IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-1640

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WILLIAM E. CRAWFORD,
Defendant-Appellant.

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

APPELLEE'S BRIEF

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FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Code

State Rules

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the District Court Abused its Discretion in Denying Crawford a Continuance.

Authorities

Ennenga v. State, 812 N.W.2d 696 (Iowa 2012)
In re Orcutt, 173 N.W.2d 66 (Iowa 1969)
Linge v. Ralston Purina Co., 293 N.W.2d 191 (Iowa 1980)
Osborn v. State, 573 N.W.2d 917 (Iowa 1998)
State v. Artzer, 609 N.W.2d 526 (Iowa 2000)
State v. Carroll, 767 N.W.2d 638 (Iowa 2009)
State v. Casady, 597 N.W.2d 801 (Iowa 1999)
State v. Clark, 814 N.W.2d 551 (Iowa 2012)
State v. Henderson, 537 N.W.2d 763 (Iowa 1995)
State v. Johnson, 219 N.W.2d 690 (Iowa 1974)
State v. Lopez, 633 N.W.2d 774 (Iowa 2001)
State v. Manna, 534 N.W.2d 642 (Iowa 1995)
State v. Myers, 79 N.W.2d 382 (Iowa 1956)
State v. Ondayog, 722 N.W.2d 778 (Iowa 2006)
State v. Pell, 119 N.W.2d 154 (Iowa 1909)
State v. Piper, 663 N.W.2d 894 (Iowa 2003)
State v. Rusega, 619 N.W.2d 377 (Iowa 2000)
State v. Teeters, 487 N.W.2d 346 (Iowa 1992)
State v. Webb, 309 N.W.2d 404 (Iowa 1981)
State v. Yates, 243 N.W.2d 645 (Iowa 1976)
Iowa R. Crim. P. 8.1(2)
Iowa R. Crim P. 2.9(2)

II. Whether the District Court Abused its Discretion in Admitting a Video of Crawford's Police Interrogation.

Authorities

Sullivan v. Louisiana, 508 U.S. 275 (1993)
Bowman v. State, 710 N.W.2d 200 (Iowa 2006)
Dubria v. Smith, 224 N.W.2d 995 (9th Cir. 2000)
Ennenga v. State, 812 N.W.2d 696 (Iowa 2012)
Lanham v. Commonwealth, 171 S.W.3d 14 (Ky. 2005)

Odeh v. State, 82 So.3d 915 (Fl. Dist. Ct. App. 2011)
State v. Boggs, 185 P.3d 111 (Ariz. 2008)
State v. Bridges, No. 16-1366, 2017 WL 6034627 (Iowa Ct. App. Dec. 6, 2017)
State v. Brown, 656 N.W.2d 355 (Iowa 2003)
State v. Carroll, 767 N.W.2d 638 (Iowa 2009)
State v. Casady, 597 N.W.2d 801 (Iowa 1999)
State v. Elliott, 806 N.W.2d 660 (Iowa 2011)
State v. Enderle, 745 N.W.2d 438 (Iowa 2007)
State v. Esse, No. 03–1739, 2005 WL 2367779 (Iowa Ct. App. Sept. 28, 2005)
State v. Farni, 325 N.W.2d 107 (Iowa 1982)
State v. Hilleshiem, 305 N.W.2d 710 (Iowa 1981)
State v. Huser, 894 N.W.2d 472 (Iowa 2017)
State v. McKettrick, 480 N.W.2d 52 (Iowa 1992)
State v. Newell, 710 N.W.2d 6 (Iowa 2006)
State v. Ondayog, 722 N.W.2d 778 (Iowa 2006)
State v. Plaster, 424 N.W.2d 226 (Iowa 1988)
State v. Putman, 848 N.W.2d 1 (Iowa 2014)
State v. Rodriquez, 636 N.W.2d 234 (Iowa 2001)
State v. Schaer, 757 N.W.2d 630 (Iowa 2008)
State v. Sowder, 394 N.W.2d 368 (Iowa 1986)
State v. Taylor, 689 N.W.2d 116 (Iowa 2004)
State v. Watson, 242 N.W.2d 702 (Iowa 1976)
State v. Webb, 309 N.W.2d 404 (Iowa 1981)
State v. Whitfield, 315 N.W.2d 753 (Iowa 1982)
Iowa R. Evid. 5.401
Iowa R. Evid. 5.402

III. Whether the District Court Abused its Discretion in Ordering Crawford to Demonstrate his Reasonable Ability to Pay Appellate Attorney Fees.

Authorities

Goodrich v. State, 608 N.W.2d 774 (Iowa 2000)
State v. Coleman, 907 N.W.2d 124 (Iowa 2018)
State v. Dudley, 766 N.W.2d 606 (Iowa 2009)
State v. Haines, 360 N.W.2d 791 (Iowa 1985)
State v. Jackson, 601 N.W.2d 354 (Iowa 1999)
State v. Klawonn, 688 N.W.2d 271 (Iowa 2004)
State v. Reed, No. 16–1703, 2017 WL 2183751 (Iowa Ct. App. May 17, 2017)
State v. Schaer, 757 N.W.2d 630 (Iowa 2008)
State v. Swartz, 601 N.W.2d 348 (Iowa 1999)
Worthington v. Kenkel, 684 N.W.2d 228 (Iowa 2004)
Iowa Code § 910.7

ROUTING STATEMENT

This case can be decided based on existing legal principles. Iowa courts have previously reviewed denials of continuance requests, the admissibility of recordings containing police officer's accusatory statements, and the means by which Iowa courts may impose appellate attorney's fees. *See State v. Clark*, 814 N.W.2d 551, 560 (Iowa 2012); *State v. Enderle*, 745 N.W.2d 438, 442–43 (Iowa 2007); *and State v. Coleman*, 907 N.W.2d 124, 134 (Iowa 2018). Transfer to the Iowa Court of Appeals is appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

Following a trial to the jury, William Crawford was convicted of second degree murder in violation of Iowa Code sections 707.1 and 707.3. On appeal, he alleges the district court abused its discretion in denying him a continuance a week prior to trial, abused its discretion in admitting a video exhibit of his interrogation, and erroneously required he pay appellate attorneys' fees without determining he possesses a reasonable ability to pay the same. The Honorable Thomas Reidel presided over trial.

Course of Proceedings

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

Facts

In the evening of August 18, 2016, William Crawford was socializing at a pavilion in LeClaire Park in Davenport, Iowa. Trial Tr. p.415 line 1–p.416 line 13. Others including Durell Parks, Gavin Whitmore, Jonah Jones, and Fred Carter were present. Trial Tr. p.676 line 25–p.677 line 11. Crawford had been drinking and playing chess. Trial Tr. p.586 line 22–p.587 line 3. His girlfriend, Amanda Baker, arrived and "all hell broke loose." Trial Tr. p.415 line 25–p.417 line 18.

