IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-1806

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JON ARTHUR DIECKMANN,
Defendant-Appellant.

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

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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II. Dieckmann's claim that the district court erred by ordering him to show he lacks the reasonable ability to pay appellate attorney's fees if they are assessed against him is unripe and unexhausted.

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ROUTING STATEMENT

Because none of the retention criteria in Iowa Rule of Appellate Procedure 6.1101(2) apply to the issues raised in this case, transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(1).

STATEMENT OF THE CASE

Nature of the Case

Defendant Jon Arthur Dieckmann appeals his convictions for attempted second degree burglary in violation of Iowa Code section 713.6 and possession of burglar's tools in violation of Iowa Code section 713.7. Dieckmann says his counsel made four blunders giving rise to ineffective-assistance-of-counsel claims. He also says that the district court erroneously ordered that he must assert that he lacks the reasonable ability to pay appellate attorney's fees if they are assessed. This Court should reject his claims.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

Sadie—Brenda Milam's chocolate lab—barked aggressively at something at Milam's back door. Trial Tr., p.28, ln.1–3; p.31, ln.8–10; p.34, ln.8–18. Milam got up from her sofa to see what was the matter. *Id.* at p.30, ln.14–16; p.34, ln.8–18. To her shock, she saw Dieckmann pushing on her porch door and trying to unlatch the hook-and-eye lock. *Id.* at p.34, ln.10 to p.36, ln.10. The door was not flush with the wall as he pushed on it. *Id.* at p.34, ln.10–18. When Milam yelled, he stopped, apologized, and left. *Id.* at p.34, ln.22 to p.35, ln.10; p.44, ln.19–24.

Shortly before Milam saw Dieckmann at her backdoor, she heard a knock at the front door but ignored it. *Id.* at p.30, ln.14–20. At the knock, Sadie began barking loudly enough to be heard outside. *Id.* at p.30, ln.21–23; p.58, ln.16–19.

Milam called the police immediately after seeing Dieckmann pushing on her porch door. *Id.* at p.35, ln.5–6. She explained that someone had come to her backdoor and tried to "jimmy" it open. Ex. 1 at 1:03. She described Dieckmann; officers located him in minutes. Trial Tr., p.77, ln.17–25; p.79, ln.20 to p.80, ln.3. When located, Dieckmann was shirtless, riding a bike, and had a large black

backpack. *Id.* at p.78, ln.22–25. The backpack had a long file, hammer, and gloves in it, along with other miscellaneous items. *Id.* at p.84, ln.15–21.

Officer Andrew Waggoner spoke with Dieckmann soon after officers located him. *Id.* at p.80, ln.18 to p.81, ln.22. Dieckmann explained that he was in the neighborhood soliciting business for his handyman company. Ex. 20 at 3:55 to 4:40. He said he was drawn to Milam's home because of the lawn. *Id.* at 5:24. After he knocked on the front door and no one answered, Dieckmann said he read a note over the doorbell directing people to go to the back door, so he did. *Id.* at 4:00 to 4:12. Milam said her doorbell had a note over it saying, "Doorbell broke. Please knock." Trial Tr., p.38, ln.6–7. She had not posted a note asking visitors to go around back. *Id.* at p.38, ln.8–10.

After hearing Dieckmann's explanation, the officer doubted him. *Id.* at p.82, ln.1–8; p.98, ln.22 to p.99, ln.5. Officer Waggoner thought it odd that Dieckmann went to Milam's seeking yard work but had no mower or tools. *Id.* at p.98, ln.6 to p.99, ln.12. The officer also said had he been soliciting work, he would have worn a shirt and not carried a large backpack. *Id.* at p.82, ln.11–19. And he observed Milam's yard looked well kept. *Id.* at p.99, ln.11–12.

At trial, Dieckmann called three witnesses. Two lived near Milam and testified to hiring Dieckmann to do yard work. *Id.* at p.133, ln.23 to p.135, ln.11; p.141, ln.9 to p.142, ln.13. The third—Dieckmann's mom's boyfriend—said he loaned Dieckmann the tools he had in his backpack. *Id.* at p.136, ln.22 to p.137, ln.23.

