IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff–Appellee, v. WILLIAM E. CRAWFORD, Defendant–Appellant.	)	S. CT. NO. 17–1640

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
THE HONORABLE THOMAS G. REIDEL, JUDGE

APPELLANT'S BRIEF AND ARGUMENT

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FINAL

CERTIFICATE OF SERVICE

On 27th 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 William E. Crawford, #6858380, Anamosa State Penitentiary, 406 North High Street, Anamosa, IA 52205.

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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 William E. Crawford appeals his conviction, sentence, and judgment following a jury trial and verdict finding him guilty of murder in the second degree, in Scott County District Court Case No. FECR379543.

Course of Proceedings: On September 21, 2016, the State charged Defendant–Appellant William E. Crawford with count I: murder in the first degree, a class "A" felony, in violation of Iowa Code sections 707.2(1)(a) and 703.1; and count II: willful injury resulting in serious injury, a class "C" felony, in violation of Iowa Code section 708.4(1). (Trial Information) (App. pp. 5–9); see also Iowa Code §§ 707.2(1)(a), 703.1, 708.4(1) (2017). Crawford filed a written arraignment

and plea of not guilty, in which he also waived his right to a trial within ninety days on September 21, 2016. (Arraignment & Plea) (App. p. 10).

After a breakdown with his attorneys from the public defender's office, Crawford was appointed a new attorney to represent him on June 21, 2017. (Order Pursuant Section 815.10) (App. pp. 25–26). On August 15, 2017, the attorney filed a motion to withdraw. (Mot. Withdraw) (App. p. 30). At the hearing on her motion, counsel asked the court to continue the trial, which was scheduled less than a week from the hearing, in the event the court did not allow her to withdraw. (Mot. Withdraw Tr. p.8 L.16–p.9 L.1). At the end of the hearing, the district court denied both the motion to withdraw and the motion to continue. (Mot. Withdraw Tr. p.12 L.1–p.13 L.15) (Order 08/15/2017) (App. pp. 31–32).

A jury trial commenced on August 21, 2017. (Trial Tr. vol.1 p.1 L.1–25, p.9 L.1–15) (Jury Verdict) (App. pp. 41–42). On August 25, 2017, the jury returned a verdict finding Crawford guilty of the lesser-included count of murder in the

second degree. (Trial Tr. vol.4 p.874 L.9–p.876 L.5) (Jury Verdict) (App. pp. 41–42).

On October 5, 2017, sentencing hearing was held. (Sentencing Tr. p.1 L.1–p.2 L.15) (Sentencing Order) (App. pp. 44–47). The district court ordered Crawford to serve an indeterminate sentence not to exceed fifty years, with a mandatory minimum sentence of seventy percent under Iowa Code section 902.12(1)(a). (Sentencing Tr. p.9 L.16–23) (Sentencing Order) (App. p. 44). The court also ordered Crawford to pay court costs and victim restitution, including $150,000 to Nunn's estate, pursuant to Iowa Code section 915.100(2)(c). (Sentencing Tr. p.9 L.16–p.10 L.7) (Sentencing Order) (App. p. 45). However, the court found Crawford did not have the reasonable ability to pay the costs of his court-appointed attorney. (Sentencing Tr. p.10 L.2–3) (Sentencing Order) (Ap. p. 45). Lastly, the court ordered Crawford to submit a DNA sample. (Sentencing Tr. p.9 L.25–p.10 L.1) (Sentencing Order) (App. p. 45).

Crawford timely filed a notice of appeal on October 12, 2017. (Notice) (App. p. 48).

Facts: On April 18, 2016, approximately thirty people were in LeClaire Park in Davenport, including the victim, Romane Nunn. (Trial Tr. vol.2 p.352 L.11–p.353 L.10). Police were called after a fight broke out, and when they arrived they found Nunn was lying face down in the grass. (Trial Tr. vol.2 p.485 L.24–25). Nunn was unresponsive on the scene. (Trial Tr. vol.2 p.486 L.9–p.487 L.24). Medics arrived, administered CPR, and took Nunn to the hospital where he later died. (Trial Tr. vol.2 p.493 L.3–20, p.500 L.22–23). The physician who performed the autopsy testified Nunn had one stab wound in his chest that penetrated the heart, resulting in significant blood loss and Nunn's death; he further stated Nunn had two other superficial stab wounds in his abdomen. (Trial Tr. vol.3 p.520 L.1–22, p.527 L.17–24).

As police investigated, they believed the stabbing of Nunn to be linked to an incident from the previous day concerning Crawford's girlfriend, Amanda Baker. (Trial Tr. vol.2 p.446

L.23–p.447 L.15; vol.4 p.755 L.16–20). At approximately 7:30 p.m. on August 17th, a police officer responded to a call about a possibly injured and intoxicated woman walking; the officer found Baker walking down a street. (Trial Tr. vol.2 p.431 L.17–p.432 L.4). Baker told the officer she was sexually assaulted but was uncooperative, denying medical assistance and declining to go to the police station to file a report. (Trial Tr. vol.2 p.432 L.18–p.433 L.8). An officer testified she was evasive, frantic, and intoxicated. (Trial Tr. vol.2 p.432 L.9–19). Baker told officers after the assault she was without a shirt, and only had her bra on; at the time she was stopped the individual who had called police had also given her his shirt. (Trial Tr. vol.2 p.437 L.5–12, p.462 L.15–23). Law enforcement gave her a ride to 1518 Brady Street where she lived. (Trial Tr. vol.2 p.433 L.9–19; vol.3 p.575 L.17–25).

In the early morning hours of August 18th, Crawford called the police to report Baker had been sexually assaulted. (Trial Tr. vol.2 p.440 L.7–8, p.463 L.2–5; vol.4 p.781 L.17–19). Law enforcement arrived at 1518 Brady Street, Apartment 2 to

talk with Crawford and Baker. (Trial Tr. vol.2 p.440 L.3–10). When officers arrived, Baker was on a bed and crying. (Trial Tr. vol.2 p.440 L.19–23). An officer described Crawford as angry and wanting to know what the police were doing to catch Baker's assailant; Crawford told officers that he was going to try to find the man and hold him until they get him so he could not hurt anyone else. (Trial Tr. vol.2 p.441 L.2–3, p.457 L.15–25). Baker did have cuts on her and older bruises, but again declined medical attention. (Trial Tr. vol.2 p.456 L.8–10, p.470 L.6–11).

Baker reported her assailant was driving a gold car, and she described him as in his early thirties, approximately five foot six inches tall, dark-skinned, and bald black male with a stocky build. (Trial Tr. vol.2 p.441 L.10–15, p.456 L.16–20). Baker testified the man forced her to take off her clothes at knifepoint, scratched her with his knife, and she believed he was going to sexually assault her; Baker told Crawford he did actually sexually assault her, but she did not testify to this at trial. (Trial Tr. vol.3 L.1–10; vol.4 p.782 L.4–5). Baker stated

the assailant only stopped because she told him she was possibly pregnant, with Crawford's child, and screamed. (Trial Tr. vol.3 p.560 L.13–15, p.561 L.3–7, p.575 L.6–9, p.577 L.8–10).