At approximately 8 p.m., Romane Nunn drove his green Saturn car to the park. Trial Tr. p.371 line 3–p.5; p.416 line 24–p.417 line 16; p.679 line 4–13. Nunn, like many others in the park, was playing the popular new game "Pokèmon Go" and speaking with fellow enthusiast Jason VanKeulen. Trial Tr. p.372 line 13–18; p.370 line 1–13.

After Nunn arrived, Baker "stood up and backed up" as though she was "in a state of shock." Trial Tr. p.587 line 4–25. She had been

assaulted the night before and believed Nunn was the man who attacked her. Baker told Crawford about her belief and he left the pavilion to approach Nunn. Trial Tr. p.415 line 25–p.418 line 25; p.587 line 11–20; p.424 line 11–p.426 line 20.

As Nunn and VanKeulen were speaking Crawford quickly approached, calling out to "Mr. Romane." Trial Tr. p.357 line 1–7; p.374 line 1–19. Based on Crawford's approach and the sound of his voice, VanKeulen knew Crawford was angry and that "nothing good is going to come from this." Trial Tr. p.373 line 16–p.376 line 11. Upon reaching Nunn, Crawford accused him of raping Baker. Trial Tr. p.376 line 9–15. When Nunn denied the accusation, Crawford "ripped his backpack off and whipped out a knife" and began swinging. Trial Tr. p.376 line 16–p.377 line 3; p.390 line 14–22. Nunn jumped back, dropping a bag of chips he was eating. Trial Tr. p.377 line 4–12. Crawford "lunged" and stabbed Nunn in the chest. Trial Tr. p.377 line 21–p.378 line 20; p.419 line 18–23. Nunn collapsed, rose once and then fell and did not rise again. Trial Tr. p.419 line 18–23. Then Crawford kicked him twice in the head "like a soccer ball." Trial Tr. p.378 line 19–23. Two other men, Bloch and Parks, joined in assaulting the mortally wounded Nunn as onlookers watched. Trial

Tr. p.379 line 2–15; p.389 line 1–p.390 line 8; p.421 line 4–10; p.681 line 4–18; p.738 line 2–23.

Afterwards, Crawford returned to the pavilion and announced "I think I killed him." Trial Tr. p. 421 line 11–21. Then he left. Trial Tr. p. 421 line 22–p.421 line 6. Minutes later, Carter encountered Crawford and Bloch. Trial Tr. p.661 line 14–p.665 line 16. As they met, Crawford announced "Folks, I think I killed that nigga, folks." Trial Tr. p.665 line 17–21. He then threw his knife in the river. Trial Tr. p.665 line 21–p.666 line 8.

After leaving the park, Crawford went to 1518 Brady Street and changed clothes. Trial Tr. p.788 line 22–p.789 line 23. Then he went to a birthday party. Trial Tr. p.789 line 4–8. He was arrested at approximately 3:44 a.m. as he walked home. Trial Tr. p.789 line 24–p.790 line 12; p.727 line 2–p.729 line 2.

In his initial interview with police, Crawford waived his *Miranda* rights and agreed to speak with police. During the interview he casually denied being at the park and insinuated that Baker or "Frankie," Baker's "baby dad," had done something to Nunn. Exh. 74 01:30–2:20; 06:45–07:04; 03:40–04:00; 05:30–06:10; 06:15–06:45; 09:49–10:40. He was unfazed by the detective's suggestions

that he had been identified by multiple persons as Nunn's assailant. Exh. 74 02:10–03:00; 12:37–13:13. Throughout the interview Crawford responded to the detective's direct questions about his involvement with shrugs, smiles, and laughs. Exh. 74 03:10–03:40; 07:25–07:45; 08:25–08:45; 09:00–09:20; 12:20–12:37; 13:41–14:10; 17:30–17:50; 19:20–35.

Although he was unforthcoming during his initial interview with police, his subsequent conversations with Baker over recorded jail lines were highly incriminating. Exhs. 69A, 69B. In Crawford's own words, he admitted his responsibility for Nunn's death: "I did it, but I don't deserve life." Exh. 69B 5:45–5:55. Crawford offered multiple reasons why he believed he was less culpable for the crime. Trial Exh. 69A 2:09–2:33; 5:48–6:10; 7:00–7:25; 7:50–8:15; Exh. 69B 2:10–2:40; 4:15–5:35; 5:45–6:15; 8:10–9:25. And Baker corroborated these statements, adding "I'm gonna go spit on where my baby stabbed him at." Exh. 69B 5:15–5:20; 5:45–6:15; 07:40–07:50.

The medical evidence was undisputed at trial. Nunn had been stabbed to death, with the wound perforating the right ventricle of his heart. p.520 line 17–p.522 line 22; p.525 line 3–p.526 line 17; Trial

Exhs. 49, 51, 52; Exh. App. 9–11. The medical examiner opined that the sole cause of death was this stab wound. Trial Tr. p.524 line 6–p.527 line 24.

Trial evidence also established that Nunn had not assaulted Amanda Baker. Rather, she had been assaulted by an individual named Travis Jones. Trial Tr. p.452 line 11–p.453 line 3. Surveillance footage from Bolt Motors revealed Jones drove a silver 1998 Chrysler New Yorker, not a Green Saturn. Trial Tr. p.451 line 20–p.452 line 5; Exhs. 72A, 72B; Exh. App. 12–13. Baker had incorrectly identified Nunn as her assailant and later admitted she had done so. Trial Tr. p.553 line 21–p.557 line 13; p.581 line 2–p.582 line 8; p.586 line 2–9. The State addresses additional facts below as necessary.

ARGUMENT

I. The District Court did Correctly Denied Crawford's Request for a Continuance.

Preservation of Error

On appeal, Crawford urges the district court abused its discretion when it denied him a continuance. Appellant's Br. 40–48. He suggests the district court's decision denied him his rights to due process, fair trial, and effective assistance of counsel. Appellant's Br. 48–51. The State agrees that the abuse of discretion issue was

preserved by Crawford's oral motion for continuance and the district court's ruling denying the request.

But the constitutional concerns Crawford presents were not preserved. The district court was not apprised that proceeding would result in a deprivation of these rights. "Our preservation rule requires that issues must be presented to and passed upon by the district court before they can be raised and decided on appeal." *State v. Manna*, 534 N.W.2d 642, 644–45 (Iowa 1995). This requirement includes constitutional issues. *See State v. Yates*, 243 N.W.2d 645, 650 (Iowa 1976). Anticipating this concern, Crawford urges this Court review the question through the lens of ineffective assistance of counsel. Appellant's Br. 51–52.