The jury rejected Dieckmann's soliciting-business explanation. It convicted him of attempted second-degree burglary and possessing burglar's tools. *Id.* at p.182, ln.15–23. Following sentencing, Dieckmann timely appealed. Sentencing Order (10/12/2017); App.23; Not. of Appeal (11/2/2017); App.26.

ARGUMENT

I. All of Dieckmann's ineffective-assistance claims fail because he either cannot prove breach or prejudice.

Preservation of Error

Ineffective assistance is an exception to error preservation; if the record is adequate, the court may address it on appeal. *State v. Thorndike*, 860 N.W.2d 316, 319 (Iowa 2015) (citing Iowa Code § 814.7(2)).

Standard of Review

Review is de novo. *Id.* (citing *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012)).

"To prove ineffective assistance, the defendant must demonstrate by a preponderance of evidence that '(1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice.'" *State v. Ortiz*, 789 N.W.2d 761, 764 (Iowa 2010) (quoting *State v. Straw*, 709 N.W.2d 128, 133(Iowa 2006)).

Merits

Dieckmann posits four ways his counsel performed ineffectively: (1) not challenging the sufficiency of the evidence, (2) not objecting to the attempted burglary instruction, (3) not objecting to certain evidence, and (4) not moving for mistrial after hearsay testimony. Def.'s Br. at 32, 43, 48, 54. All four claims fail. The State considers them in turn.

A. Sufficient evidence supported Dieckmann's convictions for attempted burglary and possessing burglar's tools.

Dieckmann says he received ineffective assistance from his counsel's "[f]ailure to properly challenge the sufficiency of the evidence." Def.'s Br. at 32 (bold removed). He attacks both his attempted burglary and possessing burglar's tools convictions. The State offered sufficient evidence of both.

1. The State offered sufficient evidence to prove Dieckmann committed attempted burglary: it showed he specifically intended to commit theft and intended to enter Milam's home.

To prove Dieckmann committed attempted second degree burglary the State had to show that he "attempted to break or enter … an occupied structure" without "permission or authority" while he had "the specific intent to commit a theft, assault or other felony" and someone was "present in … the occupied structure." Jury Instr. 25 (8/23/2017); App.18. Evidence is sufficient when, considering it "in the light most favorable to the State," it could "convince a rational jury that the defendant is guilty beyond a reasonable doubt." *State v. Thomas*, 847 N.W.2d 438, 442 (Iowa 2014). Despite this lax standard, Dieckmann claims insufficient evidence proved he had the specific intent to commit a theft or the intent to enter Milam's at all. Def.'s Br. at 40. He is wrong.

Beginning with specific intent to commit a theft, the State offered ample evidence to show he had that intent. Four pieces of evidence stand out.

First, Milam saw Dieckmann trying to unlock her porch door. Trial Tr., p.34, ln.10 to p.36, ln.10. Milam had not invited Dieckmann in. *See id.* at p.32, ln.17–21. In fact, she did not know him or why he

was there. *Id.* at p.48, ln.13–18. Yet he tried to come in anyway. *Id.* at p.34, ln.10 to p.36, ln.10. Dieckmann's attempt to enter Milam's home through a locked door without an invitation showed he intended to commit a theft inside.

Second, Dieckmann's actions show he concluded no one was home so he would break in. He knocked on the front door; no one answered. *Id.* at p.30, ln.14–24. Instead of leaving—as one would expect of a person soliciting work—Dieckmann went to the back door and tried to unlock it. *Id.* at p.34, ln.10 to p.36, ln.10. The jury could infer he concluded that no one was home so he would enter and commit theft. *State v. Reeves*, 209 N.W.2d 18, 21 (Iowa 1973) (noting jury can make reasonable inferences from evidence).