After talking with Baker and Crawford, officers went to the garage that Baker had described as the scene of her assault. (Trial Tr. vol.2 p.443 L.11–17). Once there, officers found the garage was as Baker had described; they also discovered the t-shirt and shorts she had been wearing. (Trial Tr. vol.2 p.443 L.14–17, p.445 L.11–p.446 L.14, p.460 L.11–21). Officers then contacted the garage's owner and obtained some of its video surveillance. (Trial Tr. vol.2 p.443 L.18–21). The surveillance did show a car leaving the area and then Baker leaving the garage. (Trial Tr. vol.2 p.443 L.22–25). Officers eventually identified the car and its owner; the car was a silver 1988 Chrysler New Yorker, and the owner was a man named Travis Jones. (Trial Tr. vol.2 p.451 L.16–p.452 L.25). After some investigation, the police identified a suspect, who was not Nunn. (Trial Tr. vol.3 p.553 L.25–p.554 L.9).

The next day, on April 18, 2016, several people including Amber Buser and Jason VanKeulen, were playing an augmented reality game on their phones called Pokémon Go in LeClaire Park. (Trial Tr. vol.2 p.351 L.20–p.352 L.13, p.371 L.3–5). Meanwhile, Gavin Whitmore, an acquaintance of Crawford's, was also in the park, but sitting in a different area at a table in the pavilion. (Trial Tr. vol.2 p.412 L.1–p.413 L.17). Others were in the pavilion, including Jonah Jones, Crawford, Baker, Terrell Bloch and Durrell Parks. (Trial Tr. vol.2 p.413 L.18–p.414 L.19; vol.3 p.657 L.3–11). The people in the pavilion were socializing and some were drinking alcohol, including vodka. (Trial Tr. vol.2 p.415 L.1–8; vol.3 p.580 L.6–18). Whitmore testified Crawford had been drinking liquor and probably had a "nice buzz going on." (Trial Tr. vol.2 p.428 L.15–23).

Whitmore testified everything was going fine until Baker arrived and then "all hell broke loose." (Trial Tr. vol.2 p.415 L.25–p.416 L.13). Baker saw Nunn get out of his car, a green Saturn, and she told Crawford that Nunn was at the park and

he had raped her; Whitmore testified she was crying as well. (Trial Tr. vol.2 p.416 L.19–p.417 L.18, p.426 L.1–p.427 L.10, p.581 L.2–10). Whitmore testified Baker knew Nunn's name. (Trial Tr. vol.2 p.417 L.17–18). Baker also testified she told Crawford that Nunn was her assailant several times. (Trial Tr. vol.3 p.587 L.11–17). After Baker identified Nunn as her rapist, Crawford left the pavilion and confronted Nunn. (Trial Tr. p.418 L.12–p.419 L.17).

It was around sunset, and the sky was darkening; meanwhile, Buser and VanKeulen were sitting on a park bench along the riverfront in between the amphitheater and the old boat, which used to be a casino. (Trial Tr. vol.2 p.353 L.14–19, p.381 L.1–5) (Ex. 30) (Ex. App. p. 8). The two did not know each other but had just met playing the game and started chatting; Nunn approached and started talking with them as well. (Trial Tr. vol.2 p.354 L.13–p.355 L.25, p.371 L.14–p.373 L.21). VanKuelen and Nunn did not know each other very well, but had met and talked while playing the game. (Trial Tr. vol.2 p.371 L.14–25).

VanKuelen and Nunn continued talking about the game, while Buser used her phone, when a man wearing a black t-shirt with a pair of long black jean shorts approached quickly and yelled at Nunn angrily. (Trial Tr. vol.2 p.355 L.7–p.357 L.3, p.360 L.1–6, p.374 L.1–24, p.397 L.5–10). VanKuelen later identified the man in a pretrial photo lineup and at trial as Crawford; Buser testified she did not get a good look at the man's face. (Trial Tr. vol.2 p.360 L.1–3, p.375 L.20–p.376 L.7, p.382 L.20–p.385 L.5). Joseph Nelson, another Pokémon Go player who was standing about ten to fifteen feet behind the bench, also identified the man as Crawford at trial. (Trial Tr. vol.2 p.406 L.6–16).

Buser and VanKuelen testified Crawford was yelling at Nunn, asking if he was Mr. Romane, and Nunn confirmed his first name was Romane. (Trial Tr. vol.2 p.357 L.3–7, p.374 L.5–25). Buser and VanKuelen testified Crawford screamed at Nunn that Nunn was in violation of the law and had raped his girl. (Trial Tr. vol.2 p.357 L.2–10, p.376 L.15). Buser and VanKeulen testified Crawford pulled out a knife from his

pocket, dropped his backpack on the ground in front of Buser, and swung the knife at Nunn. (Trial Tr. vol.2 p.357 L.8–p.359 L.25, p.363 L.1–19, p.376 L.16–25, p.390 L.13–22). Buser called 911. (Trial Tr. vol.2 p.357 L.15–25) (Ex. 2).

Buser and Nelson testified Nunn walked backwards with his hands in the air and informed Crawford that he was mistaken and had the wrong person. (Trial Tr. vol.2 p.360 L.9–13, p.399 L.13–p.403 L.5). VanKeulen testified Nunn jumped back and walked away from Crawford. (Trial Tr. vol.2 p.377 L.4–10). Both witnesses testified that Crawford followed Nunn into a grassy field in the park. (Trial Tr. vol.2 p.360 L.9–13, p.377 L.6–12).

Buser testified she believed Crawford stabbed Nunn once, causing Nunn to stumble, but Nunn was able to get up and back away again. (Trial Tr. vol.2 p.360 L.19–24). However, Buser testified Crawford stabbed Nunn again, causing him to fall to the ground. (Trial Tr. vol.2 p.360 L.19–24). VanKeulen testified he saw Crawford stab Nunn in the chest, and Nunn grabbed his chest and ran until collapsing. (Trial Tr. vol.2

p.377 L.18–p.378 L.20). VanKeulen and Nelson both testified while Nunn was on the ground, Crawford, along with two other men who came from the pavilion, yelled profanities at Nunn and kicked and stomped on him, including his head. (Trial Tr. vol.2 p.378 L.19–15, p.389 L.16–p.390 L.7, p.394 L.10–12, p.403 L.14–p.404 L.4). VanKeulen testified the whole thing happened extremely quickly, possibly within two minutes. (Trial Tr. vol.2 p.391 L.9–p.393 L.12).

From his seat in the pavilion, Whitmore testified he did not see the altercation with at the riverfront, but saw Crawford lunge at Nunn in the grassy field, Nunn fall and get back up, Crawford lunge again, and Nunn collapse. (Trial Tr. vol.2 p.419 L.7–23). Whitmore did not see Crawford with a knife. (Trial Tr. vol.2 p.423 L.15–19). Whitmore also testified he saw Bloch run over and kick Nunn while Nunn was on the ground. (Trial Tr. vol.2 p.421 L.4–10).

Whitmore testified Crawford then returned to the pavilion and stated "I think I killed him." (Trial Tr. vol.2 p.421 L.19–

21). Crawford then left the pavilion. (Trial Tr. vol.2 p.421 L.22–24).