This Court should not conclude the district court erred in denying the motion to continue on a ground not presented. *See Linge v. Ralston Purina Co.*, 293 N.W.2d 191, 195 (Iowa 1980) ("A trial court may not be put in error unless the issue was presented for ruling, and the failure to obtain a ruling is inexcusable unless the court refuses or fails to rule after a ruling is requested."). Because error was not preserved, this Court need not reach the constitutional variant of Crawford's claim.

Standard of Review

Iowa courts generally review a denial of a continuance for abuse of discretion. *See State v. Clark*, 814 N.W.2d 551, 560 (Iowa 2012). This Court will not find an abuse of discretion "unless the defendant shows that the trial court's discretion was exercised on grounds clearly untenable or clearly unreasonable." *State v. Henderson*, 537 N.W.2d 763, 766 (Iowa 1995). "An 'untenable' reason is one that lacks substantial evidentiary support or rests on an erroneous application of the law." *State v. Piper*, 663 N.W.2d 894, 901 (Iowa 2003) overruled on other grounds by *State v. Hanes*, 790 N.W.2d 545, 551 (Iowa 2010). Where the defendant argues that denial of the motion violates his constitutional right to due process, review is de novo. *Clark*, 814 N.W.2d at 560.

Claims of ineffective assistance are reviewed de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012).

Merits

Crawford urges that the district court's decision denied him a continuance was an abuse of discretion and additionally denied him the right to present a defense. The State addresses these variants in turn.

A. Crawford Failed to Articulate Good Cause for a Continuance; the District Court did not Abuse its Discretion.

Iowa Rule of Criminal Procedure 2.9(2) provides the "date assigned for trial shall be considered firm. Motions for continuance are discouraged. A motion for continuance shall not be granted except upon a showing of good and compelling cause." In reviewing the standard under this rule, the Iowa Supreme Court has observed the "decision to grant or deny a motion for continuance rests in the sound discretion of the trial judge. It will not be disturbed on appeal unless an injustice has resulted." *Clark*, 814 N.W.2d at 560 (quoting *State v. Artzer*, 609 N.W.2d 526, 529 (Iowa 2000); *see also State v. Johnson*, 219 N.W.2d 690, 697 (Iowa 1974) ("[I]t is largely within the trial court's discretion to grant or refuse to grant a continuance on the ground of surprise."). Crawford is required to make a specific showing of how the district court's denial prejudiced a substantial right. *See Clark*, 814 N.W.2d 566–67; *State v. Webb*, 309 N.W.2d 404, 413 (Iowa 1981) (finding defendant did not "demonstrate prejudice to a substantial right" where he alleged only "bare assertions" about knowledge that could be uncovered by deposing certain witnesses).

The propriety of a continuance decision is highly contextual. Given its "closer vantage point," the district court is better situated to discern whether a continuance is truly necessary. *State v. Teeters*, 487 N.W.2d 346, 348 (Iowa 1992). While many continuances are sought on legitimate grounds, "[i]t is far from unknown, on the other hand, for continuance motions to serve as a mere delaying tactic." *Id.* Iowa's appellate courts have respected this considerable discretion for more than a century. *See State v. Myers*, 79 N.W.2d 382, 386 (Iowa 1956); *State v. Pell*, 119 N.W.2d 154, 157 (Iowa 1909). Even if the appellate court *would* have granted a continuance under similar circumstances, this is insufficient grounds to reverse: "While we might not have made the same call had the decision been ours, we cannot say it was an abuse of discretion." *Clark*, 814 N.W.2d at 564.

In its most recent consideration of the issue, the Iowa Supreme Court examined a district court's decision to deny a continuance where days before trial the State first produced an unredacted email from a sexual assault victim to his family discussing the victim's mental illness and his dislike of the structured school where he had been placed. *Id.* at 562. The supreme court noted the e-mail was "undoubtedly an important document and one that the prosecution

had a duty to provide to the defense." *Id.* Even so, it concluded the district court did not abuse its discretion in denying Clark's continuance request because Clark's reasons for the request were vague. *Id.* at 564–66. The court also noted the information "did not change the complexion of the case such that further investigation and preparation time was needed." *Id.* That logic is equally apposite here.

Counsel's request for a continuance was a fallback request; she was attempting to withdraw from the case altogether. Withdrawal Hearing Tr. p.8 line 16–p.9 line 1. But the reasons for withdrawal—and accordingly, continuance—were inadequate. In preparing for trial, Crawford had deposed the State's witnesses. Withdrawal Hearing Tr. p.6 line 23–p.7 line 20. However, a deposition of a witness believed to be favorable to the defense went poorly:

> A witness who was mine, my best witness, didn't turn out that way at all. I mean, it couldn't be further from what I thought, and it did kind of throw me. . . . In fact, it really did create an issue for me that kind of made me step back a few feet and like, okay, what are we going to do?

Withdrawal Hearing Tr. p.7 line 24–p.9 line 18.

But an outline of the witnesses' testimony had already been provided in the minutes of testimony. Withdrawal Hearing Tr. p.9

line 14–17. In fact that at the time of the hearing, the State had provided over 100 pages of anticipated testimony. *See generally* 9/23/2016 Additional Minutes 1 (85 pages); 10/20/2016 Additional Minutes 2 (13 pages); 10/20/2016 Additional Minutes 3 (38 pages); 11/21/2016 Additional Minutes 4 (9 pages); 2/14/2017 Additional Minutes 5 (48 pages); 2/14/2017 Additional Minutes 6 (9 pages); 3/1/2017 Additional Minutes; 3/21/2017 Additional Minutes (3 pages); 4/4/2017 Additional Minutes 8 (6 pages); 4/11/2017 Additional Minutes 9; 4/17/2017 Additional Minutes 10; 8/7/2017 Additional Minutes 11 (5 pages); 8/9/2017 Additional Minutes 12 (8 pages); 8/10/2017 Additional Minutes 13. Crawford had a clear idea of what the State's evidence would establish.

Lead counsel indicated she would have been ready to proceed but for the deposition witness's "unexpected" statements. Withdrawal Hearing Tr. p.9 line 2–12. And trial remained a little less than a week away, with lead counsel's time completely reserved for trial preparation. Withdrawal Hearing Tr. p.8 line 22–23. Even if counsel needed to modify her trial strategy, this was sufficient time to retrofit preexisting defense materials to a new strategy. *See Clark*, 814 N.W.2d at 562 (noting that Clark's attorney received the revelatory e-

mail a few days before trial and did not "dramatically change the direction of the case").

