IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-1286

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHARLES R. ALBRIGHT,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR FRANKLIN COUNTY
THE HONORABLE GREGG R. ROSENBLADT, JUDGE

APPELLEE'S BRIEF

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FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Case

State Cases

State Statutes

State Rules

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Sufficient evidence exists in the record to support the defendant's conviction for first-degree kidnapping.

Strickland v. Washington, 466 U.S. 668 (1984)
DeVoss v. State, 648 N.W.2d 56 (Iowa 2002)
In re A.G., 258 Ill. Dec.835, 757 N.E.2d
Ledezma v. State, 626 N.W.2d 134 (Iowa 2001)
Millam v. State, 745 N.W.2d 719 (Iowa 2008)
State v. Bitzan, 2013 WL 3273813 (Iowa Ct. App. 2013)
State v. Davis, 584 N.W.2d 913 (Iowa Ct. App. 1998)
State v. Graves, 668 N.W.2d 860 (Iowa 2003)
State v. Griffin, 564 N.W.2d 370 (Iowa 1997)
State v. Hardin, 359 N.W.2d 185 (Iowa 1984)
State v. Krogmann, 804 N.W.2d 518 (Iowa 2011)
State v. Lane, 743 N.W.2d 178 (Iowa 2007)
State v. McGrew, 515 N.W.2d 36 (Iowa 1994)
State v. Mead, 318 N.W.2d 440 (Iowa 1982)
State v. Misner, 410 N.W.2d 216 (Iowa 1987)
State v. Ondayog, 722 N.W.2d 778 (Iowa 2006)
State v. Osterkamp, 847 N.W.2d 612 (Iowa Ct. App. 2014)
State v. Rice, 543 N.W.2d 884 (Iowa 1996)
State v. Rich, 305 N.W.2d 739 (Iowa 1981)
State v. Ristau, 340 N.W.2d 273 (Iowa 1983)
State v. Robinson, 859 N.W.2d 464 (Iowa 2015)
State v. Thorndike, 860 N.W.2d 316 (Iowa 2015)
State v. Tryon, 431 N.W.2d 11 (Iowa Ct. App. 1988)
State v. White, 668 N.W.2d 850 (Iowa 2003)
Iowa Code § 702.18
Iowa Code § 702.18(1)(a), (b)
Natalie A. Kanellis, Kidnapping in Iowa: Movements Incidental to Sexual Abuse, 67 Iowa L.Rev. 773 (1982)

II. The defendant suffered no prejudice from the district court's instruction on kidnapping in the second degree.

State v. Coffin, 504 N.W.2d 893 (Iowa 1993)
State v. Hanes, 790 N.W.2d 545 (Iowa 2010)

State v. Jeffries, 430 N.W.2d 728 (Iowa 1988)
State v. Miller, 841 N.W.2d 583 (Iowa 2014)
State v. Predka, 555 N.W.2d 202 (Iowa 1996)
State v. Spates, 779 N.W.2d 770 (Iowa 2010)
State v. Turecek, 456 N.W.2d 219 (Iowa 1990)

III. Trial counsel effectively represented the defendant.

Strickland v. Washington, 466 U.S. 668 (1984)
State v. Putman, 848 N.W.2d 1 (Iowa 2014)
State v. Bayles, 551 N.W.2d 600 (Iowa 1996)
State v. Cott, 283 N.W.2d 324 (Iowa 1979)
State v. Jones, 464 N.W.2d 241 (Iowa 1990)
State v LaRue, 594 N.W.2d 328 (S.D.1999)
State v. Nelson, 791 N.W.2d 414 (Iowa 2010)
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. Rice, 543 N.W.2d 884 (Iowa 1996)
State v. Richards, 879 N.W.2d 140 (Iowa 2016)
State v. Richardson, 400 N.W.2d 70 (Iowa Ct. App. 1986)
State v. Rodriquez, 636 N.W.2d 234 (Iowa 2001)
State v. Spargo, 364 N.W.2d 203 (Iowa 1985)
State v. Sullivan, 679 N.W.2d 19 (Iowa 2004)
State v. Taylor, 689 N.W.2d 116 (Iowa 2004)
*State v. Thorndi*ke, 860 N.W.2d 316 (Iowa 2015)
Iowa R. Evid. 5.401
Iowa R. Evid. 5.404(b)
Iowa R. Evid. 5.404
1 John W. Strong, *McCormick on Evidence*, § 185 (5th Ed. 1999)

IV. The district court acted properly in ordering restitution for court costs and in finding he had the reasonable ability to pay the costs.

