at the note, I could tell that it had writing on it, but, to me, it was so sun faded I had difficulty reading anything."

(Trial Tr. p.105 L.7–9). Milam testified her house was in good condition and was not in need of repairs. (Trial Tr. p.24 L.16–p.25 L.25) (Ex. 2) (App. p. 12). She acknowledged there were some trees on her property that needed to be trimmed, but stated her husband kept the lawn mowed. (Trial Tr. p.39 L.23–p.40 L.12).

Officers found Dieckmann in the neighborhood based on Milam's description within minutes of her 911 call. (Trial Tr. p.78 L.21–p.80 L.3) (Ex. 20 02:42–03:00). An officer testified that when he found Dieckmann, Dieckmann was pedaling on his bicycle but he was not being "overly evasive." (Trial Tr. p.102 L.16–22). The video from the officer's dash camera shows Dieckmann pedaling at a leisurely pace. (Ex. 20 02:42–03:00). Almost immediately, the officer told Dieckmann they had a call he was trying to enter a house, and Dieckmann calmly denied that he was trying to break into the house. (Trial Tr. p.105 L.10–22) (Ex. 20 03:54–04:05). Dieckmann admitted he had been at Milam's house, and he told the officer there had been a note on the door telling him to go to the back

door, which he did. (Trial Tr. p.81 L.14–16) (Ex. 20 04:00–04:15). Dieckmann told the officer he knocked and Milam had gone crazy on him. (Trial Tr. p.81 L.14–22) (Ex. 20 04:10–04:25). Dieckmann stated he apologized for disturbing her and left. (Trial Tr. p.81 L.21–22). When questioned why he was in the neighborhood, Dieckmann answered he had family friends that lived in the neighborhood, had been working around the neighborhood, and was looking for work as a handyman. (Trial Tr. p.80 L.23–13, p.103 L.22–p.104 L.1) (Ex. 20 04:20–05:129).

The responding officer testified Dieckmann was cooperative. (Trial Tr. p.101 L.18–20). Police officers testified that inside of Dieckmann's backpack were several items. (Trial Tr. p.68 L.15–13). The items included a long metal file, a hammer, and work gloves. (Trial Tr. p.69 L.1–3). When told the charges for which he was going to jail, Dieckmann stated, "That's bullshit" and told the officer the tools were for his work. (Ex. 24 11:00–11:20). Dieckmann expressed his frustration at being arrested, but then apologized to the officer

for his words, stating his surprise that this was happening to him. (Ex. 24 11:20–12:15).

There were no other homes in the neighborhood that reported burglaries. (Trial Tr. p.102 L.4–6).

Joseph Durham, a resident of Davenport, testified on behalf of Dieckmann. (Trial Tr. p.133 L.23–p.134 L.1). Durham testified he met Dieckmann around May of 2017 when Dieckmann knocked on his front door one morning and asked him if there was any work that Durham needed done. (Trial Tr. p.134 L.2–13). Durham stated he had not heard of Dieckmann's business until Dieckmann knocked on his door. (Trial Tr. p.134 L.23–25). Durham also testified that Dieckmann was riding a bicycle, which he had left on the side of the street when he approached the house. (Trial Tr. p.134 L.18–20). Durham testified he hired Dieckmann to trim some hedges, and Dieckmann did a terrific job. (Trial Tr. p.134 L.21–p.135 L.3). Durham also stated he was planning on hiring Dieckmann again if he had an odd job, and Dieckmann

would make contact with him just by knocking on his door. (Trial Tr. p.135 L.1–8).

Richard Jochim, another Davenport resident and Dieckmann's mother's boyfriend, also testified on behalf of the defense. (Trial Tr. p.136 L.19–24). Jochim testified the file was his and he used it to sharpen the blades of lawn mowers. (Trial Tr. p.137 L.3–9). Jochim also identified the hammer and work gloves as his; Jochim testified he loaned them to Dieckmann for use with his business. (Trial Tr. p.137 L.14–p.138 L.20). Jochim also testified Dieckmann would work on his lawn mower. (Trial Tr. p.137 L.24–25).

Lastly, Ricky Hess also testified on behalf of Dieckmann. (Trial Tr. p.140 L.18–20). Hess lived on 2618 Arlington Avenue, which was very close to where Milam lived. (Trial Tr. p.141 L.18–19, p.142 L.8–15) (Ex. 15) (App. p. 17). Hess was a family friend of Dieckmann's because Dieckmann's mother used to live by him. (Trial Tr. p. 141 L.13–15). Hess's daughter also lived in the neighborhood, across the street from Hess. (Trial Tr. p.141 L.20–22). Hess stated Dieckmann

worked on his lawn mowers and had mowed his lawn in the past. (Trial Tr. p.141 L.23–p.142 L.1).

Hess also testified he believed Dieckmann had been at his house working on his lawn mower the day before he was arrested. (Trial Tr. p.142 L.2–7). He further testified Dieckmann had trimmed the bushes at his daughter's house the day before he was arrested. (Trial Tr. p.142 L.16–23). Hess also believed Dieckmann would be returning to his house on the day he was arrested to continue working on his lawn mowers. (Trial Tr. p.142 L.24–p.143 L.4). Hess testified Dieckmann had been consistently working at his house for the two weeks leading up to his arrest, and that he intended to keep giving Dieckmann jobs as long as he wanted them. (Trial Tr. p.143 L.5–9). Hess also testified he saw Dieckmann knocking on his neighbor's doors, looking for work. (Trial Tr. p.143 L.19–p.144 L.5). Dieckmann had done some yardwork and odd jobs for people in the neighborhood. (Trial Tr. p.144 L.13–18).