Nor was Crawford's claim that he needed additional time to discover the identity and subpoena a man named "Florida" and his girlfriend entitled to weight. Crawford was aware of the need to find "Florida" for almost a year as trial loomed. His prior counsel had already obtained a four month continuance. 3/23/2017 Motion for Continuance; 3/27/2017 Order for Continuance; App. 11–12; 15–16. Crawford was actively communicating with people outside the jail, independent of counsel. *See* Trial Exh. 69A, 69B, 70. His failure to bring the matter to counsel's attention earlier does not render the district court's decision an abuse of discretion. *See State v. Rusega*, 619 N.W.2d 377, 384 (Iowa 2000) (finding no abuse of discretion where defendant alleged an inability to "find and depose essential character witnesses;" defendant could not name the witnesses he wished to depose or disclose their whereabouts).

Nor was "Florida" an essential part of the defense strategy. The defense list of witnesses was less than clear what "Florida" would have testified to: "Witness will testify that he is familiar with the Defendant and will testify generally about how he knows the

Defendant. The witness has personal knowledge of the Pavillion area of LeClaire Park, people who frequent the Pavilion and was present at the Pavilion on the date in question." 8/11/2017 Notice of Defense Witnesses; App. 29. In fact, the sole reference to "Florida" at trial was within the following passage:

> Q. Who did you play chess with that day?
>
> A. A couple of older guys, a guy by the name of Florida. I don't know his real—well, his real name is Sam. He's been in the area maybe five years now.
>
> Q. Okay. And what happened after that?
>
> A. As the night went on, we sat—we played a lot of games. People would just come in and out. People would walk their dogs. I used to take my dog down there a lot, but I didn't take my dog that day.
>
> Doing nothing, really. We just—we play chess.

Trial Tr. p.779 line 4–13.

Additionally, there was reason to believe that Crawford wished to use the motion for new counsel and the continuance as a means to delay his trial. As counsel noted, prior to the motion to withdraw the attorney-client relationship had been amicable. Withdraw Tr. p.7 line 21–24. Crawford claimed his attorney was not prepared; but Crawford was partially responsible for counsel's preparedness:

> It's not really her fault. She can't possibly be prepared. The woman coming in, she's ripping and running in, she's asking me, Well what's going on? I can only give her so much. I'm very limited on who—the people I need to bring in. There's just so many things. I mean, too many things, Your Honor.
>
> There's people who were still there at the pavilion that I need somehow to bring these people in. I know nicknames. I don't really know their full names. For instance, this guy from Florida, very important guy, him and his girlfriend came down on that certain day to be around me, to play chess, to show me he's doing something better with his life. He's a strong witness of this.
>
> A lot of things that's coming out now, who I had in my defense, I did not see this coming at all. There's no way I would have even brought these people in there to say nothing this bizarre. It's just all a breakdown.
>
> It's not truly her fault, but she had no clue. She cannot possibly—I'm not really trying to get rid of the woman. She's just not ready for this at all.

Withdrawal Hearing tr. p.5 line 9–p.6 line 3. This is not good cause to continue trial. *See generally State v. Lopez*, 633 N.W.2d 774, 779 (Iowa 2001) ("The court should not permit a defendant to manipulate the right to counsel to delay or disrupt the trial.").

Lastly, the detriment to the State for the continuance was not insubstantial. Over thirty witnesses had been scheduled to testify.

Withdrawal Hearing tr. p.9 line 23–p.10 line 7; Trial Tr. p.2–5. Given counsel's time to prepare, the robust nature of the minutes of testimony, the unclear reasons why a continuance was necessary, and the significant scheduling the State's case necessitated, the district court did not abuse its discretion in denying Crawford's request for a continuance.

B. Crawford's Counsel was Effective; the Record does not Support Crawford's Claim the District Court's Decision Denied him his Trial Rights.

If this Court elects to bypass the State's error preservation concern and address the merits of Crawford's due process claim and its ineffective-assistance-of-counsel variant, it will find each version of the claim fails.

To establish counsel was ineffective, Crawford must show (1) his attorney failed to perform an essential duty and (2) prejudice resulted. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2009). This Court presumes counsel is competent until Crawford meets his burden of demonstrating counsel's performance did not meet an objective standard of reasonableness. *State v. Ondayog*, 722 N.W.2d 778, 785 (Iowa 2006).

The due process right to present a defense includes the right to offer the testimony of witnesses and compel their attendance. *See Clark*, 814 N.W.2d at 561 (quoting *Osborn v. State*, 573 N.W.2d 917, 921 (Iowa 1998)). It ensures

> the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.

Id. "Motions to continue are disfavored and are justifiable only upon a 'showing of good and compelling cause.'" *State v. Ruesga*, 619 N.W.2d 377, 384 (Iowa 2000) (quoting then Iowa R. Crim. P. 8.1(2), now Iowa R. Crim. P. 2.9(2)). "The burden rests on the one seeking a continuance to show that substantial justice will be more nearly obtained thereby." *Id.* "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." *In re Orcutt*, 173 N.W.2d 66, 71 (Iowa 1969)

Much of the reasoning why the district court did not abuse its discretion also informs whether its decision denied Crawford his due

process rights. Crawford had the essential information months prior to trial, the "revelation" that a witness's testimony would be adverse to the defense was presaged in the minutes of testimony, and Crawford has never articulated a discrete theory of how "Florida"'s testimony was material to his defense, nor did this witness's supposed observations play a part in Crawford's strategy at trial.

Additionally, there is reason to believe this motion to withdraw was a tactic to delay trial. Crawford had already had one attorney removed. 5/24/2017 Order Granting Withdrawal; 5/11/2017 Report to the Court; 4/17/2017 Pro Se Motion to Appoint New Counsel; App. 17–20; 21–22; 23–24. The record indicates that after trial began, Crawford intended to make an outburst mid-trial with the hopes of causing a mistrial and staving off the jury's verdict. Trial Tr. p.700 line 8–p.702 line 3. The district court's decision to not continue the case further did not deprive Crawford the right to present a defense.

Likewise, Crawford cannot establish that his counsel's failure to raise these claims made the attorney ineffective. Repackaging the reasons given for continuance under a constitutional framing would not have changed the fact that Crawford did not proffer good cause for continuing his trial. Crawford dubiously suggests that this Court's

confidence in the proceeding should be undermined. But for the reasons described in Section II(C)(2) of this brief, overwhelming evidence supported Crawford's conviction, cementing this Court's confidence in the proceedings' outcome.