Baker testified that she told Crawford she was not certain that Nunn was the man who assaulted her. (Trial Tr. vol.3 p.582 L.1–3). She also testified Crawford went to the riverside where Nunn was and Bloch and Parks followed him. (Trial Tr. vol.3 L.4–7). Baker stayed at the table in the pavilion, and she testified she did not see any altercation. (Trial Tr. vol.3 p.582 L.4–p.583 L.2). At trial, Baker testified she did not know if Crawford owned a black folding pocketknife, but she stated she previously told a detective he did. (Trial Tr. vol.3 p.583 L.3–22). She did not see him with a knife that day. (Trial Tr. vol.3 p.586 L.14–18). At trial, Baker acknowledged she had been wrong and Nunn was not the man that assaulted her. (Trial Tr. vol.3 p.586 L.5–9).

Fred Carter, who knew Crawford well, testified that on August 18, 2016, he was walking from the skybridge to the pavilion when he encountered Crawford, Bloch, and Parks. (Trial Tr. vol.3 p.658 L.6–21, p.661 L.14–p.664 L.6). Carter

had used crack cocaine a few minutes earlier and was walking back; he testified he was "high as a kite". (Trial Tr. vol.3 p.669 L.12–p.671 L.23). Carter testified Crawford told him: "I think I killed that nigga, folks." (Trial Tr. vol.3 p.665 L.17–21). Carter testified he saw Crawford with a black folding knife in his hand, and Crawford threw it into the river. (Trial Tr. vol.3 p.665 L.20–p.666 L.8). Carter then stated Crawford and Parks took off. (Trial Tr. vol.3 p.666 L.11–14).

Bloch and Parks were both originally charged with Murder in the First Degree as codefendants of Crawford. (Trial Information) (App. pp. 5–9). Bloch and Parks both testified against Crawford at trial and received plea deals for a lesser charge of willful injury resulting in serious injury, a class "C" felony, in exchange for their testimony. (Trial Tr. vol.3 p.675 L.17–21, p.733 L.7–12) (Exs. 3, 73) (Ex. App. pp. 3–4, 14–15).

Bloch testified he was at the pavilion on August 18th and heard Baker gasp when Nunn got out of a green Saturn; Bloch described Baker as "somewhat hysterical" after seeing Nunn arrive at the park. (Trial Tr. p.677 L.5–p.679 L.10). Bloch

testified Crawford left, walked to Nunn, had a conversation with him, and returned to the pavilion. (Trial Tr. vol.3 p.679 L.14–20). When Crawford returned, Bloch stated he asked Baker if she was sure that was her assailant; Bloch testified Baker was unsure. (Trial Tr. vol.3 p.679 L.21–24). Bloch testified that approximately five minutes later, Crawford left again, taking his backpack. (Trial Tr. vol.3 p.679 L.25–p.680 L.20). Bloch testified he followed Crawford after Baker told him to go stop Crawford. (Trial Tr. vol.3 p.680 L.6–21). Bloch stated he saw Crawford swing at Nunn, but did not see a knife; Bloch also admitted to punching Nunn twice. (Trial Tr. vol.3 p.680 L.21–p.681 L.5). Bloch testified that he then left on his bicycle. (Trial Tr. vol.3 p.681 L.10–11).

Parks stated he was also under the pavilion before the altercation. (Trial Tr. vol.3 p.734 L.6–22). Parks had been drinking vodka and beer and abusing Xanax that day; he admitted to being intoxicated. (Trial Tr. vol.3 p.739 L.19–p.741 L.3). Parks testified that Baker saw Nunn walk across the field, but she seemed unsure that it was really the correct

guy; however, Parks agreed Baker identified Nunn as her assailant repeatedly and pointed him out to Crawford. (Trial Tr. vol.3 p.735 L.23–p.736 L.13, p.741 L.19). Parks stated Crawford asked her if she was telling the truth that Nunn was her assailant and Baker responded affirmatively. (Trial Tr. vol.3 p.735 L.23–p.736 L.13). Parks testified Crawford left stating he was going to talk to Nunn and that Crawford asked Bloch to walk with him over there. (Trial Tr. vol.3 p.736 L.16–p.737 L.2). Parks testified he stayed in the pavilion and saw the fight between Crawford and Nunn break out. (Trial Tr. vol.3 p.737 L.3–20). Parks testified he saw Nunn backing up, throwing his hands up, and swinging at Crawford. (Trial Tr. vol.3 p.737 L.23–p.738 L.1). He then saw Nunn fall down and get up; Parks testified he ran over to see what had happened because there were a lot of people gathered around; once he was over there he kicked Nunn twice. (Trial Tr. vol.3 p.738 L.2–15). Parks was still at the pavilion when the police arrived and was arrested. (Trial Tr. vol.3 p.739 L.4–13).

After the incident in the park, in the early morning hours of August 19, 2016, police went to 1518 Brady Street, Apartment 2, where they knew Crawford was living and subsequently executed a search warrant. (Trial Tr. vol.3 p.565 L.22–p.566 L.7, p.631 L.6–p.632 L.11, p.726 L.6–22). The police collected a pair of jean shorts with red stains and a black t-shirt. (Trial Tr. vol.3 p.558 L.2–p.569 L.6). In the shorts was a wallet that contained two EBT cards in Crawford's name. (Trial Tr. vol.3 p.570 L.20–p.571 L.6).

A few hours later at approximately 3:44 a.m. on the 19th, an officer saw Crawford walking alone. (Trial Tr. vol.3 p.727 L.1–6). The officer stopped him, handcuffed him, and transported him to the station. (Trial Tr. vol.3 p.727 L.23–p.728 L.19). This officer noted Crawford's eyes were bloodshot and his speech was slurred. (Trial Tr. vol.3 p.728 L.20–24). Detectives interviewed Crawford later in the morning of the 19th, around 4:08 a.m. (Trial Tr. vol.4 p.757 L.7–15, p.767 L.16–20). In the interview, Crawford denied being by the river that night and was not responsive to many of the officers'

questions. (Ex. 74 0:00–7:04). Crawford denied killing Nunn. (Ex. 74 17:16–17:20).

The shorts found in Crawford's apartment were tested and the stains were identified as blood; a small section of that blood was identified as Nunn's. (Trial Tr. vol.3 p.604 L.8–21). The shoes taken from Crawford at his arrest had blood on them, and DNA on the left shoe was matched to Nunn. (Trial Tr. vol.3 p.607 L.4–p.608 L.12; vol.4 p.758 L.3–22) (Ex. 21) (Ex. App. pp. 5–7). A white t-shirt worn by Crawford at the time of his arrest was also tested, but only had Crawford's own DNA. (Trial Tr. vol.3 p.616 L.6–25; vol.4 p/759 L.1–17) (Ex. 21) (Ex. App. pp. 5–7). Tennis shoes and jeans collected from Parks also had Nunn's blood on them. (Trial Tr. vol.3 p.614 L.13–p.615 L.1, p.618 L.7–17) (Ex. 21) (Ex. App. pp. 5–7). The only item belonging to Bloch tested was a white t-shirt, and it did not screen positive for blood. (Trial Tr. vol.3 p.616 L.1–5) (Ex. 21) (Ex. App. pp. 5–7).