Any additional relevant facts will be discussed below.

ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE.

A. Preservation of Error: The traditional rules of preservation of error do not apply to claims of ineffective assistance of counsel. State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006) (citation omitted).

B. Standard of Review: The Court reviews claims of ineffective assistance of counsel, which involve a constitutional right, de novo. State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012) (citing State v. Brubaker, 805 N.W.2d 164, 171 (Iowa 2011)).

C. Discussion: The U.S. Constitution and the Iowa Constitution both guarantee defendants of criminal cases the right to effective assistance of counsel. U.S. Const. amends. VI, XIV; Iowa Const. art. I, § 10; see also State v. Ambrose, 861 N.W.2d 550, 555 (Iowa 2015). To prevail on an ineffective-assistance-of-counsel claim, a defendant must establish (1) counsel failed to perform an essential duty and (2) the defense was prejudiced as a result. State v. Maxwell, 743 N.W.2d 185,

195 (Iowa 2008) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). The defendant must show both elements by a preponderance of the evidence. Id. (citing Ledezma v. State, 626, N.W.2d 134, 142 (Iowa 2001)).

The Court examines whether counsel breached a duty by measuring the attorney's "'performance against the standard of a reasonably competent practitioner.'" Clay, 824 N.W.2d at 495 (quoting Maxwell, 743 N.W.2d at 195). The Iowa Supreme Court has stated:

> There is a presumption the attorney performed his duties competently. The claimant successfully rebuts this presumption by showing a preponderance of the evidence demonstrates counsel failed to perform an essential duty. A breach of an essential duty occurs when counsel makes such serious errors that he or she was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. We do not find such a breach by second-guessing or making hindsight evaluations.

Id. (citations omitted). The Court examines the attorney's performance by objectively determining whether his actions were reasonable under the prevailing professional norms. Id. (citing State v. Lyman, 776 N.W.2d 865, 878 (Iowa 2010)).

Counsel's performance is reviewed by examining the totality of the circumstances. State v. Lane, 743 N.W.2d 178, 181 (Iowa 2007) (citing State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987)).

"Competent representation requires counsel to be familiar with the current state of the law." Clay, 824 N.W.2d at 496 (citing State v. Hopkins, 576 N.W.2d 374, 379–80 (Iowa 1998)). Trial counsel is not expected to predict changes in the law, but counsel must "exercise reasonable diligence in deciding whether an issue is 'worth raising.'" State v. Westeen, 591 N.W.2d 203, 210 (Iowa 1999) (citing State v. Schoelerman, 315 N.W.2d 67, 72 (Iowa 1982)). However, counsel does not have a duty to raise an issue that is meritless. Brubaker, 805 N.W.2d at 171 (citing State v. Greene, 595 N.W.2d 24, 29 (Iowa 1999)). The Iowa Supreme Court has stated "that 'failure to preserve error may be so egregious that it denies a defendant the constitutional right to effective assistance of counsel.'" State v. Hrbek, 336 N.W.2d

431, 435–36 (Iowa 1983) (quoting Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981)).

Once the Court has determined the attorney failed to perform an essential duty, it must examine whether prejudice resulted by that failure. Clay, 824 N.W.2d at 496 (citations omitted). There is prejudice to the defendant if "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" State v. Leckington, 713 N.W.2d 208, 218 (Iowa 2006) (quoting Strickland, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding." State v. Carrillo, 597 N.W.2d 497, 500 (Iowa 1999) (citing Osborn v. State, 573 N.W.2d 917, 922 (Iowa 1998)). In examining whether prejudice exists, the Court "'must consider the totality of the evidence, what factual findings would have been affected by counsel's errors, and whether the effect was pervasive or isolated and trivial.'" Maxwell, 743 N.W.2d at 196 (quoting Bowman v. State, 710 N.W.2d 200, 203 (Iowa 2006)). The "'benchmark for judging

any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985) (quoting Strickland, 466 U.S. at 686).

While the Court usually considers claims alleging ineffective assistance of counsel in postconviction relief proceedings, the Court will address ineffective-assistance-of-counsel claims on direct appeal when the record is sufficient. Iowa Code § 814.7(2)–(3) (2017); Clay, 824 N.W.2d at 494 (citations omitted). The Court also considers ineffective-assistance-of-counsel claims when the trial attorney's actions, or lack thereof, cannot be explained by plausible strategic or tactical considerations. Hopkins, 576 N.W.2d at 378 (citing State v. Ceron, 573 N.W.2d 587, 590 (Iowa 1997)).

1. Failure to properly challenge the sufficiency of the evidence.

"To 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. Truesdell, 679 N.W.2d 611, 615 (Iowa 2004). At the close of the State's evidence, Dieckmann moved for judgment of acquittal arguing the State had failed to meet its burden; the district court denied the motion. (Trial Tr. p.113 L.23–p.115 L.24). After the close of all evidence, trial counsel renewed the general motion, which the court again denied. (Trial Tr. p.153 L. 9–p.154 L.5). This general motion is inadequate to preserve error on a sufficiency challenge. See id.; see also State v. Carey, No. 02–1377, 2004 WL 356260, at *5 (Iowa Ct. App. Feb. 27, 2004) (unpublished table decision) (finding simply arguing the State did not establish a jury question was insufficient for error preservation); State v. Kluge, No. 02–0666, 2003 WL 21544492, at *1 (Iowa Ct. App. July 10, 2003) (unpublished table decision) (finding merely alleging the State failed to prove its case is not specific and did not preserve a challenge to an insufficiently supported element of the crime).