The jury could have buttressed its conclusion by rejecting Dieckmann's claim about the note on Milam's doorbell. Milam explained a note over her doorbell said "[d]oorbell broke. Please knock." Trial Tr., p.38, ln.6–7. Officer Lori Walker—who responded to Milam's 911 call—agreed. *Id.* at p.71, ln.20–21. Officer Waggoner could not read the note as it was sun faded. *Id.* at p.105, ln.3–9. Yet Dieckmann said he thought the note said to go around back and knock. Ex. 20 at 4:00 to 4:12. The jury was free to conclude that he

lied about the note to have an innocent explanation for why he went around back. *See Thomas*, 847 N.W.2d at 442 (noting jury can "reject certain evidence, and credit other evidence" (citation omitted)).

Third, his story about soliciting business for his handyman company strains credulity. Dieckmann approached Milam's house shirtless. Ex. 1 at 0:32. He had no business card for his company. *See* Trial Tr., p.52, ln.16–19. Despite claiming he approached Milam's home to ask after yard work, he had no lawn mower or yard tools. *Id.* at p.98, ln.22 to p.99, ln.10. Moreover, the lawn did not need mowing. *Id.* at p.99, ln.11–12. And instead of leaving when it appeared no one was home, he went around back and tried to force the door open. *Id.* at p.32, ln.22–24; p.34, ln.10 to p.36, ln.10.

Relatedly, that some people in the neighborhood hired Dieckmann says nothing about his intent to commit theft at Milam's. Indeed, both people that hired Dieckmann were home when he was looking for work. But that he was willing to do work when people were home and offered it does not mean he lacked the specific intent to commit theft in Milam's home when he thought no one was home.

Fourth, when Milam saw Dieckmann trying to unlock her backdoor, he apologized and quickly left instead of explaining

himself. *Id.* at p.44, ln.19–24. Had he really been seeking work, presumably he would have made his pitch. Instead, he apologized—probably because Milam caught him trying to break into her home. The jury could infer his guilty conscience from that conduct.

Iowa caselaw confirms these facts were sufficient to prove Dieckmann specifically intended to commit theft upon entering Milam's home. Take *State v. Bolden*. No. 14–0597, 2016 WL 4384426, at *4 (Iowa Ct. App. Aug. 17, 2016). There the court concluded sufficient evidence proved the specific intent to commit theft from a defendant's trying to enter a home while he had a flashlight and gloves in August, trying to remain unseen as he left, and his implausible explanation. *Id.*; *see also State v. Erving*, 346 N.W.2d 833, 835–36 (Iowa 1984) (holding sufficient evidence supported finding the intent to commit theft in an attempted burglary conviction when defendant stole nothing but removed a glass panel from a locked pharmacy area making entry into the pharmacy easier). Here the evidence is even stronger as Milam saw Dieckmann trying to force entry.

As for Dieckmann's intent to break or enter, Milam saw him trying to unlatch her backdoor. Trial Tr., p.34, ln.10 to p.35, ln.10. He

was pushing the door in to gain access to the lock. *Id.* And he was found with a long file and hammer that could help him get in. *Id.* at p.84, ln.15–21. These facts proved he intended to enter Milam's home. His implausible explanation buoyed that conclusion.

Because sufficient evidence supported both the intent to commit theft and intent to enter elements of the attempted burglary conviction, counsel breached no duty by declining to raise a sufficiency challenge.

2. The State offered sufficient evidence to prove Dieckmann possessed burglar's tools.

To convict Dieckmann of possessing burglar's tools the State had to prove that he "had in his possession a key, tool, instrument, device or explosive" and "intended to use the key, tool, instrument, device or explosive to commit a burglary." Jury Instr. 29 (8/23/2017); App.19. Dieckmann asserts that the State offered "insufficient proof that [he] had the intent to perpetuate a burglary." Def.'s Br. at 40–41. But as just explained, the State offered considerable evidence from which the jury could conclude he intended to commit a burglary at Milam's home. And that he had a long file, hammer, and gloves at the top of the backpack he carried allowed the jury to find that he had those "tool[s]" to use in "commit[ting the] burglary." Jury Instr. 29

(8/23/2017); App.19. Contrary to Dieckmann's assertions, the jury could reject his "handyman business" explanation for having tools. *See State v. Salkil*, 441 N.W.2d 386, 388 (Iowa Ct. App. 1989) (holding jury could reject the defendant's "explanation" for why he had burglary tools in concluding sufficient evidence supported defendant's conviction). This Court should affirm.