In the afternoon of August 19, 2016, after his arrest, Crawford called Baker from the jail phone. (Trial Tr. vol.3

p.687 L.21–p.688 L.25). In the call, Crawford says "it's over with for me." (Ex. 69A 0:43.7–2:43.7). Baker asks Crawford why he did not go out of town, tells Crawford she's sorry, she did not know Nunn was her assailant until she saw his face at the park, and tells Crawford that she is going to tell them that she did it. (Ex. 69A 0:43.700–2:43.700). Crawford tells Baker that man is dead and she does not have to worry about him anymore; Baker states that what happened to Nunn was justice, and Crawford tells her that he told Nunn that he was in the judgment of the law. (Ex. 69B 6:53:329–7:23:400). Crawford says he was "out of my mind drunk" and was extremely upset by the assault on Baker. (Ex. 70 8:13:200–9:01:500). The two talk about Crawford being able to plead insanity. (Ex. 70 8:13:200–9:01:500).

Crawford made another call from jail on August 21, 2016. (Trial Tr. vol.3 p.689 L.17–p.690 L.1). In that call, Crawford stated all Nunn had to do was let the police take him in, and he was just following Nunn while Baker called the police. (Ex. 71 5:25:400–6:03:200). He said that he asked

Nunn if he knew Baker, he said no, so he picked his backpack and followed Nunn. (Ex. 71 5:25:400–6:03:200).

Law enforcement forensically examined Nunn's cellular telephone. (Trial Tr. vol.3 p.693 L.4–p.694 L.13). The examination showed that Nunn sent a text message on August 18, 2016, at 8:20:53 p.m. (Trial Tr. vol.3 p.694 L.10–p.695 L.4) (Ex. 65) (Confidential App. p. 8). The message was to a person named "Bo" in Nunn's contacts, and it said "Dude that was beating on his girl thinks he gonna stab me." (Trial Tr. vol.3 p.695 L.5–19) (Ex. 65) (Confidential App. p. 8). Carter testified that prior to the stabbing, he saw Nunn in LeClaire Park. (Trial Tr. vol.3 p.658 L.6–21). Carter testified Nunn was seated at a table in the pavilion with his back to Baker, Crawford, and several other people who at a different table in the pavilion. (Trial Tr. vol.3 p.658 L.22–p.659 L.9, p.670 L.21–25). Carter testified Baker and Crawford got into an argument, yelled at each other, and Crawford pushed Baker. (Trial Tr. vol.3 p.659 L.3–9). Carter testified Nunn was on his

phone at the time and stayed on his phone, but he would have heard the argument. (Trial Tr. vol.3 p.659 L.19–p.661 L.10).

Crawford testified in his own defense. He testified he and Baker had been together for seven years, lived together, and considered each other husband and wife. (Trial Tr. vol.4 p.777 L.9–20). Crawford testified he went to LeClaire Park on the 18th to play chess in the pavilion. (Trial Tr. vol.4 p.778 L.9–24). He stated he got there around 1:00 in the afternoon and started drinking beer about an hour later. (Trial Tr. vol.4 p.779 L.8–21). He testified Amanda arrived closer to 4:00 p.m., and they smoked marijuana. (Trial Tr. vol.4 p.782 L.14–p.783 L.8).

Crawford testified he was in the middle of a chess game when Baker jumped back and quickly stood up. (Trial Tr. vol.4 p.783 L.9–21). Crawford stated she was having trouble breathing, acting like she was going to vomit, and "acted like the life just left her body." (Trial Tr. vol.4 p.783 L.8–22). When Crawford asked her what was wrong, she pointed out Nunn and identified him as the man that had assaulted her earlier

that day. (Trial Tr. vol.4 p.783 L.22–p.784 L.6). Crawford stated that he told her to call the police and walked to confront Nunn. (Trial Tr. vol.4 p.784 L.8–17).

Crawford testified he confronted Nunn about assaulting a female, and Nunn acted confused, which Crawford did not believe. (Trial Tr. vol.4 p.785 L.10–20). Crawford told Nunn the police were on their way, and Nunn started walking away, which Crawford interpreted as trying to get to Nunn's car. (Trial Tr. vol.4 p.785 L.21–24). Because he believed Nunn was trying to leave before the police arrived, Crawford stated he ran up to Nunn and grabbed his shirt; a fight then broke out. (Trial Tr. vol.4 p.785 L.21–p.786 L.2). Crawford admitted swinging at Nunn, tripping him, and kicking him, but denied ever stabbing him. (Trial Tr. vol.4 p.785 L.3–25, p.787 L.12–17). Crawford testified he showed Nunn the knife as they were fighting, and Nunn tried to grab his hand; Crawford was unsure when Nunn actually was stabbed. (Trial Tr. vol.4 p.787 L.12–21). Crawford testified he did not want Nunn to die; he only meant to beat Nunn up before the police arrived

because of what he believed Nunn did to Baker. (Trial Tr. vol.4 p.785 L.1–8). Crawford admitted to throwing the knife in the river. (Trial Tr. vol.4 p.794 L.3–13). He testified he was very intoxicated at the time. (Trial Tr. vol.4 p.787 L.22–23).

Crawford testified he left the park and went to some friends' house. He eventually went to 1518 Brady Street to change his clothes. (Trial Tr. vol.4 p.789 L.3–18). He then went to a friend's house, where he saw that Nunn had died on the news and got very upset, so he continued drinking. (Trial Tr. vol.4 p.789 L.3–12). Crawford testified he snapped and was in shock because he "knew we didn't kill that man." (Trial Tr. vol.4 p.789 L.2, 21–23). Crawford was walking home when the police officers stopped him. (Trial Tr. vol.4 p.790 L.2–9). Crawford testified that he was going to tell his side of the story, but did not want to talk to the police. (Trial Tr. vol.4 p.790 L.15–22, p.797 L.6–16).

Any additional relevant facts will be discussed below.

ARGUMENT

I. THE COURT SHOULD HAVE GRANTED CRAWFORD'S MOTION TO CONTINUE THE TRIAL.

A. Preservation of Error: Crawford's attorney filed a motion to withdraw on August 15, 2017—six days before the trial was scheduled to start. (Mot. Withdraw) (App. p. 30). During the hearing on that motion, she orally moved for a continuance, stating she needed more time to prepare if the court did not allow her to withdraw. (Mot. Withdraw Tr. p.1 L.1–25, p.8 L.11–p.9 L.1). The court's denied both the motion to withdraw and the request for the continuance. (Mot. Withdraw Tr. p.12 L.1–p.13 L.15) (08/15/2017 Order) (App. pp. 33–34). Therefore, error was preserved. Lamasters v. State, 821 N.W.2d 856, 864 (Iowa 2012).

If the Court determines the issue was not properly preserved for any reason, Crawford respectfully requests this issue be considered under the Court's familiar ineffective-assistance-of-counsel framework. See State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983). 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: This Court reviews the court's denial of a motion to continue for an abuse of discretion. State v. Clark, 814 N.W.2d 551, 560 (Iowa 2012) (citation omitted). "An abuse of discretion occurs when the trial court exercises its discretion 'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" State v. Rodriguez, 636 N.W.2d 234, 239 (Iowa 2001) (quoting State v. Maghee, 573 N.W.2d 1, 5 (Iowa 1997)). "'A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law.'" Id. (quoting Graber v. City of Ankeny, 616 N.W.2d 633, 638 (Iowa 2000)).