"In reviewing challenges to the sufficiency of evidence supporting a guilty verdict, courts consider all of the record evidence viewed 'in the light most favorable to the State, including all reasonable inferences that may be fairly drawn from the evidence.'" State v. Sanford, 814 N.W.2d 611, 615 (Iowa 2012) (quoting State v. Keopasaeuth, 645 N.W.2d 637, 639–40 (Iowa 2002)). The Court should uphold the verdict only if it is supported by substantial evidence in the record as a whole. Id. "Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." State v. Kemp, 688 N.W.2d 785 (Iowa 2004) (citing State v. Webb, 648 N.W.2d 72, 75 (Iowa 2002)). However, consideration must be given to all of the evidence, not just the evidence supporting the verdict. State v. Petithory, 702 N.W.2d 854, 856–57 (Iowa 2005) (citation omitted). "The evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." Webb, 648 N.W.2d at 76 (citing State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981)).

The State has the burden of proving "every fact necessary to constitute the crime with which the defendant is charged." Webb, 648 N.W.2d at 76 (citing State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976)); see also State v. Limbrecht, 600 N.W.2d 316, 317 (Iowa 1999) (citing State v. Harrison, 325 N.W.770, 772–73 (Iowa Ct. App. 1982)) ("That record must show that the State produced substantial evidence on each of the essential elements of the crime."). "Inferences drawn from the evidence must raise a fair inference of guilty on each essential element, including the element of intent." See Truesdall, 679 N.W.2d at 618 (citing State v. Speicher, 625 N.W.2d 738, 741 (Iowa 2001)).

Iowa Code section 713.2 provides:

> Any person, having the intent to commit a felony, assault, or theft therein, who, having no right, license, or privilege to do so, attempts to enter an occupied structure, the occupied structure not being open to the public, or who attempts to remain therein after it is closed to the public or after the person's right, license, or privilege to be there has expired, or any person having such intent who attempts to break an occupied structure, commits attempted burglary.

Iowa Code § 713.2 (2017). In this case, there was insufficient evidence that Dieckmann had any "intent to commit a felony, assault, or theft" or that he "attempted to enter [the] structure." See id.

First, there was no showing that Dieckmann intended enter the house with the intent to take possession or control of Milam's property. Cf. State v. Copenhaver, 844 N.W.2d 442, 450 (Iowa 2014). While Milam testified there was a note on her door that stated the doorbell was broken and instructing the visitor to knock, evidence in the record showed Dieckmann believed the note stated to go to the back door. (Trial Tr. p.38 L.4–7, p.49 L.4–12, p.56 L.21–24, p.81 L.14–16) (Ex. 20 04:00–04:15). Moreover, there was evidence in the record through a police officer's testimony that the sign was actually unreadable, lending itself to possible faulty interpretations. See (Trial Tr. p.105 L.7–9). "[W]hen two reasonable inferences can be drawn from a piece of evidence, we believe such evidence only gives rise to a suspicion, and, without additional

evidence, is insufficient to support guilt. See Truesdall, 679 N.W.2d at 618–19 (citations omitted).

There was evidence in the record that showed the door would move inward when touched, such as knocked upon, as Dieckmann told the officer he had. (Trial Tr. p.34 L.17–p.35 L.2, p.81 L.14–22) (Ex. 20 04:10–04:25). There was no evidence presented about where the hook and eye latch on the door was located or whether it was simply in a spot where someone would knock on the door. While Milam did not hear a knock at the back door, it was undisputed her dog was loudly barking and growling at the time, potentially covering up the sound of a knock. (Trial Tr. p.30 L.25–p.31 L.18). Moreover, there was a sign that clearly stated "Beware of the Dog," and Milam testified you could hear her dog's bark from outside of the house; as Dieckmann pointed out to the officers he could see the dog barking at him from outside of the porch and it made little sense to try to break into a house with that dog there. (Trial Tr. p.58 L.12–19) (Ex. 20 06:50–7:05) (Ex. 7, 13) (App. pp. 15-16).

Furthermore, Dieckmann's actions after he interacted with Milam do not support any intent to commit an assault, felony, or theft or that he attempted to enter the structure. Rather than force his way into the home to perpetuate any assault, theft, or felony, Dieckmann apologized for startling and bothering Milam. (Trial Tr. p.35 L.2–5, p.39 L.13–18, p.81 L.21–22). After he apologized, he walked away, not ran, and made sure to close the fence's gate on the way out. (Trial Tr. p.35 L.2–10, p.39 L.13–18, p.81 L.21–22). Milam herself stated after their interaction, Dieckmann "looked very relaxed" and "like he belonged" in the neighborhood—not exactly the demeanor expected of someone who had just been caught trying to break into a home. (Trial Tr. p.45 L.10–12, p.60 L.6–9).

When the police found him, Dieckmann was leisurely and nonevasively riding his bicycle down the sidewalk. (Trial Tr. p.102 L.16–22) (Ex. 20 02:42–03:00). He was not frantically trying to get away from the house or attempting to hide. Although his backpack contained different clothing, such as

jeans, a t-shirt, and a jacket, he had not changed his clothing or made any other attempt to change his description. (Trial Tr. p.110 L.3–8, p.148 L.12–15, p.149 L.23–p.150 L.1) (Ex. 20 02:42–03:00). Nor had he left his backpack or bicycle somewhere hidden in an attempt to escape or avoid detection by police, despite being familiar with the area and friendly with some of the homeowners. He was calm when approached by officers and was cooperative with law enforcement. (Trial Tr. p.101 L.18–20) (Ex. 20 03:00–04:05).