And Crawford's attorney was prepared. Counsel effectively cross-examined the State's witnesses. Counsel raised objections and attempted to exclude evidence believed harmful to the case. *See generally* Trial Tr. p.13 line 19–p.34 line 11; p.482 line 4–p.483 line 15; p.638 line 15–p.643 line 22; p.714 line 9–p.724 line 4. She strategically—and sensibly—urged that although Crawford may have been responsible for Nunn's death, his conduct did not meet the elements of first-degree murder. Trial Tr. p.841 line 5–22; 859 line 10–p.860 line 17. Her strategy was *successful*. 8/28/2017 Criminal Verdict; App. 43. Crawford articulates no reason why the lack of a continuance should undermine this Court's confidence in the jury's verdict or why a continuance would have led to an even more favorable outcome. Given the present state of the record his conclusory prejudice argument is insufficient. This Court should affirm.

II. The District Court's Cautionary Instruction Prevented Crawford from Suffering any Unfair Prejudice from Exhibit 74.

Preservation of Error

Crawford's claim under this heading is actually three distinct claims. One he properly litigated and preserved, and the latter two he raises for the first time on appeal.

The State does not contest error preservation as to the hearsay issue. The question of whether Detective Thomas made hearsay statements during Crawford's interrogation illustrated in Exhibit 74 was litigated below. Counsel raised the question of whether Thomas's statements contained hearsay. Trial Tr. p.714 line 10– p.724 line 4; p.749 line 9–p.750 line 17; p.761 line 2–18. The district court ultimately rejected Crawford's challenge, accepting the State's argument that Thomas's statements were not being admitted for the truth of the matter asserted, but were relevant because they provided context to Crawford's responses and demeanor within the recording. Trial Tr. p.714 line 10– p.724 line 4; p.749 line 9–p.750 line 17. It rejected Crawford's argument after noting that two of the claimed hearsay comments involved witnesses that had already testified at trial. Trial Tr. p.749 line 16–19. And, as for the third individual who

did not testify at trial, the district court pointed to a proposed limiting instruction as mitigating any potential prejudice. Trial Tr. p.749 line 20–p.750 line 6.

But on appeal, Crawford urges that Thomas's statements were also improper vouching and violated the Confrontation Clause. Appellant's Br. 56–57, 60–61, 63–65. But trial counsel made no reference to impropriety of the statements on vouching grounds or raised a Confrontation Clause concern during the pretrial hearing on the motions in limine or when challenging the contents of the video when it was subsequently offered at trial. Trial Tr. p.13 line 19–p.34 line 11. Nor was the issue raised in any of Crawford's motions in limine and decided by the district court. 8/21/2017 Motion in Limine #3; 8/16/2017 Motion in Limine #2; 3/24/2017 Motion in Limine #1; App. 13, 35–40. The hearsay objection was insufficient to preserve a these latter issues. *See State v. Farni*, 325 N.W.2d 107, 109 (Iowa 1982) (objection that question "calls for hearsay" was too broad to raise Confrontation Clause issue). Realizing this, Crawford brings a formulaic ineffective assistance of counsel variant on any claim not preserved. Appellant's Br. 53, 67–69.

The State addresses the preserved claims first, turning then to Crawford's claim that counsel was ineffective.

Standard of Review

Iowa courts review the admission of hearsay evidence for correction of errors at law. *State v. Huser*, 894 N.W.2d 472, 495 (Iowa 2017). When hearsay is improperly admitted, the district court's error is presumed to be prejudicial unless the State demonstrates the error was harmless. *Id.* (citing *State v. Elliott*, 806 N.W.2d 660, 669 (Iowa 2011)). The State may show improperly admitted evidence was not prejudicial by proving the error was harmless beyond a reasonable doubt. *State v. Sowder*, 394 N.W.2d 368, 372 (Iowa 1986).

Iowa courts review based on the Confrontation Clause de novo. *State v. Newell*, 710 N.W.2d 6, 23 (Iowa 2006). Violations of the Confrontation Clause are also subject to harmless error review. *Id.* at 25 ("[T]he inquiry 'is not whether, in a trial that occurred without the error, a guilty verdict surely would have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.'") (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)).

Iowa courts similarly review claims of ineffective assistance of counsel de novo. *See Ennenga*, 812 N.W.2d at 701.

Merits

At trial, Crawford objected to the State playing portions of State's Exhibit 74. He argued that portions of the statements Detective Thomas made in the recording were substantively false, contained references to Crawford's prior criminal activity, and contained hearsay. Trial Tr. p.714 line 10–p.719 line 6. On appeal, he renews the latter challenge and points to other statements he believes were unfairly prejudicial. He also claims his trial counsel was ineffective for not also raising a Confrontation Clause challenge to the recording. All of these claims fail. The State first addresses whether Thomas's statements during his interview with Crawford were hearsay, why their admission was harmless even if they were hearsay, and finally why Crawford has not established *Strickland* prejudice.

A. Thomas's statements were admissible to give context to Crawford's verbal and assertive non-verbal conduct.

Crawford's preserved challenge targets statements Detective Thomas made during his initial interview. In the interview, Thomas indicated that several persons observed him in a fight with Nunn and

asked Crawford to share his version of what happened. *See generally* Trial Exh. 74. His hearsay challenge fails in multiple respects.

First, Crawford is mistaken the State must establish that Thomas's statements in the recording fall under an exception to the rule excluding hearsay. Appellant's Br. 56. As the State argued at trial, the statements were not hearsay because they are not being admitted as substantive evidence to prove the truth of the content of the declarants' out-of-court statements. Trial Tr. p.720 line 19–p.723 line 22. Instead, they were admitted to provide context for Crawford's non-hearsay answers and recorded physical and emotional responses. *See State v. Bridges*, No. 16-1366, 2017 WL 6034627, at *10–11 (Iowa Ct. App. Dec. 6, 2017) (recording containing detective's statements repeatedly calling the defendant a liar was still admissible because the statements were not testimony and provided context for the defendant's statements); *State v. Esse*, No. 03–1739, 2005 WL 2367779, at *3 (Iowa Ct. App. Sept. 28, 2005) (noting that, when State offered a recording of defendant's admissions made during interview with investigators, "the agents' questions and statements were admissible to place his answers in context")*; see also State v. Hilleshiem*, 305 N.W.2d 710, 712–13 (Iowa 1981) ("Statements of one

party to a conversation may be admitted without regard to their truth or falsity in order to show the context in which admissible statements by another party were made."); *State v. Watson*, 242 N.W.2d 702, 705 (Iowa 1976) ("The statement was not hearsay because it was not intended to prove the truth of any fact. The statement itself had no element of truth or falsity. It could prove nothing except its own utterance."). Such statements contained within a recording are admissible so long as they are relevant. Iowa Rules of Evidence 5.401, 5.402.