Because they involve constitutional rights, the Court reviews claims of a violation of the constitutional right to due process and claims of ineffective assistance of counsel. Id. (citations omitted); 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: On August 15, 2017, six days before trial was scheduled to start, the court held a hearing on the motion to withdraw, in which defense counsel also moved to continue the trial. (Mot. Withdraw Tr. p.1 L.1–25, p.8 L.11–p.9 L.1).

Iowa Rule of Criminal Procedure 2.9 governs the court's decision to grant or deny a motion for continuance. "A motion for continuance shall not be granted except upon a showing of good and compelling cause." Iowa R. Crim. P. 2.9(2) (2017). The Iowa Rule of Civil Procedure standard—"upon a showing that substantial justice will be more nearly obtained"—has also been incorporated in criminal cases on when to grant a continuance. See State v. Simmons, 454 N.W.2d 866, 868 (Iowa 1990); see also Iowa R. Civ. P. 1.911(1) (2017).

"Many trial continuances are sought on legitimate grounds. In spite of careful plans and diligent preparations, an unanticipated event will on occasion necessarily precipitate

a continuance motion." State v. Teeters, 487 N.W.2d 346, 347 (Iowa 1992). Trial judges must "do justice to those needing and deserving a continuance." See id. "The trial judge must sense whether a given continuance motion stems from a legitimate need, or from a wish to delay." Id.; see also State v. LaGrange, 541 N.W.2d 562, 564 (Iowa Ct. App. 1995) (finding the court abused its discretion in denying continuance when subpoenaed defense witness did not return after lunchtime and was drunk).

In this case, Crawford did not seek a continuance as simply a delay tactic. Crawford was currently in custody and had been since the date of his arrest, on August 19, 2016. (Criminal Complaint; 08/15/2017 Order Incarceration Status) (Confidential App. pp. 4–7; App. pp. 31–32). Importantly, the first chair defense counsel was only appointed less than two months earlier, on June 21, 2017. (Order Pursuant Section 815.10) (App. pp. 25–26). The second chair defense counsel was appointed less than a month prior to the hearing. (Order Approving Appointment Second Chair) (App. pp. 27–28).

Accepting this appointment was a huge undertaking. The prosecutors had been involved since the beginning of the case, almost a year earlier. The State with its almost "unlimited manpower and resources" had already completed its investigation. See State v. Eads, 166 N.W.2d 766, 771 (Iowa 1969) ("[T]he trail is often cold" by the time the defendant is able to start his own investigation.). While defendant's prior counsel had done some depositions, the record makes it clear that the current counsel had also conducted some, as recently as the four days before the hearing. (Mot. Withdraw Tr. p.7 L.24–p.9 L.22). Counsel had a duty to "explore all avenues leading to facts relevant to the merits of the case." Clark, 814 N.W.2d at 568 (Appel, J., dissenting).

Counsel provided as specific explanations for the need of a continuance under the circumstances. At the hearing, Crawford explained his frustration with his counsel, including that he did not feel she was adequately prepared, noting the short time she had been on the case, and his desire to find

more defense witnesses to the incident in the park. (Mot. Withdraw Tr. p.5 L.3–25). Crawford also noted recent events in the case that had come out differently than expected. (Mot. Withdraw Tr. p.5 L.22–p.6 L.4). Counsel echoed this statement, explaining that the deposition of what they previously believed to be their best witness, which they had done four days earlier, had not gone as the defense had planned; she now believed she needed more time to prepare for trial. (Mot. Withdraw Tr. p.8 L.3–15, p.9 L.2–12). Counsel stated:

> it couldn't be further from what I thought, and it did kind of throw me. . . . now it does open the door to more problems. . . . In fact, it did really create an issue for me that kind of made me step back a few feet and like, okay, what are we going to do? That's what happened.

(Mot. Withdraw Tr. p.9 L.2–12). Moreover, when talking to the court, trial counsel candidly informed it this was only the second murder trial she was involved with. (Mot. Withdraw Tr. p.3 L.15–18). Also notably, the second chair indicated he was

not prepared to try the case if the first chair withdrew. (Mot. Withdraw Tr. p.2 L.17–p.3 L.4).

Crawford was charged with one of the most serious offenses in Iowa. A defendant who is facing life imprisonment should be given reasonable time to prepare for trial. "Courts have repeatedly stated that the seriousness of the charge is a critical factor in determining whether there has been adequate preparation time." Clark, 814 N.W.2d at 569 (Appel, J., dissenting). Pretrial preparation is "perhaps the most critical period in a criminal proceeding." Id. at 568. "[I]t is better to eliminate potential problems with adequate representation up front prior to trial by being somewhat generous with respect to defense requests rather than deal with resulting problems on the back end with the very blunt post hoc Strickland-type tools." Id. at 570. "[P]roof of the prejudice from lack of adequate preparation may well be absent from the record precisely because of the lack of preparation." Id. at 571.

In ruling, the trial court stated:

> In this matter, once again, we're coming up against the one-year deadline for a speedy trial.

> [Defense counsel] seems to be prepared. She's indicated she's got the week blocked off to work on this, that she's been working on this. Mr. Crawford has previously expressed through correspondence a satisfaction with [defense counsel].
>
> The Court does not give a lot of weight to the State's argument of the inconvenience of the witnesses. While that's certainly important, everybody's lives and what really happens is important, the Court gives the primary concern to Mr. Crawford because he's the one whose life is going to be the most greatly impacted by the outcome of this trial.
>
> Nonetheless, Mr. Crawford has not told me anything specifically that they need to do that would lead me to believe that a continuance is warranted or would do anything more than delay this trial. We've got somebody with the nickname Florida and the girlfriend of Florida. Even reading the notice of defense witnesses and what they're going to testify to, it doesn't appear that their testimony is extremely relevant based on the notice of defense witnesses and the statements made here today.

(Mot. Withdraw Tr. p.9 L.2–p.13 L.13). Accordingly, the court denied the motion to continue the trial. (Mot. Withdraw Tr. p.13 L.14–15) (08/15/2017 Order) (App. pp. 33–34).

Courts should strive to move a case to its conclusion within a reasonable period of time. Ragan v. Petersen, 569 N.W.2d 390, 395 (Iowa Ct. App. 1997). "While timely case processing is an important aspect of justice, the paramount

obligation of a court is to insure the process is fair and just." Id. "The concept of "substantial justice" favors a trial which allows both parties an opportunity to fully and fairly develop their claims and defenses without prejudice to the other party." Id.

Crawford demonstrated "good and compelling cause" and that "substantial justice" would more nearly obtained by the continuance. Iowa R. Crim. P. 2.9(2); Iowa R. Civ. P. 1.911(1). Short of a detailed outline of what the defense had expected the witness's testimony to be, what the witness actually testified to, and how it affected their trial strategy, it is unclear what else the court needed as a specific reason for the continuance. Trial counsel clearly informed the court that the witness's testimony in the deposition only four days earlier was completely unexpected, gave her much to think about, and changed their trial strategy. (Mot. Withdraw Tr. p.8 L.3–15, p.9 L.2–12). Furthermore, counsel made it clear that she was unexperienced in trying cases as serious as the one at hand. (Mot. Withdraw Tr. p.3 L.15–18). Nor was the second

chair adequately prepared to pick up any extra slack for her. (Mot. Withdraw Tr. p.2 L.17–p.3 L.4).