Goodrich v. State, 608 N.W.2d 774 (Iowa 2000)
Iowa Coal Min. Co., Inc. v. Monroe County, 555 N.W.2d 418 (Iowa 1996)
State v. Alexander, No. 16-0669, 2017 WL 510950

(Iowa Ct. App. Feb. 8, 2017)
State v. Bonstetter, 637 N.W.2d 161 (Iowa 2001)
State v. Brown, No. 16-1118, 2017 WL 2181568
(Iowa Ct. App. May 17, 2017)
State v. Bullock, No. 15-0982, 2017 WL 4049276
(Iowa Ct. App. Sept. 13, 2017)
State v. Campbell, No. 15-1181, 2016 WL 4543763
(Iowa Ct. App. Aug. 31, 2016)
State v. Harrison, 351 N.W.2d 526 (Iowa 1984)
State v. Ihde, 532 N.W.2d 827 (Iowa Ct. App. 1995)
State v. Jackson, 601 N.W.2d 354 (Iowa 1999)
State v. Janz, 358 N.W.2d 547 (Iowa 1984)
State v. Johnson, 887 N.W.2d 178 (Iowa Ct. App. 2016)
State v. Jose, 636 N.W.2d 38 (Iowa 2001)
State v. Kaelin, 362 N.W.2d 526 (Iowa 1985)
State v. Kemmerling, No. 16-0221, 2016 WL 5933408
(Iowa Ct. App. Oct. 12, 2016)
State v. Kurtz, 878 N.W.2d 469 (Iowa Ct. App. 2016)
State v. Love, 589 N.W.2d 49 (Iowa 1998)
State v. McMurry, No. 16-1722, 2017 WL 4317302
(Iowa Ct. App. Sept. 27, 2017)
State v. Pace, No. 16-1785, 2018 WL1629894
(Iowa Ct. App. 2018)
State v. Richardson, 890 N.W.2d 609 (Iowa 2017)
State v. Storrs, 351 N.W.2d 520 (Iowa 1984)
State v. Swartz, 601 N.W.2d 348 (Iowa 1999)
State v. Van Hoff, 415 N.W.2d 647 (Iowa 1987)
Iowa Code § 910.3
Iowa Code § 910.7
Iowa Code §§ 910.4 and 910.5
Iowa Code § 910.2(1)
Iowa Code § 910.5(1)(d)
Iowa Code § 910.7(1)
Iowa Code §910.7(2)
Iowa Code § 910.2(2)
Iowa Code §§ 910.1(3) & (4)
Iowa Code §§ 910.2

ROUTING STATEMENT

This case can be decided based on existing legal principles. Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

Charles Albright appeals his convictions for willful injury causing bodily injury and first-degree kidnapping. The Honorable Gregg Rosenbladt presided over the proceedings in Franklin County. The issues in this appeal are whether sufficient evidence supports the kidnapping conviction, whether the court erred when it instructed the jury, whether counsel was ineffective, and whether the court improperly ordered restitution for court costs.

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

The Crime

Kim Hartman spent most of October 7, 2016, being beaten and held against her will by her boyfriend, Charles Albright. Hartman and Albright dated for over two years and lived together in various

locations throughout their relationship. Tr. Vol. II,p.19,L11-p.20,L7, p.20,L20-21,L18. In October of 2016, Hartman and Albright were living in a run-down home at 201 Virginia Street in Meservey, Iowa. Vol. II Tr. p. 19,Ls11-19,p.20,Ls7-17.

Albright did not go to work the morning of October 7, 2016. Tr. Vol. II,p.23,L11-p.24,L1. Albright thought that Hartman had people over when he left the house so he stayed home to keep an eye on her. Tr. Vol. IIp.23,L21-p.25, L19. Albright thought she was cheating on him and kept a secret phone to contact other people. Tr. Vol. II, p.24,L12-p.25, L8. She had no phone, as she had no job. Tr. Vol. II, p.21,Ls.19-22. She had to quit working at Subway because Albright thought she was cheating on him with her co-workers. Tr. Vol. II, p.22, Ls6-18. She had no other source of income except Albright. Tr. Vol. II,p.25,L25-p.26,L2. If Hartman wanted to call her kids, she had to ask Albright's permission to use his phone to call them. Tr. Vol. II,p.24,L.23-p.25,L5.

Albright was particularly angry at Hartman on the morning of October 7th. Tr. Vol. II, p.25, L.15-p.26,L.12. Around 1:30 am., after using methamphetamine, Albright hit and punched her in the face and told her she was "worthless", a "cheating c**t," and "good for

nothing." Tr. Vol. II,p.25,L.15-p.26,L22 , p.33,L.21-p.34,L.8. Hartman put on her coat and walked toward the door. Tr. Vol. II,p.26, L23-p.27,L13. Albright grabbed her around the collar, threw her against a wall, told her she was not leaving, and locked the door. Tr. Vol. II,p.27,Ls1-13, p.27,L22-p.28,L8. Albright threw Hartman on the floor, slammed her head against the ground, and threw her on a mattress that was lying on the floor. Tr. Vol. II, p. 278,L22-p.28,L8.