There was also evidence that supported Dieckmann's assertions that he had started a handyman business and was doing work in the area. Hess, Milam's neighbor only a few blocks east, testified Dieckmann had done work for him and his daughter the day before he was arrested, and he expected Dieckmann back the next day. (Trial Tr. p.141 L.23–p.143 L.9). Hess also testified he saw Dieckmann going door to door, knocking on his neighbor's homes looking for odd jobs, and he stated some of his neighbors had actually hired Dieckmann. (Trial Tr. p.143 L.19–p.144 L.18). This information

corroborates and is consistent with what Dieckmann reported to police when questioned on the day of his arrest.

Based on the evidence in the record, there is simply insufficient evidence to establish that Dieckmann had any intent to commit a theft, assault, or felony, nor was there sufficient evidence to show he intended to enter or break into the home. Because the evidence does not raise a fair inference of guilt and only "create[s] speculation, suspicion, or conjecture," this Court should find it insufficient and vacate Dieckmann's conviction for Attempted Burglary in the Second Degree. See Webb, 648 N.W.2d at 76 (citing Hamilton, 309 N.W.2d at 479).

Similarly, the evidence regarding Dieckmann's charge of Possession of Burglar's tools was merely based on speculation, suspicion, or conjecture. See id. Under section 713.7, "a person who possesses any key, tool, instrument, device or explosive, with the intent to use it in the perpetration of a burglary, commits an aggravated misdemeanor." Iowa Code § 713.7 (2017). As discussed above, there was insufficient proof

that Dieckmann had the intent to perpetuate a burglary. In addition, Milam, who was the only witness to the attempted burglary, stated that she did not see any tools or anything else in Dieckmann's hands when he was at her back door. (Trial Tr. p.37 L.22–24). Nor did Milam even testify that Dieckmann was wearing the backpack when he was at her backdoor or whether he had left it at the front of her house with his bicycle.

Moreover, Dieckmann's possession of the tools was consistent with his explanation of being a handyman and looking for work in the area. The owner of the file testified he lent Dieckmann the alleged burglar's tools for his handyman business and he used the file for sharpening the blades of the mower. (Trial Tr. p. 137 L.3–p.138 L.20). Milam's neighbor testified Dieckmann had been working on his lawn mowers the day before he was arrested and Dieckmann had planned to be back the day of his arrest to continue work on the mowers. (Trial Tr. p.141 L.23–p.143 L.9). Dieckmann also had other tools in his backpack, such as a drill, drill bits, wire, a

pocketknife, pliers, screwdrivers, wrenches, and several tools, consistent with the tools of the handyman trade, but not charged as burglar's tools. (Trial Tr. p.149 L.14–21). Again, the evidence presented in this case does not raise a fair inference of Dieckmann's guilt, but rather it only "create[s] speculation, suspicion, or conjecture." See id. As such, the Court should also reverse his conviction for Possession of Burglar's Tools.

Because trial counsel's challenge to the sufficiency of the evidence was not properly preserved, trial counsel was ineffective. See Hrbek, 336 N.W.2d at 435–36 (citation omitted) (noting the failure to preserve error can deny a defendant the right to effective assistance of counsel). Because such a challenge is meritorious, as discussed above, Dieckmann was prejudiced by the breach of duty. See State v. Schories, 827 N.W.2d 659, 664–65 (Iowa 2013) ("[T]here is no conceivable strategic reason for failing to preserve a potentially valid motion to dismiss for lack of sufficient evidence."); see also Brubaker, 805 N.W.2d at 174 ("Having found that the

district court would have sustained trial counsel's proper objection, Brubaker was prejudiced by his trial counsel's failure to object to the sufficiency of the evidence and move for judgment of acquittal citing this specific reason. Therefore, Brubaker's trial counsel was ineffective as a matter of law.").

2. *Failure to object to the marshalling instruction for Attempted Burglary in the Second Degree.*

During its ruling on the motion for judgment of acquittal, the district court noted its belief the State had presented sufficient evidence "for a jury to determine he had the specific intent to commit a theft." (Trial Tr. p.116 L.21–23). However, the court did not find there was sufficient evidence for either of the other intent alternatives—specifically intent to commit an assault or a felony. In the event the Court determines the evidence was minimally sufficient as to the burglary charge as to Dieckmann's intent to commit a theft, trial counsel was ineffective for failing to object to the marshalling instruction and the district court erred in instructing the jury on the Attempted Burglary in the Second Degree Charge.

Instruction Number 25 was the marshalling instruction for Attempted Burglary in the Second Degree. (Instruction No. 25) (App. p. 18). It stated:

> Under Count 1 the State must prove all of the following elements of the lesser-included charge of Attempted Burglary in the Second Degree:
>
> 1. On or about the 15th day of May, 2017, the defendant attempted to break or enter into a residence at 2421 Grand Avenue, Davenport, Scott County, Iowa.
> 2. The house was an occupied structure as defined in Instruction No. 22.
> 3. The defendant did not have permission or authority to attempt to break or enter into the house.
> 4. *The defendant did so with the specific intent to commit a theft, assault or other felony.*
>
> If the State has proved all the elements, the defendant is guilty of Attempted Burglary in the Second Degree under Count 1. If the State has failed to prove any one of the elements, the defendant is not guilty of Attempted Burglary in the Second Degree and you will then consider the charge of Criminal Trespass explained in Instruction No. 26.

