IN THE SUPREME COURT OF IOWA

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

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

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED NOVEMBER 21, 2018

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CERTIFICATE OF SERVICE

On December 3, 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, 1227 W Rusholme Street, Davenport, IA 52804.

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in finding there was sufficient evidence supporting the verdicts?

II. Did the Court of Appeals err in finding that the district court merely summarized the law when it ordered that the Defendant's court-appointed appellate attorney fees would be assessed in full unless the defendant affirmatively requested a hearing on his reasonable ability to pay?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

Defendant–Appellant Jon Arthur Dieckmann requests the Iowa Supreme Court grant further review in this case because it raises an issue that involves an important question of law that should be resolved by the Iowa Supreme Court, and it is of broad public importance. See Iowa R. App. P. 6.903(2)(d) & 6.1103(1)(b)(2), (4) (2017). Specifically, this Court should clarify the proper scope and procedure of the assessment of future attorney fees as criminal restitution without considering the defendant's reasonable ability. Additionally, the Court of Appeals' decision is in conflict with and misinterprets this Court's decision in State v. Coleman, 907 N.W.2d 124 (Iowa 2018). See Iowa R. App. 6.903(2)(d) & 6.1103(1)(b)(1).

In Coleman, this Court addressed a sentencing order with nearly identical language to the sentencing in order in this case, which stated the entirety of defendant's appellate attorney fees would be assessed against him unless he filed a request for a hearing regarding his reasonable ability to pay them within thirty days of the issuance of procedendo

following his appeal. Coleman, 907 N.W.2d at 149. The Supreme Court stated "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.

In this case, the Court of Appeals found that the language in the sentencing order "merely summarize[d] the law and put[] Dieckmann on notice that he may be required to pay appellate attorney fees for any possible appeal." (Opinion p. 9). However, despite the Court of Appeal's finding that the district court's order was not an order to pay fees, the plain language of the district court's sentencing order does provide an order authorizing the Clerk of Court to assess the court-appointed appellate fees in full against the defendant in full unless the defendant affirmatively requests a hearing once procedendo has issued from the appeal. The order states:

> . . . 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). Therefore, if the defendant does not request a hearing, the order clearly authorizes the Clerk's office to assess the full amount of attorney's fees against the defendant. See id.

A defendant's reasonable ability to pay is a constitutional prerequisite for a criminal restitution order provided by Iowa Code chapter 910. State v. Harrison, 351 N.W.2d 526, 529 (Iowa 1984); State v. Haines, 360 N.W.2d 791, 797 (Iowa 1985). Iowa's recoupment statute does not infringe on a defendant's right to counsel because of the reasonable-ability-to-pay determination. Haines, 360 N.W.2d at 793–94; State v. Dudley, 766 N.W.2d 606, 614–15 (Iowa 2009). "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." Id. at 615 (citation omitted).

Therefore, the district court must exercise its discretion on whether a defendant should be assessed attorney fees at the sentencing hearing or upon a supplemental application prior to entry of such an order. The portion of the sentencing order relating to the obligation to pay appellate attorney fees absent Dieckmann's affirmative request for hearing on his reasonable ability to pay amounts to an unauthorized and illegal sentence. No reimbursement obligation may be imposed without the court's *first* making a reasonable ability to pay determination. The imposition of the full costs for legal assistance for the appeal without determining the defendant's reasonable ability to pay such costs is unconstitutional and violates Iowa law. See Haines, 360 N.W.2d at 793–94; Dudley, 766 N.W.2d at 614–15. Therefore, the Court should accept further review on this issue.

In addition, the Court should find the Court of Appeals erred in finding that the trial counsel was not ineffective for failing to challenge the sufficiency of the evidence. (Opinion pp. 5–8). 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" or that he possessed the tools "with intent to perpetuate a burglary." Iowa Code §§ 713.2, 713.7 (2017). The evidence that the State presented did not "raise a fair inference of guilt," but rather only created "speculation, suspicion, or conjecture." State v. Webb, 648 N.W.2d 72, 76 (Iowa 2002) (citing State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981)).

WHEREFORE, Defendant–Appellant Jon Arthur Dieckmann respectfully requests that this Court grant further review of the November 21, 2018 decision of the Court of Appeals.