B. Dieckmann cannot prove ineffective assistance from his counsel's failure to challenge the attempted burglary instruction because he suffered no prejudice.

The marshalling instruction for attempted burglary allowed the jury to convict if it found Dieckmann attempted to enter Milam's house with "the specific intent to commit a *theft, assault or other felony*." Jury Instr. 25 (emphasis added). Yet the evidence only supported a finding that he had the intent to commit theft. *See* Trial Tr. p.116, ln.21–23. Because the instruction allowed the jury to convict on two unsupported theories, Dieckmann reasons, his counsel was ineffective for allowing the instruction be submitted to the jury. Def.'s Br. at 43–48.

Dieckmann is right that the intent element for attempted burglary should target the specific crime that the evidence showed the defendant intended to commit upon entering a dwelling. *See State v.*

Mesch, 574 N.W.2d 10, 11 (Iowa 1997). Thus, his counsel probably breached a duty by failing to object to that instruction. But because he asserts an ineffective-assistance claim, he must prove prejudice. *State v. Thorndike*, 860 N.W.2d 316, 321–22 (Iowa 2015); *State v. Maxwell*, 743 N.W.2d 185, 195–96 (Iowa 2008). That requires him to prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v Washington*, 466 U.S. 668, 694 (1984). Dieckmann cannot do so.

At the outset, Iowa cases state that "when there is no suggestion the [complained of] instruction contradicts another instruction or misstates the law there cannot be a showing of prejudice for purposes of an ineffective-assistance-of-counsel claim." *Maxwell*, 743 N.W.2d at 197. Here, Dieckmann suggests neither that the instruction misstates the law nor that it contradicts other instructions. *See* Def.'s Br. at 43–48. And he could not do so had he tried because the instruction tracks the statute. *Compare* Jury Instr. 25, *with* Iowa Code § 713.2. That alone defeats his claim.

In any event, Dieckmann cannot show a reasonable probably the jury believed he had the intent to commit an assault or other

felony because the State offered no such evidence. As for assault, the evidence showed that when Dieckmann saw Milam he apologized and left, he did not try to attack her. Trial Tr., p.44, ln.19–24. No juror could have concluded he had the intent to commit assault, so it is not reasonably likely a juror convicted on that theory. Turning to the intent to commit some "other felony," the State never suggested he intended to commit any other felony. Nor did the record suggest some other felony that Dieckmann might have intended to commit. *See Maxwell*, 743 N.W.2d at 197 (finding no prejudice on ineffective-assistance claim from submitting an unsupported alternative when no evidence supported the avenue of conviction allowed by the instructional error); *see also Thorndike*, 860 N.W.2d at 322 (same, but prosecutor also acknowledged in argument the unsupported alternative in the jury instruction did not apply). True, at closing the State's argument about specific intent tracked the instruction's language instead of targeting theft, but that does not change the evidence. It remains true that the State offered no evidence from which the jury could conclude Dieckmann intended to commit assault or some "other felony" in Milam's home.

Thus, had the instructions omitted the words "assault or other felony" the result of his trial would have been the same. Dieckmann cannot prove prejudice. This Court should affirm.

C. The record is insufficient to determine whether counsel breached a duty by allowing exhibit 20 in evidence without objecting. Objecting could not have excluded Officer Waggoner's observations.

Next, Dieckmann says he received ineffective assistance from his counsel's "[f]ailure to object to improper and inadmissible evidence." Def.'s Br. at 48 (bold removed). He specifically targets exhibit 20 and testimony from Officer Waggoner that Dieckmann believes improperly attacked his credibility. Def.'s Br. at 48–53.