(Instruction No. 25) (App. p. 18) (emphasis added). Trial counsel did not object to any of the instructions. (Trial Tr. p.124 L.21–p.125 L.1).

The district court "is required to 'instruct the jury as to the law applicable to all material issues in the case . . . .'" State v. Marin, 788 N.W.2d 833, 837 (Iowa 2010) (quoting Iowa R. Civ. P. 1.924), overruled on other grounds by Alcala v. Marriott Intern., Inc., 880 N.W.2d 699 (Iowa 2016) ("The rules pertaining to jury instructions in civil cases apply equally to the trial of criminal cases."). "[T]he court is not required to give any particular form of an instruction" but "must . . . give instructions that fairly state the law as applied to the facts of the case." Id. at 838. "[T]he instruction must be a correct statement of the law and the instructions as a whole should adequately and correctly cover the substance" of the applicable law. State v. Monk, 514 N.W.2d 448, 451 (Iowa 1994).

Challenges to the sufficiency of the evidence derive from the Due Process Clause's requirement that to sustain a criminal conviction, the State must have proved the defendant guilty beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 316 (1979) (citing In re Winship, 397 U.S. 358

(1970)) ("In short, Winship presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense."); see also State v. Frei, 831 N.W.2d 70, 76 (Iowa 2013). "It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process." Jackson, 443 U.S. at 314. Therefore, conviction of a crime upon insufficient evidence results in a denial of due process.

If the Court determines the district court was correct that sufficient evidence was presented to submit the theory that Dieckmann had the intent to commit a theft, but there was insufficient evidence for the other theories that Dieckmann had the intent to commit a felony or an assault, Dieckmann is entitled to a new trial. This is because it is unclear which theory the jury found occurred in order to convict Dieckmann of Attempted Burglary in the Second Degree. See State v.

Tyler, 873 N.W.2d 741, 753–54 (Iowa 2016) (citation omitted); State v. Schlitter, 881 N.W.2d 380, 391 (Iowa 2016). Additionally, the State actually generally argued to the jury there was intent to commit a felony, assault, or theft, despite the insufficient evidence. See, e.g., (Trial Tr. p.158 L.13–16, p.160 L.7–p.163 L.9, p.165 L.11–18). As in the case of Tyler, reversal is required as a matter of sound judicial administration when the jury considers a theory that was not supported by the evidence. See Tyler, 873 N.W.2d at 753–54. Furthermore, reversal is required under Article I, section 9 of the Iowa Constitution. See id. at 754 n.11 (noting several states have rejected the U.S. Supreme Court's federal due process analysis in Griffin v. United States, 502 U.S. 46 (1991), but not explicitly deciding the issue under the Iowa Constitution); Iowa Const. art. I, § 9. See, e.g., State v. Jones, 29 P.3d 351, 371 (Haw. 2001); State v. Ice, 997 P.2d 737, 741 (Kan. 2000); Commonwealth v. Plunkett, 664 N.E.2d 833, 837 (Mass. 1996); State v. Ortega-Martinez, 881 P.2d 231 (Wash. 1994); State v. Owens, 323 P.3d 1030 (Wash. 2014).

Both sound judicial administration and Article I section 9 of the Iowa Constitution require that there be sufficient evidence for each alternative means supporting a conviction. Dieckmann was prejudiced by trial counsel's failure to object to the unsupported alternatives. Therefore, he is entitled to a new trial. See Tyler, 873 N.W.2d at 753–54

3. *Failure to object to improper and inadmissible evidence.*

Trial counsel was ineffective for failing to object to several instances of improper and inadmissible evidence. In particular, Exhibit 20 in its entirety was admitted without objection despite much of it being objectionable. (Trial Tr. p.87 L.13–17). Approximately ten minutes into the exhibit, the officer leaves after interacting with Dieckmann to go to Milam's house and speak with another officer who is already there. The two officers' conversation is captured on the exhibit. Upon arriving, Officer Walker tells Officer Waggoner what Milam reported. (Ex 20 12:25–15:18, 17:50–18:27).

Officer Walker specifically is heard saying: "It's a screen door with a lock on top. And he has something in the door trying to undo the lock." (Ex. 20 12:55–13:05). He asks her if Milam saw him with the file, to which she responds, "Something. She's not sure what it was." (Ex. 20 12:55–13:05). Officer Waggoner asks if she saw him reaching between the door and the frame, and Officer Walker responds affirmatively and that "he was trying to get the locking mechanism off." (Ex. 20 13:05–13:25). Officer Waggoner then radios for another officer to transport Dieckmann on the charged counts. (Ex. 20 14:00–14:20). They go to the backyard, where Officer Walker says: "And he has the door open a little bit, and he's trying to get that lock undone." (Ex. 20 14:55–15:18).