In addition, the record clearly demonstrates that the defense should have been given more time to try to locate the two additional witnesses. (Mot. Withdraw Tr. p.13 L.8–9). It is unreasonable that the court believed these witnesses' testimony would not be relevant. (Mot. Withdraw Tr. p.13 L.8–13). These witnesses were both present in the park when Nunn was killed. (Notice Defense Witnesses) (App. p. 29). They were both potential eyewitnesses of the assault and were with Crawford prior to the incident. (Notice Defense Witnesses) (App. p. 29). As such, their testimony is directly relevant to the incident's occurrences, Crawford's state of mind, and any alleged provocation for his actions.

While the one year deadline under Iowa Rule 2.33 could possibly be an adequate reason for denying a continuance, it is not in this case. First, Crawford filed a written arraignment on September 21, 2017. (Arraignment & Plea) (App. p. 10). Under Rule 2.33(2)(d), there was still a full month from when

trial was scheduled until the deadline ran. See Iowa R. Crim. P. 2.33(2)(d) (2017). Even a continuance of one month would have given trial counsel more time to reconsider the strategy and prepare. Given that she was prepared before the surprising testimony at deposition just days earlier, it would seem that a month would have been adequate. Moreover, as Rule 2.33(2)(d) makes it clear, the court is able to grant an extension upon a showing of good cause. Iowa R. Crim. P. 2.33(2)(d). A continuance for defense trial counsel, who was only recently appointed, to adequately prepare for trial clearly would fall into the category of good cause under the rule, especially for a class "A" felony. See, e.g., State v. O'Connell, 275 N.W.2d 197, 200 (Iowa 1979) (finding that the legislature intended that defense counsel could waive a defendant's speedy trial rights by asking for and receiving a continuance); State v. LeFlore, 308 N.W.2d 39, 41 (Iowa 1981). In addition, under Iowa case law, the defendant cannot "actively participate in the events which delay[] his [trial but] later [seek] to take advantage of that delay to terminate the

prosecution." State v. Zaehringer, 306 N.W.2d 792, 796 (Iowa 1981). Thus, Rule 2.33 did not pose any issue or deterrent for granting a continuance in this case.

For the reasons noted above, the trial court exercised its discretion for reasons clearly untenable and unreasonable. See Rodriguez, 636 N.W.2d at 239 (quoting Maghee, 573 N.W.2d at 5). As such, this Court should find the trial court abused its discretion by denying Crawford a continuance of trial. See id. Therefore, Crawford must be granted a new trial.

Moreover, the Iowa Supreme Court has found the denial of a continuance for trial preparation violated an individual's right to due process. See, e.g., In re Orcutt, 173 N.W.2d 66, 70 (Iowa 1969). In Orcutt, substitute counsel was appointed just three days before a termination of parental rights hearing, and counsel moved for a continuance, which the court denied. Id. at 68. The Supreme Court held: "Assignment of counsel under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case will not satisfy the necessary requisite of due process of law." Id. at 70. The

Court recognized "that a defendant in a criminal case who goes to trial has been denied effective assistance of counsel if counsel is not given adequate opportunity to prepare for trial." Id. at 69. The Court acknowledged the trial court has wide discretion in determining whether to grant a continuance, but that discretion has constitutional limits. Id. at 70–71. "Whether in any case enough time has been afforded for consultation, investigation for witnesses and preparation of the law and facts depends upon the circumstances of the case including the complexity of the factual issues and the legal principles involved." Id. at 71.

New witnesses or developments "tend to throw existing strategies and preparation into disarray." Leka v. Portuondo, 257 F.3d 89, 101 (2nd Cir. 2001). "When such a disclosure is first made on the eve of trial . . . the opportunity to use it may be impaired." Id. at 101. The "belated revelation of . . . material might meaningfully alter a defendant's choices before and during trial: how to apportion time and resources to various theories when investigating the case, whether the

defendant should testify, whether to focus the jury's attention on this or that defense, and so on." United States v. Burke, 571 F.3d 1048, 1054 (10th Cir. 2009).

In this case, the remedy available to ensure Crawford's right to due process, fair trial, and effective assistance of counsel was to grant a continuance of trial. As trial counsel noted, the revelation of material six days before trial made her rethink their trial strategy. (Mot. Withdraw Tr. p.8 L.3–15, p.9 L.2–12). The revelation of this information before just days before trial did not allow enough time to fully investigate and effectively use this information at trial. See id.

Moreover, the defense was still trying to locate two witnesses. (Mot. Withdraw Tr. p.13 L.8–9). Additionally, trial counsel had only been handling a substantial case, with over thirty five witnesses and a vast amount of background information, for less than two months. (Mot. Withdraw Tr. p.9 L.24–25) (Order Pursuant Section 815.10) (App. pp. 25–26). She had not had a lot of experience with this type of case before, only handling one other murder previously, and

candidly informed the court she needed more time to prepare. (Mot. Withdraw Tr. p.3 L.15–18, p.8 L.3–15, p.9 L.2–12). The court's denial of the motion to continue the trial violated Crawford's due process rights to a fair trial with effective assistance of counsel.

To any extent the Court determines error was not preserved on the above arguments, trial counsel was ineffective for failing to raise these issues and preserve error. Crawford hereby incorporates the law regarding ineffective assistance of counsel discussed below in Division II.C.4. Counsel has a duty to preserve error and adequately argue the applicable law, and there was no strategic reason for counsel's failure to do so; to the contrary, counsel clearly tried to articulate why she needed more time to adequately prepare Crawford's defense. See State v. Hrbek, 336 N.W.2d 431, 435–36 (Iowa 1983); State v. Hopkins, 576 N.W.2d 374, 378 (Iowa 1998). For the reasons discussed above, counsel's motion for a continuance should have been granted. If counsel had been more specific in her argument or adequately preserved error,

the motion to continue would have been granted. See State v. Leckington, 713 N.W.2d 208, 218 (Iowa 2006) (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)). Crawford was prejudiced by counsel's failure to do so because trial did go forward a mere six days later despite counsel's recognition that she needed more time to adequately prepare. As such, confidence in the outcome is undermined, and Crawford should be afforded a new trial. Gering v. State, 382 N.W.2d 151, 153–54 (Iowa 1986).

D. Conclusion: The Defendant–Appellant William E. Crawford respectfully requests the Court vacate his conviction and remand to the district court for a new trial.

II. THE DEFENDANT WAS PREJUDICED BY THE ADMISSION OF IMPERMISSIBLE EVIDENCE CONTAINED IN EXHIBIT 74.

A. Preservation of Error: Prior to its introduction, Crawford objected to several portions of the exhibit that contained his interview with law enforcement officers. (Trial Tr. vol.3 p.714 L.10–p.723 L.23). Crawford argued the officers' statements about other individuals' statements were not

relevant, hearsay, and prejudicial, and indicated it was inappropriate to let in evidence of a person's statements that did not testify at the trial. (Trial Tr. vol.3 p.714 L.10–p.723 L.23). After hearing argument from both parties, the district court denied the motions regarding Exhibit 74. (Trial Tr. vol.3 p.749 L.9–p.750 L.4). Therefore, error was preserved by timely objections and the district court's adverse rulings.