As Albright continued to assault Hartman, his German shepherd dog latched on to her leg and bit her. Tr.Vol. II,p.28,L11-p.30,L10. Albright picked up a cordless drill and hit her in the pelvis with it all the while calling her "worthless" and a "whore." Tr. Vol. II,p.29,L 20-p.31,L5. Albright again beat her about the face and head and she managed to put her arms up to block his blows. Tr. Vol.II,p.31,L3-p.32, L14. He picked up a knife he called the "Pig Sticker" and cut her behind her right ear. Tr. Vol. II,p.32,Ls15-24,p.52,Ls17-23. He also used a stun gun on her and put the contacts against her wrist. Tr.Vol.II,p.49,L2-p.50,L5.

The abuse went on intermittently for hours; Albright would fall asleep, wake up, and beat Hartman again. Tr. Vol. II p.33,L21-p.354, L5. When Albright fell asleep, Hartman tried to move away from him

but he woke up and began beating her again. Tr.Vol.II,p.33,L21-p.35,L5. Whenever she tried to move away from him towards the door, he blocked her exit. Tr.Vol.II,p.35,Ls2-13.

The beating stopped for a short period when Albright loaded his dog into his truck to take the dog to the vet in Sheffield, Iowa. Tr. Vol. II,p.36,Ls5-13. She did not want to get into the truck with him. Tr. Vol. II,p.36,Ls5-20. She thought Albright would "get rid of her." Tr.Vol.II,p.36,Ls.5-20. Albright forced her to get in the truck. Tr. Vol.IIp.36,L21-p.37,L2. He told her she was not going to stay at home. Tr. Vol.IIp.36,L21-p.37,L.2. Once in the truck, the beatings resumed. Tr. Vol. II,p.37,Ls5-12.

While en route to the veterinarian's office in Sheffield, Iowa, Albright spoke to his long-time friend, Shawn Rockwell. Tr. Vol. II,p.39,Ls6-25, Vol. III,p.54,Ls2-17. Albright had the phone on speaker and Hartman pleaded for help. Tr. Vol. II,p.40,Ls12-21. Albright believed that Hartman cheated on him with another man when Hartman left Albright a few weeks before. Tr. Vol. III,p 102,Ls15-25. Albright struck her again and broke dentures and her nose in two places. Tr. Vol. II,p.37,L7-p.38,L3. Albright told Hartman "he would bury [her] up to [her] neck in a cornfield and let a

combine take [her] head off and nobody would ever find [her]." Tr. Vol. II,p.40,Ls19-25. Hartman believed he would do it because he was so angry. Tr. Vol.II,p.41,Ls1-4. Hartman previously made a noose and told her to hang herself so she was not a "bother to anyone else." Tr.Vol.II,p.52, lines 2-6.

Once in Sheffield, Albright went into the veterinarian's office with the dog. Tr. Vol. II,p.41,Ls21-25. She did not run away at that point because the veterinarian's office had a large window. Tr.Vol.II, p. 42, Ls3-12. She thought he would be able to see her run from inside the office. Tr.Vol.II, p. 42, Ls3-12. Albright got back in the truck, said he needed a drink, and drove to a nearby Casey's. Tr. Vol. II,p.41,L4-p.42,L4. Before he got out of the truck, he hit her again and told her not to go anywhere. Tr. Vol.II,p. 42,L22-p.43,L1.

The Escape

After Albright left the truck, Hartman began thinking about her kids and decided she needed to live for them. Tr.Vol. II,p.43,L12-18. Bruised, bloodied, and beaten, Kimberly Hartman made a break for it and ran across the street and into a Dollar General Store for help. Tr.Vol. II,p.43,L17-p.44,L9. She borrowed a phone from the clerk, got the key to the bathroom, ran to the back of the store, locked

herself in the bathroom, and called 911. Tr.Vol. II p.44,L11-p.45,L9. Hartman told the 911 operator she needed to get to the hospital or "somewhere safe." Tr.Vol.II,p. 43,L17-p.45,L19, Exh. 2; Exh. App. 3-6. Hartman told the operator her boyfriend, Charlie Albright, "hurt" her and that he was driving a 2004 Chevrolet Silverado. Exh. 2; Exh. App. 3-6. Hartman said she "did not want anything to happen to him" but she wanted to be safe. Exh. 2; Exh. App. 3-6. The operator told Hartman to stay there and she would dispatch an officer to the store. Exh. 2; Exh. App. 3-6. Moments later, Sheffield police chief Sam Cain knocked on the door to assist the frightened Hartman. Exh. 2; Exh. App. 3-6.