Approximately twenty minutes into the exhibit, Officer Waggoner leaves Milam's house and stops to talk to a person. (Ex. 20 20:00–20:31). He states, "We had a gentleman trying to get into houses." (Ex. 20 20:20–20:38). He then can be

heard talking to a woman[1] stating Dieckmann gave him a sob story about looking for work. (Ex. 20 23:10–23:30). Then he says: "He's go this big old straight [unintelligible] file in his backpack." The woman asks, "Is that what he was using?" to which Officer Waggoner responds, "Yeah. It's a wood handled file, with a flat file about that long." (Ex. 20 23:30–23:49).[2]

Such evidence amounted to inadmissible hearsay and, if minimally relevant for a non-hearsay purpose, the probative value of the statements was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury under Rule 5.403. See Iowa R. Evid. 5.403, 5.801, 5.802 (2017). Alternatively, even assuming a valid nonhearsay purpose the court should have excluded the statements under Rule 5.403 because their probative value was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."

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[1] Presumably he is talking to Officer Walker again, although it is not clear.

[2] At trial, Officer Waggoner identified that he was describing State's Exhibit 16, the file found in Dieckmann's backpack. (Trial Tr. p.88 L.3–16).

See Iowa R. Evid. 5.403; see also State v. Edgerly, 571 N.W.2d 25, 29 (Iowa Ct. App. 1997) (citations omitted). "Unfair prejudice arises when the evidence would cause the jury to base its decision on something other than the proven facts and applicable law, such as sympathy for one party or a desire to punish a party." State v. Reynolds, 765 N.W.2d 283, 290 (Iowa 2009), overruled on other grounds by Alcala v. Marriott Intern., Inc., 880 N.W.2d 699 (Iowa 2016), (quoting State v. Taylor, 689 N.W.2d 116, 124 (Iowa 2004).

The Court should consider the true purpose for the offered evidence, not just the proffered purpose. State v. Elliott, 806 N.W.2d 660, 668 (Iowa 2011). By allowing the full exhibit to be entered into evidence when it still contained otherwise inadmissible statements by law enforcement agents, trial counsel failed to protect her client from the inadmissible and problematic evidence. The admission of this evidence allows the State to restate their theory of the case, largely using double hearsay. See People v. Sanders, 75 Cal. App. 3d 501, 507–08 (Cal. Ct. App. 1977). In addition, it

impermissibly enables the State to bolster Milam's credibility by providing otherwise inadmissible prior consistent statements. Moreover, the officers' remarks throughout the exhibit suggest Dieckmann used the file in order to try to unlatch the hook and eye lock—something Milam did not testify to—thereby improperly bolstering the State's evidence that Dieckmann both was attempting to break into the home and that the file was a burglar's tool. As such, Dieckmann was prejudiced by counsel's failure to object to this evidence.

Moreover, Officer Waggoner's characterization of Dieckmann's explanation as a "sob story" and his inflection during these comments make it clear he believes Dieckmann is not credible. See (Ex. 20 23:10–23:30). Moreover, his testimony at trial, which counsel did not object to, also indicated that he believed Dieckmann was lying. He stated Dieckmann's story was rambling and an over-explanation, commented that if he was out looking for work he would not "show up with shorts and no shirt, dragging a giant backpack," and stated Dieckmann "had absolutely nothing

with him that would support that. You know if I'm out riding around, picking houses to be mowed, I'd probably have some mowing equipment with me to conduct that activity." See (Trial Tr. p.81 L.5–8, p.82 L.1–19, p.98 L.24–p.99 L.5).

"It is well-settled law in Iowa that a bright-line rule prohibits the questioning of a witness on whether another witness is telling the truth." Bowman v. State, 710 N.W.2d 200, 204 (Iowa 2006). In addition, neither expert nor lay witnesses may express an opinion as to the ultimate fact of the accused's guilt or innocence. State v. Myers, 382 N.W.2d 91, 97 (Iowa 1986). Thus, trial counsel breached a duty by not objecting to the officer's statements at trial and in Exhibit 20 regarding Dieckmann's honesty and the credibility as they were not properly admissible. See id. Courts have noted that "statements by state officials, who are largely perceived to be 'cloaked with governmental objectivity and expertise,' create 'a real danger that the jury will be unfairly influenced.'" State v. Davis, No. 13–1099, 2014 WL 5243343, at *6 (Iowa Ct. App. Oct. 15, 2014) (unpublished table decision) (quoting State v.

Huston, 825 N.W.2d 531, 537–38 (Iowa 2013)). By allowing an alleged expert to testify regarding his belief that Dieckmann was lying, there was a real danger the jury was unfairly influenced and discredited Dieckmann's explanation because the trained law enforcement expert did not credit it. See id. For the reasons above, and because the evidence of Dieckmann's guilt was not overwhelming, Dieckmann has established confidence in the verdict is undermined and prejudice. See Carrillo, 597 N.W.2d at 500 (citing Osborn, 573 N.W.2d at 922).

4. Failure to move for mistrial after the jury heard improper evidence.

During her testimony, Milam stated her belief that if she had not been home, Dieckmann would have entered her house. (Trial Tr. p.52 L.4–7). She then continued, stating: "After all of this, there was some Public Works guys working on our street, and they said that they watched him do that to, like, three or four houses." (Trial Tr. p.52 L.7–10). After this statement, defense counsel objected. (Trial Tr. p.52 L.11).

The district court sustained the objection and told the jury to disregard the statement. (Trial Tr. p.52 L.14–15).

Counsel objected to this improper testimony, as it was clearly hearsay and referred to bad acts that were inadmissible, or their probative value was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." See Iowa R. Evid. 5.403, 5.404, 5.801, 5.802 (2017). Because it was improper and inadmissible, the trial court properly sustained the objection and ordered the jury to disregard the statements. (Trial Tr. p.52 L.14–15). Counsel has a duty to preserve error and to be a zealous advocate. See Hrbek, 336 N.W.2d at 435–36 (quoting Scurr, 304 N.W.2d at 235); Simmons v. State Public Defender, 791 N.W.2d 69, 75 (Iowa 2010) (noting a criminal defendant is entitled to real and zealous advocacy from his attorney). Given the impropriety of the evidence and prejudicial impact of the statements, trial counsel was ineffective for failing to move for a mistrial.