To the extent the claimed errors were not properly preserved for any reason, Crawford respectfully requests this issue be considered under the Court's familiar ineffective-assistance-of-counsel framework. See Tobin, 333 N.W.2d at 844.

B. Standard of Review: Appellate courts review challenges to the admission of evidence for an abuse of discretion. State v. Martin, 704 N.W.2d 665, 671 (Iowa 2005) (citations omitted).

Because they involve constitutional rights, the Court reviews claims of ineffective assistance of counsel and violations of the confrontation clause de novo. Clay, 824

N.W.2d at 494 (citing Brubaker, 805 N.W.2d at 171); State v. Brown, 656 N.W.2d 355, 361 (Iowa 2003) (citing State v. Tangie, 616 N.W.2d 564, 568 (Iowa 2000)).

C. Discussion: Before its admission, Crawford objected to several statements and questions the law enforcement officers made to Crawford during their interview, in Exhibit 74. In the interview, the officers stated that a lot people in the park witnessed the incident and positively identified Crawford. (Ex. 74 02:21–02:12, 09:28–09:32). When Crawford denied being at the park, they asked why all the people that picked him out of a lineup would lie. (Ex. 74 09:26–09:40). The officers also mentioned twice that Parks, Gavin, Jonah had witnessed the assault, identified Crawford as the assailant, and stated Crawford "did the main damage." (Ex. 74 10:03–10:44, 12:39–13:00).

The district court erred in permitting the State to introduce such evidence at trial over Crawford's objections. The statements regarding the lineups and what others had told law enforcement 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. They also improperly commented on the witnesses' credibility. Additionally, because the statements were testimonial, their admission at trial violated Crawford's constitutional rights under the confrontation clause. Lastly, if the Court determines these issues were not properly preserved, trial counsel was ineffective.

1. Several of law enforcement's statements in Exhibit 74 were impermissible hearsay, inappropriate, and constituted an improper opinion on witnesses' credibility. Alternatively, even if admissible under a nonhearsay purpose, these statements should have been excluded under Rule 5.403.

The Iowa Rules of Evidence define hearsay as an out-of-court statement offered into evidence to prove the truth of the matter asserted. Iowa R. Evid. 5.801(c) (2017). Hearsay statements are not admissible unless they fall within a recognized exception as permitted by the Iowa Constitution, a

statute, or a rule. Iowa R. Evid. 5.802 (2017). Whether a statement is hearsay is determined by the purpose of the offered testimony. State v. Horn, 282 N.W.2d 717, 724 (Iowa 1979). The State, as the proponent of the hearsay, has the burden of proving it falls within an exception to the hearsay rule. State v. Cagley, 638 N.W.2d 678, 681 (Iowa 2001).

"A statement is defined under our rules of evidence as '(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.'" State v. Dullard, 668 N.W.2d 585, 590 (Iowa 2003) (quoting Iowa R. Evid. 5.801). The term assertion "is generally recognized to be a statement of fact or belief." Id.

As outlined above, the detectives discussed several other people's statements and identifications, and they made impermissible comments about the credibility of other alleged witnesses and what evidence the jury and judge should weigh throughout the interview. Such statements should have been excluded because they were not admissible for a valid nonhearsay purpose. See State v. Huser, 894 N.W.2d 472,

496–97 (Iowa 2017) (finding the State introduced impermissible hearsay evidence through questioning tactics that did not elicit any direct statements); see also United States v. Kenyon, 481 F.3d 1054, 1065 (8th Cir. 2007) (citation omitted) (noting that statements can be hearsay without the listener hearing the exact words if the substance of the statement was conveyed).

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 . . . ." See Iowa R. Evid. 5.403 (2015); 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). When applying the 5.403 balancing test, the court should examine the following factors:

> (1) the need for the proffered evidence "in view of the issues and other available evidence," (2) whether there is clear proof it occurred, (3) the "strength or weakness of the prior-acts evidence in supporting the issue sought to be prove[d]," and (4) the degree to which the evidence would improperly influence the jury.

State v. Webster, 865 N.W.2d 223, 243 (Iowa 2015) (quoting Martin, 704 N.W.2d at 672).

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); State v. Cordova, 51 P.3d 449, 455 (Idaho Ct. App. 2002) ("Although we agree . . . that the tactics employed in Cordova's interrogation are acceptable interrogation tactics, we do not agree that certain comments, which may be permissible for purposes of interrogating a defendant, are also admissible in court for consideration by the jury."). The court failed to do so. Allowing the interrogation of Crawford to be entered into

evidence when it still contained otherwise inadmissible statements by law enforcement agents is problematic. This method 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 rehabilitate impeached witnesses. Id.

The video contains several portions where the officers hammer Crawford on his story and how many other people have identified him as the person who inflicted the "main damage" on Nunn. Thus, it appears the main purpose of introducing these portions of the exhibit was to show Crawford was a liar, was less credible than the State's witnesses, and was the person who had killed Nunn because he had been identified by multiple people as doing most of the damage to Nunn. "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, the officers' statements regarding the credibility of other witnesses, and therefore implicitly regarding Crawford's own credibility, should not have been admissible. But see State v. Enderle, 745 N.W.2d 438, 442–443 (Iowa 2007) (finding defendant failed to show he was prejudiced or the police's comments were impermissible as to his credibility).

In addition, several of the statements were unnecessary for purpose of providing context Crawford's answers as he simply listened to a substantial amount of the detectives' statements or just denied he knew what had happened. See State v. Davis, No. 13–1099, 2014 WL 5243343, at *6 (Iowa Ct. App. Oct. 15, 2014) (unpublished table decision) (quoting People v. Musser, 835 N.W.2d 319, 333 (Mich. 2013)). Many of the objectionable statements of the detectives could have been redacted without harming any probative value of Crawford's statements. See id. at 328–333.

The admission of the video also improperly bolstered the State's witnesses. The officers mentioned they have lots of witnesses that were playing Pokémon Go, plus Parks, Gavin, and Jonah. Both Parks and Gavin Whitmore[1] did testify at trial. However, the officers' comments also suggest that the officers spoke with other people that did not testify as trial; for example, Jonah and the people playing Pokémon Go that identified Crawford as the perpetrator. Thus, the officers' statements regarding what other people were saying had the appearance of both bolstering the witnesses that did testify by providing a possible prior consistent statement and providing the jury with the belief that other witnesses who did not testify at trial corroborated the trial testimony of the witnesses that did testify, like Parks and Whitmore. 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.'" Davis,

[1] This assumes the man named Gavin that officers mention in the exhibit is in fact Gavin Whitmore.

2014 WL 5243343, at *6 (quoting State v. Huston, 825 N.W.2d 531, 537–38 (Iowa 2013)).

As far as the detectives talked about witnesses they talked with that did not testify at trial, trial counsel was unable to cross examine any of these alleged witnesses and none of these statements would have been admissible if the officers had merely tried to testify to them on the stand. Furthermore, the admission of the statements in this form cannot be cured by cross-examination. Defense counsel is placed in a precarious position of being unable to effectively cross-examine the officers about the statements made during the interrogation regarding the information they received from non-testifying witnesses. Counsel is unable to ask the detectives whether those witnesses actually told the police that information because if they did, counsel has just admitted damaging, otherwise inadmissible evidence against their client.