Likewise, Iowa courts have rejected challenges that police officers' "derogatory comments on [a defendant's] credibility were unnecessary to provide context" for the individual's responses. *See Enderle*, 745 N.W.2d at 442–43 ("[S]tatements by police officers during interrogations are not 'testimony' given by witnesses at trial and were not offered at trial to impeach the defendant, but to provide context for his responses.").

And Thomas's statements did inform the context surrounding Crawford's conduct on the video. In his brief, Crawford urges the statements were unnecessary because "he simply listened to a substantial amount of the detectives' statements or just denied he

knew what had happened." Appellant's Br. 60. But this is exactly why the officers statements were relevant. In the video, Crawford initially sat casually and declined to respond to the officer's questions as to his activities during the evening. Exh. 74 00:00–01:50. He denied being at the scene and was evasive when asked if he was familiar with that area. Exh. 74 01:30–2:20; 06:45–07:04. When told that he had been positively identified as being in a fight, Crawford simply shrugged it off. Exh. 74 02:10–03:00; 12:37–13:13. Rather than answer the detectives' direct questions, Crawford attempted to change the topic, interchangeably insinuating that Baker or someone named Frankie was responsible for the crime, or that the police were actually interested in a different incident altogether. 03:40–04:00; 05:30–06:10; 06:15–06:45; 09:49–10:40. He denied having done anything and denied the seriousness of his relationship with Baker. Exh. 74 02:55–03:15. Throughout the interview Crawford responds to Thomas's piercing questions with shrugs, smiles, and laughs as though amused. Exh. 74 03:10–03:40; 07:25–07:45; 08:25–08:45; 09:00–09:20; 12:20–12:37; 13:41–14:10; 17:30–17:50; 19:20–35. In fact, he is so unperturbed he begins singing. Exh. 74 11:07–12:15; 14:00–14:24. When told he is being held for the charge of first degree

murder, he maintains his indifferent composure. Without the detectives' statements, the jury would be unable to place Crawford's denials, obfuscations, and general bemusement and mannerisms in their appropriate context. The district court did not abuse its discretion in admitting the exhibit.

B. Crawford was not Prejudiced by Thomas's Statements Because Cumulative Evidence was Already in the Record; any Error from Admitting the Redacted Version of Exhibit 74 was Harmless.

Even if this Court concluded the district court abused its dicretion, reversal is not automatic: "if the State establishes that the error was harmless beyond a reasonable doubt, reversal is not required." *See Newell*, 710 N.W.2d at 25 (citing *State v. Brown*, 656 N.W.2d 355, 361 (Iowa 2003)). The State can readily meet that burden here. First, the cautionary instruction given sharply undermines any claim that the jury improperly used or was prejudicially influenced by the recording. Second, the statements in the recording were cumulative to the eyewitness testimony at trial. Finally, the evidence at trial was overwhelming in establishing Crawford's guilt.

1. The Cautionary Instruction Mitigated the Potential for Unfair Prejudice.

Crawford's brief does not address the most important element in analyzing whether Detective Thomas's statements were unfairly prejudicial. Anticipating Crawford's challenge to the recording, the State agreed the district court should give a cautionary instruction prior to playing the video. Trial Tr. p.720 line 3–24. The district court modified the State's proposed instruction, making explicit the fact that Thomas was not obligated to "be honest" while conducting questioning. Trial Tr. p.749 line 20–p.750 line 4. Immediately prior to viewing the recording the trial court instructed the jury

> you are about to hear evidence of the defendant being interviewed by a police detective. You might find this evidence helpful in your deliberations. However, this evidence is not being admitted to prove the truth of the matters asserted or contained in the questions posed by the detective.
>
> Law enforcement officers are not required to be honest when interrogating witnesses. Those questions, like statements, arguments and comments by the lawyers, are not evidence.

Trial Tr. p.750 line 23–p.751 line 7. Given this thorough cautionary instruction, Crawford's claim of prejudice rings hollow. Cautionary instructions sharply reduce the potential for prejudice. *See State v.*

Putman, 848 N.W.2d 1, 15-16 (Iowa 2014); *see also State v. Plaster*, 424 N.W.2d 226, 232 (Iowa 1988) ("It is only in extreme cases that such an instruction is deemed insufficient to nullify the danger of unfair prejudice."). And Iowa courts presume that juries comply with instructions. *Ondayog*, 722 N.W.2dat 784–85 n.2. Crawford's brief does not address this issue.

And indeed, the jury's verdict strongly suggests it was not unduly prejudiced against him. It convicted him of second-degree murder, not first. 8/28/2017 verdict; *see generally State v. Rodriquez*, 636 N.W.2d 234, 243, 243 n.4 (Iowa 2001) (rejecting notion that jury was roused to "overmastering hostility" based prejudicial bad acts evidence, noting that the jury did not convict of the highest count charged); *see also State v. Taylor*, 689 N.W.2d 116, 130 (Iowa 2004) ("We also note the court acquitted the defendant of the kidnapping charge, an indication the bad-acts evidence did not motivate the fact finder to categorically rule against the defendant."). Because the instruction directly informed the jury that it should not accept Thomas's statements as true, Crawford's claims of prejudice crumble.

2. *Thomas's Statements were Cumulative of Evidence Already in the Record; No Prejudice Resulted from the Jury Hearing the Same Evidence.*

This Court may also affirm because Thomas's accusatory statements were cumulative to the eyewitness testimony in the record. Multiple witnesses testified Crawford approached Nunn aggressively, began an altercation with him, and Nunn collapsed. Trial Tr. p.355 line 16–p.357 line 1; p.360 line 14–24; p.371 line 3–p.376 line 25; p.418 line 12–p.419 line 23; p.420 line 11–18; p.421 line 4–24; p.734 line 18–p.739 line 6. Crawford acknowledged he was responsible for Nunn's death. Trial Tr. p.786 line 3–5. This weighs against any finding of prejudicial error because "substantially the same evidence is in the record without objection." *See State v. McKettrick*, 480 N.W.2d 52, 60 (Iowa 1992).

3. *The Evidence of Crawford's Guilt was Overwhelming.*

The cumulative nature of Thomas's statements dovetails with the fact that overwhelming evidence supported conviction. Any ancillary prejudice that might have resulted from the exhibit's admission was insignificant in the face of the State's case. *See Elliot*, 806 N.W. at 669 n.1 ("Another way to show the tainted evidence did

not affect the jury's verdict is to show other overwhelming evidence of the defendant's guilt, making the prejudicial impact of the tainted evidence insignificant."). This evidence breaks into three categories: eyewitness observations, scientific evidence linking Crawford with the murder, and Crawford's own statements and conduct.