Beginning with exhibit 20, it is an approximately 25 minute recoding from Officer Waggoner's body microphone. Ex. 20. It includes the officer's conversation with Dieckmann, his decision to charge Dieckmann, his conversation with Officer Walker about what she found in her investigation, his conversation with a neighborhood resident, and Officer Waggoner's observations at Milam's house. *Id.*

At least three strategic reasons could have justified not objecting to the recording. First, the recording allowed Dieckmann to explain his actions—he was soliciting business—without taking the stand. And his explanation for why he was at Milam's backdoor was

essential to his defense. Second, given that Dieckmann asserted an innocent explanation for his conduct, counsel may have thought trying to exclude the video would have looked dishonest, undermining his defense. Third, the video included Officer Waggoner's statement that there were no "obvious signs" of forced entry on Milam's backdoor. Ex. 20 at 18:18. Counsel could have viewed any risk from admitting the video to be outweighed by the benefits of that statement corroborating Dieckmann's story. Because we do not know why counsel declined to object, this claim must wait for post conviction relief.

Turning to Officer Waggoner's testimony, Dieckmann believes that testimony "indicated [the officer] believed Dieckmann was lying." Def.'s Br. at 52. Specifically, he thinks Officer Waggoner's statements that those looking for work wear shirts, do not drag backpacks around, and bring the equipment needed to do the work solicited showed that the officer disbelieved him. *Id.* at 52–53. But these are opinions flowing from the officer's observations. Officer Waggoner could testify to the facts he observed and why they raised his suspicion. And contrary to Dieckmann's assertion, Officer Waggoner did not opine that Dieckmann was lying. *Cf. Bowman v.*

State, 710 N.W.2d 200, 204 (Iowa 2006) (noting a witness cannot be questioned "on whether another witness is telling the truth"). Objecting, therefore, was futile. Counsel had no duty to raise a meritless claim. *State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999).

D. Dieckmann proved neither breach nor prejudice from his counsel's declining to request a mistrial after the court sustained an objection and struck hearsay testimony.

Dieckmann insists that his counsel's "[f]ailure to move for mistrial after the jury heard improper evidence" amounts to ineffective assistance. Def.'s Br. at 54 (bold removed). He specifically targets Milam's testimony that "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." *Id.* (citing Trial Tr. p.52, ln.7–10).

Counsel breached no duty. She immediately objected, and the district court instructed the jury to disregard the testimony. Trial Tr. p.52, ln.11–15. Counsel took appropriate steps to exclude the testimony. She had no duty to do more.

Moreover, had counsel sought a mistrial, the district court would have denied it. The court sustained the objection and struck the offending testimony. That generally remedies the jury's hearing hearsay testimony. *State v. Huser*, 894 N.W.2d 472, 498 (Iowa 2017);

State v. Wade, 467 N.W.2d 283, 285 (Iowa 1991). The general remedy was sufficient. The testimony amounted to four lines out a 182 page trial transcript. Trial Tr. p.52, ln.7–10. This fleeting testimony did not warrant a mistrial.

That the testimony was ambiguous augments that conclusion. The "Public Works guys" apparently said "they watched [Dieckmann] do *that* to, like, three or four houses." *Id.* (emphasis added). But what *that* refers to is unclear. True, it could refer to Milam's belief, articulated in the preceding two sentences, that Dieckmann was "still going to do it"—meaning break in. But it could have just as easily referred to a description of Dieckmann's conduct: approaching doors throughout the neighborhood. In the second scenario the testimony would have actually supported Dieckmann's case. Because the testimony is ambiguous, there is no prejudice warranting a mistrial.

Dieckmann also cannot prove *Strickland* prejudice. As explained, the objectionable testimony was immediately excluded and struck. Also, the evidence came in via another source: exhibit 24. In that exhibit, Dieckmann implores the police officer driving him to ask the public works employees on the street what they saw him doing. Ex. 24 at 14:30 to 15:00. Duplicated evidence rarely establishes

prejudice, and it cannot here. *See State v. Newell*, 710 N.W.2d 6, 19 (Iowa 2006) (citation omitted) (duplicate evidence in the record removes the threat of prejudice from admitting hearsay testimony). Last, because the testimony Dieckmann targets is ambiguous, he cannot prove a different outcome likely had he sought a mistrial. Trial Tr., Trial Tr. p.52, ln.7–10.