The district court should have sustained Crawford's objections to the evidence because it is inadmissible hearsay,

the record indicates the lack of a nonhearsay purpose, and the record indicates the State entered the interview into evidence for otherwise inadmissible purposes. Alternatively, even assuming they had a proper nonhearsay purpose, the court should have prohibited the statements because any probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury and the statements constituted an improper comment on the State's witnesses.

2. The admission of the detectives' statements regarding witnesses that did not testify at trial violated the defendant's rights under the federal and state constitutions.

The Sixth Amendment to the U.S. Constitution and Article I, section 10 of the Iowa Constitution both afford criminal defendants the right to confront witnesses. U.S. Const. amend. VI; Iowa Const. art. I, § 10. Statements made to police officers during an investigation are testimonial in nature. See Crawford v. Washington, 541 U.S. 36, 52–53, 68 (2004). Thus, where hearsay is testimonial, its admissibility

depends not only on the rules of evidence but also on the confrontation clause. See id. at 68.

Pursuant to the confrontation clause, testimonial statements of witnesses absent from trial may be admitted only where (a) the declarant is unavailable and (b) the defendant has had a prior opportunity to cross-examine the declarant. Id. at 59–68. When a defendant challenges the admissibility of a hearsay statement under the confrontation clause, the burden of establishing compliance with the constitutional standard lies with the State. See State v. Bentley, 739 N.W.2d 296, 298 (Iowa 2007).

Here, there was no showing that Jonah or any of the Pokémon Go players were unavailable to testify at Crawford's trial. Nor was there any showing that Crawford had any opportunity to cross examine the declarants that provided the police with consistent stories but did not testify at trial. Thus, the State failed to show the statements did not violate Crawford's rights under the confrontation clauses. See id. Thus, the court should have excluded the detectives'

statements regarding other witnesses, who did not appear at trial, gave the police consistent information, had no reason to lie, and gave information inconsistent with what Crawford told the detectives as violating Crawford's constitutional rights.

3. The admission of the challenged evidence prejudiced the Defendant and was not harmless error.

Evidence inadmissible under Iowa Rule 4.303 requires reversal when it appears because of the improperly admitted evidence the defendant has "suffered a miscarriage of justice or had his rights injuriously affected." State v. Moorehead, 699 N.W.2d 667, 672 (Iowa 2005). Prejudice is presumed unless the record affirmatively establishes otherwise. Id. at 673. However, the erroneous admission of evidence in violation of the confrontation clause is subject to a harmless-error analysis. See State v. Kennedy, 846 N.W.2d 517 (Iowa 2014). "To establish harmless error when a defendant's constitutional rights have been violated, the State must prove beyond a reasonable doubt that the error complained of did

not contribute to the verdict obtained." State v. Cox, 781 N.W.2d 757, 771 (Iowa 2010) (citation omitted).

Under either of these standards, Crawford is entitled to relief for the admission of the improper evidence. For the reasons discussed above, the evidence of the officers' comments on listed State witnesses' credibility, and therefore Crawford's, and other unlisted witnesses' statements implicating Crawford was extremely prejudicial to the fairness of Crawford's trial. The hearsay evidence at issue was not cumulative and was offered for the purpose of introducing impermissible vouching for State's witnesses before the jury. The evidence provided prior consistent statements for some witnesses and bolstered their credibility by insinuating others who did not testify at trial also corroborated their testimony. It also suggested that Crawford was solely involved and was the perpetrator that "did the main damage" to Nunn. In addition, the use of these ex parte examinations as evidence against Crawford is primary evil the confrontation clauses are concerned with. See Bentley, 739 N.W.2d at 298.

Because of the prejudicial effect the detectives' statements in the interview, it was unreasonable for the district court to admit these statements into evidence. Thus, the district court erred in admitting this evidence and abused its discretion. See Rodriguez, 636 N.W.2d at 239 (quoting Maghee, 573 N.W.2d at 5. Crawford's rights were injuriously affected and the record does not affirmatively establish he was not prejudiced by the evidence's admission; the error was not harmless. The Court should find a new trial is warranted.

4. Trial counsel was ineffective if the Court determines any error was not preserved.

A criminal defendant is entitled to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 10 of the Iowa Constitution. See U.S. Const. amend. VI, XIV; Iowa Const. art. I, § 10. If counsel fails to provide professionally competent service or assistance, the defendant's right to counsel is violated. State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987). To establish a claim of ineffective assistance of counsel, a

defendant must demonstrate, by a preponderance of the evidence, that (1) trial counsel failed to perform an essential duty; and (2) counsel's failure resulted in prejudice to the defendant. State v. Ortiz, 789 N.W.2d 761, 764 (Iowa 2010) (citations omitted). Ultimately, the main concern is with the "'fundamental fairness of the proceeding whose result is being challenged.'" Risdal, 404 N.W.2d at 131 (quoting Strickland, 466 U.S. at 696 (1984).

To any extent the Court determines error was not preserved on the above arguments, trial counsel was ineffective for failing to raise these issues and preserve error. Counsel has a duty to preserve error, and there was no strategic reason for counsel's failure to do so; rather, it is clear that counsel attempted to properly attack the impermissible evidence. See Hrbek, 336 N.W.2d at 435–36; Hopkins, 576 N.W.2d at 378. For the reasons discussed above, such objections were meritorious, counsel had a duty to preserve error on the objections, and Crawford was prejudiced by counsel's failure to do so. Because confidence in the outcome

is undermined, Crawford is entitled to a new trial. See Gering, 382 N.W.2d at 153–54.

D. Conclusion: The Defendant–Appellant William E. Crawford respectfully requests the Court vacate his conviction and remand to the district court for a new trial.

III. 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); see also 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:

> . . . Defendant is advised as follows regarding his right to Court-Appointed Appellate Counsel: . . . If you qualify for court-appointed counsel, then you can be court-appointed 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. You may request a hearing on your reasonable ability to pay court-appointed appellate attorney fees within 30 days of the issuance of the procedendo following the appeal. *If you do not file a request for a hearing on the issue of your reasonable ability to pay court-appointed appellate attorney fees, the fees approved by the State Public Defender will be assessed in full to you.*

(Sentencing Order) (App. pp. 45–46) (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 Crawford 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. 45–46) ("If you do not file a request for a hearing on the issue of your reasonable ability to pay court appointed appellate attorney fees, the fees approved by the State Public Defender *will* be assessed in full to you.") (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 Crawford's reasonable ability to pay those fees.

Therefore, for the reasons above, the portion of Crawford'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.

C. Conclusion: The portion of Defendant-Appellant William E. Crawford'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. 45–46) ("If you do not file a

request for a hearing on the issue of your reasonable ability to pay court-appointed appellate attorney fees, the fees approved by the State Public Defender will be assessed in full to you.").

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 $ 10.05, and that amount has been paid in full by the Office of the Appellate Defender.

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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) because:

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