If the motion had been made, the trial court would be allowed broad discretion in making the determination to grant or deny the mistrial. State v. Trudo, 253 N.W.2d 101, 106 (Iowa 1977). A mistrial is appropriate when the jury cannot reach an impartial verdict. State v. Piper, 663 N.W.2d 894, 902 (Iowa 2003), overruled on other grounds by State v. Hanes, 790 N.W.2d 545, 551 (Iowa 2010). Prejudice is required in order for a new trial to be ordered. State v. Carey, 165 N.W.2d 27, 29 (Iowa 1969) (citations omitted).

As a general rule, the prompt action of the trial court in striking the offending evidence from the record and instructing the jury to disregard will ordinarily prevent prejudice. State v. Wade, 467 N.W.2d 283, 285 (Iowa 1991) (quoting State v. Brown, 397 N.W.2d 689, 699 (Iowa 1986)). However, the Court must examine the circumstances of the case and determine whether "the ordinary remedy was insufficient to ensure the defendant received a fair trial." State v. Huser, 894 N.W.2d 472, 498 (Iowa 2017). Given the comment on an ultimate issue and the prejudicial effect discussed below, the

mistrial would have been granted in the proper exercise of discretion.

Moreover, the evidence was not simply hearsay, but was also bad acts evidence. "Empirical studies have confirmed the courts' fear that juries treat bad-acts evidence as highly probative." State v. Sullivan, 679 N.W.2d 19, 24 (Iowa 2004) (citations omitted). Such evidence is not admissible "on a fear that juries will tend to give it excessive weight" and "on a fundamental sense that no one should be convicted of a crime based on his or her [other] misdeeds." Id.

Counsel should have moved for a mistrial because the testimony given regarded an essential element of the crime, was prejudicial, and made it impossible for the jury to reach an impartial verdict. Piper, 663 N.W.2d at 901–902; Carey, 165 N.W.2d at 29. Once the jury heard that other witnesses told Milam that Dieckmann had tried to break into or had cased other houses in the neighborhood, it was extremely unlikely they could put that information aside as instructed. It was highly prejudicial, and it goes against human nature to

simply put aside such highly relevant information as to the issue of whether Dieckmann intended to and attempted to burglarize the home. Moreover, the evidence that was presented regarding Dieckmann's intent to commit the burglary or his attempt to enter the house was thin, as discussed in Division I.C.1 above. This improper evidence bolstered the State's argument that Dieckmann tried to enter Milam's house with the intent to commit a theft. The evidence was not cumulative, nor did the State in this case establish overwhelming evidence of Dieckmann's guilt. See Elliott, 806 N.W.2d at 669.

Therefore, prejudice resulted in that the jury was unable to reach an impartial verdict, and this Court should find confidence in the outcome is undermined. See Piper, 663 N.W.2d at 902; Schertz, 380 N.W.2d at 408 (quoting Strickland, 466 U.S. at 686). Dieckmann must have a new trial without the improper hearsay and bad acts evidence, which tainted his ability to have a fair trial.

5. Cumulative Error.

Where trial counsel's errors may not individually render his assistance ineffective, the cumulative effect of multiple errors may amount to ineffective assistance of counsel. See Wycoff v. State, 382 N.W.2d 462, 473 (Iowa 1986); Clay, 824 N.W.2d at 500–02 ("If a claimant raises multiple claims of ineffective assistance of counsel, the cumulative prejudice from those individual claims should be properly assessed under the prejudice prong of Strickland. The court should look at the cumulative effective of the prejudice arising from all claims."). Here, if the Court finds Dieckmann was not prejudiced by the individual instances of ineffectiveness discussed above in this Division, the Court should find trial counsel's errors, cumulatively, prejudiced Dieckmann.

The cumulative effect of trial counsel's errors, as discussed above, undermines confidence in the outcome and establishes a reasonable probability that, but for counsel's breaches of his duty, the outcome of trial would have been different. See Strickland, 466 U.S. at 669. For these reasons,

Dieckmann was prejudiced by trial counsel's multiple errors on pivotal issues in this case therefore depriving him of his right to effective assistance of counsel and a fair trial.

D. Conclusion: Defendant–Appellant Jon Arthur Dieckmann respectfully requests the Court vacate his convictions and remand to district court for a dismissal. Alternatively, he asks this Court reverse his convictions and remand for a new trial.

II. THE DISTRICT COURT ERRED IN ORDERING APPELLATE ATTORNEY FEES TO BE ASSESSED IN THEIR ENTIRETY UNLESS THE DEFENDANT FILED A REQUEST FOR HEARING ON THE ISSUE OF HIS REASONABLE ABILITY TO PAY.

A. Preservation of Error: The Court reviews appeals of restitution orders are reviewed for an abuse of discretion. State v. Van Hoff, 415 N.W.2d 647, 648 (Iowa 1987). Whereas, the Court reviews constitutional claims de novo. State v. Dudley, 766 N.W.2d 606, 612 (Iowa 2009) (citation omitted).