Dieckmann's counsel acted decisively and effectively to prevent the jury from considering this hearsay testimony. She need not have done more. This Court should affirm.

E. Dieckmann has shown but one error so he cannot prove prejudice from one error's "cumulative" effect.

Dieckmann argues "the cumulative effect" of his counsel's "multiple errors" amounts to ineffective assistance and prejudice. Def.'s Br. at 59–60. But he only showed one error: not objecting to the attempted burglary instruction. Because his counsel committed but one error, there cannot be cumulative effects from multiple errors. And even if there were multiple errors, none caused him prejudice. Aggregating any prejudice from each error yields the same result. This Court should affirm.

II. Dieckmann's claim that the district court erred by ordering him to show he lacks the reasonable ability to pay appellate attorney's fees if they are assessed against him is unripe and unexhausted.

Preservation of Error

This claim is unripe and unexhausted.

First, the claim is unripe. An appellate court will not review a challenge to the reasonable ability to pay a restitution order unless the district court has ordered a plan of restitution. *State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999); *State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999). Here, the court has entered no such plan. Instead, it has entered a sentencing order requiring Dieckmann to request a hearing on his reasonable ability to pay appellate attorney fees if he appeals and if he receives state provided counsel. Sentencing Order (10/12/2017) at 2; App.24. Until the district court enters a plan of restitution requiring Dieckmann to pay appellate attorney fees, this Court should not consider his claim. *State v. Reed*, No.16–1703, 2017 WL 2183751, at *2 (Iowa Ct. App. May 17, 2017) (citing *Worthington v. Kenkel*, 684 N.W.2d 228, 234 (Iowa 2004)).

Second, the claim is unexhausted. Once the district court orders a plan of restitution—which it should not do regarding appellate attorney's fees until determining Dieckmann's reasonable ability to

pay—he can petition the district court for a modification under Iowa Code section 910.7. *Swartz*, 601 N.W.2d at 354; *Jackson*, 601 N.W.2d at 357. "Until that remedy has been exhausted, [this Court] ha[s] no basis for reviewing the issue." *Swartz*, 601 N.W.2d at 354; *Jackson*, 601 N.W.2d at 357.

Standard of Review

This Court reviews "restitution order[s] … for correction of errors at law." *State v. Coleman*, 907 N.W.2d 124, 134 (Iowa 2018) (quoting *State v. Klawonn*, 688 N.W.2d 271, 274 (Iowa 2004)). It reviews constitutional issues de novo. *Id.* (citing *State v. Dudley*, 766 N.W.2d 606, 612 (Iowa 2009)).

Merits

If the Court reaches the merits, Dieckmann is right: "the district court erred in ordering appellate attorney fees would be assessed in their entirety unless the defendant filed a request for hearing on the issue of his reasonable ability to pay." Def.'s Br. at 60 (bolding and capitalization removed). In an attack on an identically worded order in another case, the Iowa Supreme Court stated that the district court "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.* at 149 (citing *Goodrich v. State*, 608 N.W.2d 774, 776 (Iowa 2000)).[1] The district court, therefore, must consider Dieckmann's reasonable ability to pay if and when it "assesses any future fees on [Dieckmann's] case." *Id.*

CONCLUSION

For the foregoing reasons this Court should affirm Dieckmann's convictions and decline to adjudicate his claim attacking the sentencing order.

REQUEST FOR NONORAL SUBMISSION

This case is appropriate for nonoral submission.

Respectfully submitted,

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[1] The district court entered its sentencing order containing the appellate-attorney-fee language before *Coleman* was decided. Sentencing Order (10/12/2017); App.23; *Coleman*, 907 N.W.2d 124.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **4,097** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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