STATEMENT OF THE CASE

Nature of the Case: Defendant–Appellant Jon Arthur Dieckmann seeks further review of the decision of the Court of Appeals affirming 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.

Facts: The Court of Appeals' statement of the background facts is essentially correct. Any additional relevant facts will be discussed below.

ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY CHALLENGE THE SUFFICIENCY OF THE EVIDENCE.

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) (citation omitted).

C. Discussion: In this case, trial counsel was ineffective for failing 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. (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. (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. (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 (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. (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. (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. (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. (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. (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. (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. (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. (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. (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. (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. (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. (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. (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. (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. (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 State v. Hrbek, 336 N.W.2d 431, 435–36 (Iowa 1983) (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 State v. Brubaker, 805 N.W.2d 164, 174 (Iowa 2011) ("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."). Thus, Dieckmann requests the Court reverse his convictions and remand for dismissal.

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. Thus, Dieckmann requests this Court vacate

the portion of his sentence relating to the obligation to pay appellate attorney fees absent a request for hearing on reasonable ability to pay and 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.").

CONCLUSION

Defendant–Appellant Jon Arthur Dieckmann requests this Court accept his application for further review, vacate the decision of the Court of Appeals, and remand his case for dismissal. Alternatively, he asks the Court to vacate the portion of the sentencing order requiring him to pay appellate attorney fees unless he affirmatively requests a hearing.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $ 4.15, and that amount has been paid in full by the Office of the Appellate Defender.

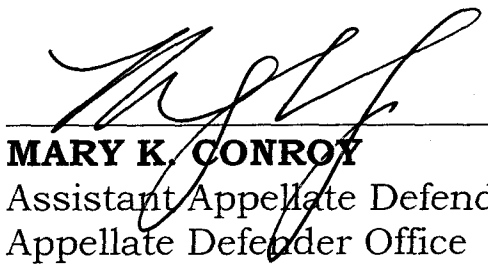
MARK C. SMITH
State Appellate Defender

MARY K. CONROY
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 4,173 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).



Dated: 11.29.2018

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IN THE COURT OF APPEALS OF IOWA

No. 17-1806
Filed November 21, 2018

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JON ARTHUR DIECKMANN,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Marlita A. Greve, Judge.

Jon Dieckmann appeals his conviction and sentence for attempted burglary in the second degree and possession of burglar's tools. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Mary K. Conroy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Zachary Miller, Assistant Attorney General, for appellee.

Considered by Danilson, C.J., and Vogel and Tabor, JJ.

VOGEL, Judge.

Jon Dieckmann appeals his conviction and sentence for attempted burglary in the second degree and possession of burglar's tools. He argues his counsel was ineffective on several grounds and the district court improperly assessed appellate attorney fees. We find his counsel was not ineffective for failing to challenge the sufficiency of the evidence, we preserve his other ineffective-assistance claims, and we find the court did not err in addressing appellate attorney fees. Therefore, we affirm.

I. Background Facts and Procedure

On May 15, 2017, Brenda Milam was alone at home with her dog. Her property has a paved walkway leading from the sidewalk to her front door and around the north side of her house. Her property also has a privacy fence that encloses the backyard and abuts the north and south sides of the house. Her fence has gates along the north and south sides that latch from the backyard side. She has "BEWARE OF THE DOG" signs on both gates and the front of her house. For the past four years, her front door has had a sign that says, "Doorbell broke. Please knock." She has a three-season room attached to the rear of her house, with an exterior door secured by an interior hook latch.

Milam, who was not feeling well, decided to rest on her living room couch and watch television. Shortly after 9:00 a.m., she heard a knock at her front door. Her dog barked at the door, but she decided to ignore it and remained on the couch. Her dog continued barking and growling as it made its way towards the rear of the house. She became alarmed and went to the three-season room, where she saw a man trying to open the exterior door. She could not see "if there was

something in his hand, but his hands were pushing on [the] door with the other hand towards the latch." She screamed at him, and he apologized and walked around the south side of the house to the front. He closed the south fence gate behind him, reaching over the gate to latch it shut, and rode away on a bicycle. Milam immediately called the police to report the incident. While talking to the police, she watched the man approach another house before riding out of view.