First and most importantly, Crawford murdered Nunn in a popular park in front of impartial eyewitnesses. Buser testified that as she was sitting on a park bench, Crawford "speed walking slash almost running" approached the man standing next to her—Nunn. Trial Tr. p. 355 line 16–p.357 line 1. Once he arrived, he "scream[ed] at him that he was in violation of the law" and when Nunn expressed confusion at this statement, Crawford "screamed, You raped my girl, and pulled a knife." Trial Tr. p.357 line 2–14. He swung the knife and then "jabbed him once," felling Nunn. Trial Tr. p.360 line 14–24. VanKeulen was sitting next to her and testified to the same events. Trial Tr. p.371 line 3–p.376 line 25. He identified Crawford as the man who approached Nunn, killed him, and then "ran up and kicked him in the his head like a soccer ball" twice. Trial Tr. p.375 line 20–p.376 line 7; p.376 line 9–p.379 line 11.

Scientific evidence also linked him to the crime. Crawford's black jean shorts had bloodstains that contained Nunn's DNA. Trial Tr. p.602 line 13–p.605 line 18. His left shoe had Nunn's blood on it, and his right had DNA consistent with Nunn's profile. Trial Tr. p.606 line p.4–p.609 line 4.

Finally, the nature of Crawford's out-of-court statements and testimony undercut any potential for prejudice. During the interview, Thomas repeatedly challenged Crawford's murky responses to his direct questions. *See generally* Exh. 74. Crawford takes issue with this, arguing "the main purpose of introducing these portions of the exhibit was to show Crawford was a liar. . ." Appellant's Br. 59. But at trial, Crawford told the jury he was lying to the officers and being evasive. Trial Tr. p.797 line 4–16; p.800 line 18–p.801 line 2. In fact, he claimed he was proud of his performance during the interrogation. Trial Tr. p.790 line 15–22; p.798 line 19–21. Any error in admitting Thomas's accusations to the same effect is harmless. *See Bridges*, 2017 WL 6034627, at *11 (finding defendant could not establish *Strickland* prejudice for counsel's failure to request cautionary instruction on detective's accusations in video where defendant admitted at trial that he had been lying to the officer).

Similarly, Crawford's contacts with individuals outside the jail prior to trial were incriminating. Crawford contacted Baker after his arrest. Trial Exh. 69A, 69B. During their recorded conversations, he offered multiple rationales for why he stabbed Nunn; he was either justified in killing him, he was very intoxicated, or he "just lost it." Trial Exh. 69A 2:09–2:33; 5:48–6:10; 7:00–7:25; 7:50–8:15; Exh. 69B 2:10–2:40; 4:15–5:35; 5:45–6:15; 8:10–9:25. Crawford summed up his view of the situation succinctly: "I did it, but I don't deserve life." Exh. 69B 5:45–5:55. Baker's statements during the conversation confirmed Buser and VanKeulen's testimony that Crawford was responsible: "I'm gonna go spit on where my baby stabbed him at." Exh. 69B 5:15–5:20; 5:45–6:15; 07:40–07:50. Thomas's accusatorial statements were confirmed by these admissions.

Crawford also testified at trial. Though he attempted to minimize his culpability, he substantively confirmed the other witnesses' testimony. He confirmed he was at LeClaire Park, that Baker was also at the park and pointed out Nunn to him. Trial Tr. p.778 line 6–21, p.782 line 14–p.784 line 6. He testified that he walked up to where Buser and VanKeuen were seated to confront Nunn. Trial Tr. p.785 line 10–p.786 line 2. When asked point blank

whether he stabbed Nunn Crawford equivocated: "I want to tell you I did, but it wasn't me. It was my actions." Trial Tr. p.786 line 3–4. Although he disputed causing some of Nunn's injuries, he did not dispute that he had a knife, did not dispute that he "poked" Nunn, did not deny that for some reason he threw his knife in the river, and changed clothes after leaving the scene. Trial Tr. p.786 line 6–p.788 line 8; p.792 line 17–23; p.794 line 3–14; p.804 line 6–15. Any limited prejudice that arose from Thomas's statements was immaterial. *See Newell*, 710 N.W.2d at 25–26; *see also State v. Whitfield*, 315 N.W.2d 753, 755 (Iowa 1982) (holding that when same evidence is already in the record, admission of hearsay is not prejudicial). Reversal is unnecessary and this Court should affirm.

C. Because Thomas's Statements in the Interrogation Video were Cumulative, Counsel was not Obligated to Preserve Vouching or Confrontation Clause Challenges.

Finally, the State addresses Crawford's unpreserved claims: whether counsel was ineffective for failing preserve challenges that Thomas's statements in the recording were impermissible vouching or violated the Confrontation Clause. Again, Crawford must show (1) his attorney failed to perform an essential duty and (2) prejudice resulted. *Carroll*, 767 N.W.2d at 641. This Court may make short

work of both claims. As to the vouching claim, Thomas's statements were not testimony, and counsel was not obligated to object on the ground that it was improper vouching testimony. On both claims Crawford has not established his counsel was ineffective because he cannot establish prejudice.

1. Thomas's Statements in the Video Were not Testimony. They did not Violate the Prohibition Against Commenting on the Credibility of Witnesses.

Crawford urges that counsel should have objected to the Thomas's statements in the video as improper commentary on his credibility. Appellant's Br. 59–60. In doing so, Crawford invokes Iowa caselaw establishing a "bright-line rule" precluding questioning a witness on the credibility of another witness. *Id.* (citing *Bowman v. State*, 710 N.W.2d 200, 204 (Iowa 2006)). But this bright-line rule simply is not applicable to this case. A recording of Thomas's statements was not testimony. The Kentucky Supreme Court when considering a similar issue concluded that a police officer's statement during interrogation challenging whether the suspect is telling the truth was

> not an attempt to describe to the jury the defendant's personality; nor are they statements aimed at impeaching a *witness*,

> especially when it is unknown whether a criminal defendant will take the stand. By making such comments, the officer is not trying to convince anyone—not the defendant (who knows whether he or she is telling the truth), other officers, a prosecutor, or the jury—that the defendant was lying. Rather, such comments are part of an interrogation technique aimed at showing the defendant that the officer recognizes the holes and contradictions in the defendant's story, thus urging him or her to tell the truth.

Lanham v. Commonwealth, 171 S.W.3d 14, 27 (Ky. 2005) (emphasis in original). Often, these statements are no different than the theory of the prosecution which is presented to the jury. *See Dubria v.* Smith, 224 N.W.2d 995 (9th Cir. 2000) (cited by *Enderle*, 745 N.W.2d at 442-43). Likewise, in the context of an interrogation any "aura of special reliability and trustworthiness" normally attributed to a police officer's statement is diminished. *Id.* at 1001–02.