B. Standard of Review: The Court may review a defendant's argument that the district court abused its discretion during his sentencing on direct appeal, even in the

absence of an objection in the district court. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994) (citations omitted); State v. Cooley, 587 N.W.2d 752, 754 (Iowa 1998) (citations omitted) ("It strikes us as exceedingly unfair to urge that a defendant, on the threshold of being sentenced, must question the court's exercise of discretion or forever waive the right to assign the error on appeal.").

C. Discussion: The district court's sentencing order contained the following paragraph regarding the assessment of appellate attorney fees.

> . . . The Defendant is advised that if he qualifies for court-appointed appellate counsel then he can be assessed the cost of the court-appointed appellate attorney when a claim for such fees is presented to the clerk of court following the appeal. The Defendant is further advised that he may request a hearing on his reasonable ability to pay court-appointed appellate attorney fees within 30 days of the issuance of the procedendo following the appeal. *If the Defendant does not file a request for a hearing on the issue of his reasonable ability to pay court-appointed appellate attorney fees, the fees approved by the State Public Defender will be assessed in full to the Defendant.*

(Sentencing Order) (App. pp. 23–25) (emphasis added).

The sentencing court may only assess restitution for court-appointed attorney fees to the extent the defendant is reasonably able to pay. See Iowa Code § 910.2(1) (2017) ("[T]he sentencing court shall order that restitution be made by each offender . . . to the clerk of court . . . to the extent that the offender is reasonably able to pay, for . . . court-appointed attorney fees ordered pursuant to section 815.9 . . . ."); Id. § 815.14 (2017) ("The expense of the public defender required to be reimbursed is subject to a determination of the extent to which the person is reasonably able to pay, as provided for in section 815.9 and chapter 910."). "A defendant's reasonable ability to pay is a constitutional prerequisite for a criminal restitution order such as that provided by Iowa Code chapter 910." Van Hoff, 415 N.W.2d at 648 (citations omitted). Thus, before ordering payment for court-appointed attorney fees and court costs, the court *must* consider the defendant's reasonable ability to pay. See id. A court's imposition of a reimbursement obligation on the defendant "without any

consideration of [his] ability to pay infringes on [the defendant's] right to counsel." Dudley, 766 N.W.2d at 626.

The last paragraph of the district court's sentencing order states that unless Dieckmann affirmatively requests a hearing challenging his ability to pay, the full amount of appellate attorney fees will simply be imposed by the district court following the conclusion of the appeal. (Sentencing Order) (App. pp. 23–24) ("If the Defendant does not file a request for a hearing on the issue of his reasonable ability to pay court-appointed appellate attorney fees, the fees approved by the State Public Defender *will* be assessed in full to the Defendant.") (emphasis added). This aspect of the sentence is unauthorized and illegal. It also amounts to a "failure of the court to exercise discretion or an abuse of that discretion." See Van Hoff, 415 N.W.2d at 648. Statutorily and constitutionally, the court *must* consider the defendant's ability to pay before ordering payment for court-appointed attorney fees. Id. It is error for the district court to shift the burden of raising the issue of the ability to pay to the

defendant, by providing that the court will assess the full amount unless the defendant affirmatively challenges his ability to pay such costs. Rather, the court is obligated to affirmatively make an ability to pay determination before ordering payment for court-appointed attorney fees. See Dudley, 766 N.W.2d at 615 (citations omitted) ("A cost judgment may not be constitutionally imposed on a defendant unless a determination is *first* made that the defendant is or will be reasonably able to pay the judgment.") (emphasis added); see also Goodrich v. State, 608 N.W.2d 774, 776 (Iowa 2000) ("Constitutionally, a court must determine a criminal defendant's ability to pay *before* entering an order requiring such defendant to pay criminal restitution pursuant to Iowa Code section 910.2.") (emphasis added).

In State v. Coleman, the Iowa Supreme Court faced a challenge to language nearly identical to that contained in the sentencing order in this case. State v. Coleman, 907 N.W.2d 124, 148–49 (Iowa 2018). Because the Court in Coleman vacated the defendant's sentence and remanded for further

sentencing proceedings based on a separate error, it found it was unnecessary to address the issue concerning appellate attorney fees. Id. at 149. However, it stated:

> Nonetheless, when the district court assesses any future attorney fees on Coleman's case, it must follow the law and determine the defendant's reasonable ability to pay the attorney fees without requiring him to affirmatively request a hearing on his ability to pay.

Id. (citing Goodrich, 608 N.W.2d at 776). Just as in Coleman, the district court ordered future attorney fees without following Iowa law and determining Dieckmann's reasonable ability to pay those fees.

Therefore, for the reasons above, the portion of Dieckmann's sentence relating to the obligation to pay appellate attorney fees absent his affirmative request for hearing on his reasonable ability to pay amounts to a statutorily and constitutionally unauthorized sentence and is, therefore, illegal.

D. Conclusion: The portion of Defendant–Appellant Jon Arthur Dieckmann's sentence relating to the obligation to

pay appellate attorney fees absent a request for hearing on reasonable ability to pay should be vacated, and this matter should be remanded to the district court for entry of an amended sentencing order omitting the offending language. See (Sentencing Order) (App. pp. 23–24) ("If the Defendant does not file a request for a hearing on the issue of his reasonable ability to pay court-appointed appellate attorney fees, the fees approved by the State Public Defender will be assessed in full to the Defendant.").

REQUEST FOR NONORAL SUBMISSION

Counsel requests this case be submitted without 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 $5.43, and that amount has been paid in full by the Office of the Appellate Defender.

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