At or about 9:14 a.m., Sergeant Andrew Waggoner with the Davenport Police Department responded to Milam's call. Sergeant Waggoner quickly found Dieckmann in the location Milam indicated. Dieckmann "was literally an exact match of" the description Milam provided, including riding a bicycle, wearing no shirt, and carrying a large backpack. He stopped Dieckmann, and Dieckmann explained he was in the neighborhood looking for odd jobs such as lawn mowing and maintenance. He claimed he had just knocked on Milam's front door, noticed a sign telling him to go to the back door, and walked around to the back. When he knocked on the back door, a woman in the house screamed at him so he apologized and left. Officers found several items inside Dieckmann's backpack, including a long metal file, hammer, and work gloves. Sergeant Waggoner testified these items can be used for burglary.

On June 14, the State filed a trial information charging Dieckmann with burglary in the second degree and possession of burglar's tools. From August 21 to 23, a trial was held. Dieckmann presented testimony from two Davenport residents, who had hired him to perform odd jobs and were satisfied with his work, and testimony from his mother's boyfriend, who said Dieckmann had been working odd jobs and he had loaned Dieckmann the metal file and other tools inside the

backpack. The jury found Dieckmann guilty of attempted burglary in the second degree and possession of burglar's tools. Iowa Code §§ 713.6, .7 (2017). On October 12, the district court sentenced him to terms of incarceration not to exceed five years for attempted burglary and two years for possession of burglar's tools, run concurrently, plus suspended fines and other terms. The sentencing order contains the following provision:

> The Defendant is advised that if he determines to appeal this ruling, he may be entitled to court-appointed counsel to represent him in an appeal. 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.

Dieckmann now appeals.

II. Standard of Review

"We review claims of ineffective assistance of counsel de novo." *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012). We review claims of an illegal sentence for correction of legal errors at law. *State v. Lyle*, 854 N.W.2d 378, 382 (Iowa 2014).

III. Ineffective Assistance of Counsel

Dieckmann argues his counsel was ineffective for failing to (1) challenge the sufficiency of the evidence; (2) object to the marshalling instruction for attempted burglary in the second degree; (3) object to improper and inadmissible evidence; and (4) move for mistrial after the jury heard improper evidence. He also

argues the cumulative effect of these errors resulted in prejudice. *See Clay*, 824 N.W.2d at 501–02 (discussing cumulative errors in ineffective-assistance claims).

"In order to succeed on a claim of ineffective assistance of counsel, a defendant must prove: (1) counsel failed to perform an essential duty; and (2) prejudice resulted." *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The defendant must prove both prongs by a preponderance of the evidence. *Id.* at 196.

A. Sufficiency of the Evidence

"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) (citations omitted). "[W]e will uphold a verdict if substantial record evidence supports it." *Id.* (quoting *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006)). "Evidence is considered substantial if, when viewed in the light most favorable to the State, it can convince a rational jury that the defendant is guilty beyond a reasonable doubt." *Id.*

Dieckmann was convicted of attempted burglary in the second degree and possession of burglar's tools. Even if we assume Dieckmann's counsel failed to perform an essential duty by challenging the sufficiency of the evidence, he must show this failure resulted in prejudice. *See Maxwell*, 743 N.W.2d at 195.

Iowa Code section 713.2 provides the following definition of attempted burglary:

> 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.

"A person commits attempted burglary in the second degree" if, "[w]hile perpetrating an attempted burglary in or upon an occupied structure in which one or more persons are present, the person does not have possession of an explosive or incendiary device or material, nor a dangerous weapon, and no bodily injury is caused to any person." Iowa Code § 713.6(1)(b).

Dieckmann only challenges the sufficiency of the evidence as it relates to his "intent to commit a felony, assault or theft" inside Milam's home. *See id.* § 713.2. According to Milam's testimony, Dieckmann knocked on her front door and entered her backyard when no one answered. In doing so, he walked through the grass on the south side of her home, ignored the paved walkway along the north side, and walked through a gate in her privacy fence. She then saw him attempt to open the latched door of her attached three-season room, and he left when she screamed at him. Sergeant Waggoner encountered Dieckmann a few minutes later. Dieckmann confirmed he had recently walked around to the back door of a house, but Sergeant Waggoner testified Dieckmann claimed a sign at the house told visitors to go around back. Milam testified she has no such sign on her property and no visitor had ever walked around the south side of her property to her back door. Dieckmann also claimed he was soliciting odd jobs in the area, but he wore no shirt while supposedly approaching potential customers and had few tools for yardwork with him. Milam's testimony, as supported by Sergeant