Other courts are in agreement. *See Odeh v. State*, 82 So.3d 915, 920 (Fl. Dist. Ct. App. 2011) ("This court has recognized there is a difference between an investigating officer giving an opinion as testimony before a jury, and an investigating officer giving an opinion during the interrogation of a suspect."); *State v. Boggs*, 185 P.3d 111, 120–21 (Ariz. 2008) (noting prohibition on lay and expert testimony as to veracity of other witnesses' statements, but concluding that

police's statements in recording did not warrant reversal, the "accusations were part of an interrogation technique and were not made for the purpose of giving opinion testimony at trial"). In fact, as Crawford acknowledges, the Iowa Supreme Court has already rejected a matching argument. Appellant's Br. 60.

In *State v. Enderle*, 745 N.W.2d 438, the defendant contended that his trial attorney was ineffective for failing to move for redaction of police comments during a recorded interrogation on similar grounds—that the statements were an impermissible comment on his credibility. The Iowa Supreme Court rejected the claim in two respects. It found Enderle was "hard-pressed" to establish prejudice, and also concluded that "Similar claims have been made and rejected in other cases, primarily on the basis that statements by police officers during interrogations are not 'testimony' given by witnesses at trial and were not offered at trial to impeach the defendant but to provide context to his responses [in the recording]." *Enderle*, 745 N.W.2d 442–43. The Iowa Court of Appeals has since applied similar logic in *Bridges*, 2017 WL 6034627, at *10. This Court should do the same. Counsel was not obligated to raise a meritless issue because Thomas's statements were not testimony.

2. *Both Ineffective Assistance of Counsel Claims Fail Because the State's Evidence was Overwhelming and Thomas's Statements were Cumulative to Evidence Already in the Record.*

Crawford's vouching and confrontation clause claims also fail because he cannot establish prejudice. Crawford insists he was prejudiced but has not articulated a theory of how counsel's alleged failings altered the outcome of his trial. Appellant's Br. 68. Noted above, overwhelming evidence supported conviction. Even if counsel had successfully persuaded the district court to exclude these portions of the video, this Court may remain confident in the outcome of the proceeding. *See, e.g., State v. Casady*, 597 N.W.2d 801, 808 (Iowa 1999) (finding no prejudice from counsel's failure to object to improper admission of other crimes, the case against the defendant was "very substantial").

Likewise, Crawford's confrontation clause claim fails because Whitmore and Parks each testified at trial that Crawford approached Nunn and then Nunn collapsed. Whatever evidence Jonah Jones would have testified to was already in the record. Trial Tr. p.418 line 12–p.419 line 23; p.420 line 11–18; p.421 line 4–24; p.734 line 18–p.739 line 6. Where identical evidence has already been admitted,

counsel's failure to act could not result in prejudice. *See, e.g., State v. Schaer*, 757 N.W.2d 630, 638 (Iowa 2008).

In sum, the strength of the State's case and the cumulative nature affirmatively establish that Crawford was not prejudiced by his counsel's conduct. This Court should affirm.

III. Crawford's Appellate Attorney's Fees Claim is Unripe and Unexhausted.

Preservation of Error

Crawford's final claim is unripe and unexhausted.

First, the claim is unripe. An appellate court will not review a challenge to the reasonable ability to pay a restitution order unless the district court has ordered a plan of restitution. *State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999); *State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999). Here, the district court has entered no such plan. Instead, its sentencing order requires Crawford to request a hearing on his reasonable ability to pay appellate attorney fees *if* he appeals and *if* he receives state provided counsel. 10/5/2017 Sentencing Order p.2–3; App.___. Until the district court actually enters a plan of restitution requiring Crawford to pay appellate attorney fees, this Court need not and should not consider the claim. *State v. Reed*,

No. 16–1703, 2017 WL 2183751, at *2 (Iowa Ct. App. May 17, 2017) (citing *Worthington v. Kenkel*, 684 N.W.2d 228, 234 (Iowa 2004)).

Additionally, the claim is unexhausted. Once the district court orders a plan of restitution—which it should not do regarding appellate attorney's fees until determining Crawford's reasonable ability to pay—he can petition the district court for a modification under Iowa Code section 910.7. *Swartz*, 601 N.W.2d at 354; *Jackson*, 601 N.W.2d at 357. "Until that remedy has been exhausted, [this Court] ha[s] no basis for reviewing the issue." *Swartz*, 601 N.W.2d at 354.

This Court need not address the issue and may affirm.

Standard of Review

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

Merits

If the Court reaches the merits, this Court need only sever and vacate the district court order's language touching on appellate

attorney fees. The district court's order included the following language:

> You are advised that if you appeal this ruling, you may be entitled to court-appointed counsel to represent you in that appeal. Defendant is advised as follows regarding his right to Court-Appointed Appellate Counsel: If you appeal this ruling, you may be entitled to court-appointed counsel to represent you in that appeal. If you qualify for court-appointed appellate counsel, then you 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. *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.*

10/5/2017 Order of Disposition p.2–3 (emphasis added); App. 45–46. In an attack on a materially similar worded order in another case, the Iowa Supreme Court stated that the district court "must follow the law and determine the defendant's reasonable ability to pay the attorney fees without requiring him to affirmatively request hearing on his ability to pay." *Coleman*, 907 N.W.2d at 149 (citing *Goodrich v. State*, 608 N.W.2d 774, 776 (Iowa 2000)). Although the district

court's order was issued prior to the supreme court's opinion in *Coleman*, the latter simply reapplied pre-existing law. *See Goodrich*, 608 N.W.2d at 776; *State v. Haines*, 360 N.W.2d 791, 795–96 (Iowa 1985) ("The Iowa scheme insures that counsel is available to defendant at the time needed. *Only after conviction and a determination that the criminal defendant is reasonably able to pay for the services of an attorney*, despite his indigency at an earlier time, is the criminal defendant required to pay for the services of his attorney." (emphasis added)). The district court, therefore, must consider Crawford's reasonable ability to pay if and when it "assesses any future fees on case." *Coleman*, 907 N.W.2d at 149.

CONCLUSION

The district court correctly denied Crawford's fallback request for a continuance one-week prior to trial. His counsel's failure to frame the issue under the lens of a constitutional right would not have changed the fact that Crawford proffered insufficient cause to delay trial. The district court correctly admitted the video of Crawford's interrogation over his objection. Crawford's claim regarding appellate attorneys' fees is unripe and unexhausted. This Court should affirm his conviction for second-degree murder.

REQUEST FOR NONORAL SUBMISSION

The State does not request oral submission. If oral argument is ordered, the State would be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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Dated: August 29, 2018

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