Waggoner's testimony and the contents of the backpack, provides substantial evidence to support a finding that Dieckmann had "the intent to commit a felony, assault or theft" inside Milam's home. *See id.*

However, Dieckmann points to evidence he claims is exculpatory. Milam acknowledged the sign on her home telling people to knock had been in place for years, and Dieckmann speculates the sign may be difficult to read now. Milam's barking dog was likely audible outside the home when he knocked. He calmly left and locked the gate after she screamed at him. He did not try to evade Sergeant Waggoner when approached. He had several work tools with him when stopped. Multiple witnesses testified they had recently paid Dieckmann to perform odd jobs for them. He was able to present these arguments to the jury, and the jury was entitled to accept the above evidence as sufficient. *See State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993) *("*The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive."). Even considering his arguments, substantial evidence supports finding Dieckmann committed attempted burglary in the second degree.

Regarding the possession of burglar's tools, the crime occurs when a person "possesses any key, tool, instrument, device or any explosive, with the intent to use it in the perpetration of a burglary." Iowa Code § 713.7. As explained above, substantial evidence supports finding Dieckmann had the intent to commit burglary. Dieckmann had several tools with him at the time, and Sergeant Waggoner testified his tools could be used to commit burglary. Dieckmann notes Milam testified she did not see the tools with him in her backyard and his witnesses testified he used the tools in his handyman business. However, when considering

all of the evidence, substantial evidence supports finding he possessed burglar's tools. *See State v. Caya*, 519 N.W.2d 419, 422 (Iowa Ct. App. 1994) ("We recognize that these tools have legitimate uses and, absent other evidence, would not be [categorized] as burglar tools. However, because there is other evidence from which it may be inferred beyond reasonable doubt that defendant intended to use the tools in the commission of a crime, we believe a jury question on this issue has been generated. The credence and weight to be given to [the defendant's] explanations was a question for the jury.").

Because the evidence is sufficient to support Dieckmann's convictions for attempted burglary in the second degree and possession of burglar's tools, no prejudice resulted when his counsel did not challenge the sufficiency of the evidence and his counsel was not ineffective for failing to do so.

B. Other Grounds for Ineffective Assistance

Dieckmann also argues his counsel was ineffective for failing to object to the marshalling instruction for attempted burglary in the second degree, object to improper and inadmissible evidence, and move for mistrial after the jury heard improper evidence. On the record before us, we are unable to determine if his counsel breached an essential duty on any of these grounds. *See State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006) ("Because '[i]mprovident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel,' postconviction proceedings are often necessary to discern the difference between improvident trial strategy and ineffective assistance." (citation omitted)); *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978) ("Even a lawyer is entitled to his [or her] day in court . . . ."). Therefore, we preserve

these grounds—and his cumulative-error claim—for potential postconviction proceedings.

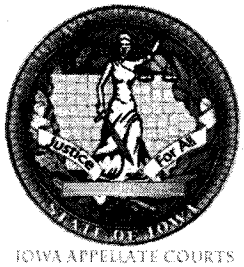
IV. Appellate Attorney Fees

Dieckmann argues the district court erred when it ordered him to pay appellate attorney fees unless he requested a hearing on the issue of his reasonable ability to pay. Regardless of whether a defendant requests a hearing, "[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." *State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009). However, the provision in the sentencing order regarding appellate attorney fees is not an order to pay fees; rather, it merely summarizes the law and puts Dieckmann on notice that he may be required to pay appellate attorney fees for any possible appeal. If "the district court assesses any future attorney fees on [Dieckmann'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." *State v. Coleman*, 907 N.W.2d 124, 149 (Iowa 2018). Therefore, the court did not error in this provision of the sentencing order.

V. Conclusion

Dieckmann's counsel was not ineffective for failing to claim the evidence is insufficient to support his convictions for attempted burglary in the second degree and possession of burglar's tools. We preserve his other ineffective-assistance claims for potential postconviction review. Additionally, the court did not err in discussing appellate attorney fees in the sentencing order.

AFFIRMED.



IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
17-1806	State v. Dieckmann

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