When Hartman opened the door, Chief Cain saw that her eyes were almost completely swollen shut, she had severe bruising on her face, arms, hands, and dried blood on her lip. Tr.Vol. II Tr. p. 139,L7-p.140,L24. Chief Cain called an ambulance for her. Tr. Vol.II Tr.p.140, Ls14-23. He also called the Franklin County Sheriff's office to assist with the case. Tr. Vol.II p.140, L24-p.141,L12.

While waiting for the ambulance to arrive, Chief Cain saw Cheryl Larson, who was an EMT, shopping in the store. Tr. Vol.II p. 141,L17-p.142,L1. Chief Cain asked Larson to assist Hartman. Tr.

Vol.II,p.142,Ls2-12. Larson walked to the back of the store where Kim Hartman was hiding. Tr. Vol.II,p.149,Ls8-21. She noticed bruising and swelling, blood underneath Hartman's right ear, her arms and hands were swollen and bruised, and she had bite marks on her legs. Tr. Vol.II,p.150,Ls1-25. Larson described Hartman as "scared, kind of timid, kind of withdrawn." Tr. Vol.II,p. 151,Ls5-8. Hartman told Larson she had been held against her will. Tr. Vol. II,p.152,Ls23-25. Larson learned that Hartman's boyfriend, Albright, beat her. Tr. Vol.II,p.144,L17-p.145,L9,p.152,Ls20-25, Exh.2; Exh. App. 3-6. She was taken to the hospital where she learned she had two fractures on her nose. Tr.Vol.II,p.52,Ls16-25. It had to be reset. Tr.Vol.II,p.52,Ls16-25.

When Franklin County Sheriff's Deputy Adam Blau arrived at the Dollar General Store, he saw Kimberly Hartman and thought she had "been in a boxing match." Tr. Vol. II,p.156,L24-p.158,L4. Chief Cain explained the situation to him and Deputy Blau put out an "attempt to locate" throughout the state for Charlie Albright driving a white Silverado with front end damage. Tr.Vol. II,p. 158,Ls11-25.

The Investigation

The "attempt to locate" yielded no results after eleven days. Tr. Vol.II,p.158,L24-p.159,L19. Deputy Blau requested assistance from the Iowa Division of Criminal Investigation. Tr. Vol. II,p.159,Ls10-14. Special Agent Jim Thiele assigned himself to the case on October 18, 2016. Tr. Vol. III,p.9,L23-p.10,L4. Agent Thiele obtained a search warrant for the home Albright and Hartman shared in Meservey, Iowa. Tr. Vol. III,p.27,L23-p.10,L4. During a search of the residence, Agent Thiele found and seized a cordless drill. Tr. Vol.III,p.27,L21-p.30,L12.

On October 19, 2016, law enforcement located Albright at an acreage owned by Stephanie Setterholm in Mason City. Tr. Vol. III,p. 13,L2-p.14,L5. Albright admitted he became "enraged" and hit Hartman several times while he drove to the veterinarian's office in Sheffield. Tr. Vol. III,p. 102,L16-p.103,L9. He denied holding her against her will. Tr. Vol. III,p.106,Ls9-15.

Several months later, Setterholm discovered two bags with items she did not recognize in her home. Tr. Vol. III,p.19,L15-p.20,L12. One of the items in the bag was a booklet. Tr. Vol III,p.20,L23, p.22,L23. Agent Thiele discovered that fingerprints on

the booklet belonged to Albright. Tr. Vol III,p.22,L20-p.23,L2. Kim Hartman also recognized the items as belonging to Albright. Tr. Vol. III,p.22,Ls11-19. These items included a noose and a knife with the words "Pig Sticker" on it. Tr. Vol. III,p 23,L11-p.25,L9. Additional facts will be discussed below as relevant to the State's case.

ARGUMENT

I. Sufficient evidence exists in the record to support the defendant's conviction for first-degree kidnapping.

Preservation of Error

The State does not agree Albright preserved error on his claim. "The doctrine of error preservation has two components—a substantive component and a timeliness component." *State v. Krogmann,* 804 N.W.2d 518, 523 (Iowa 2011) (holding a one-page resistance that stated there was no legal basis for the State's actions did not properly preserve error with respect to the defendant's constitutional claims). To preserve error on appeal, the party must first state the objection in a timely manner, that is, at a time when corrective action can be taken, in addition to the basis for the objection. *Id.* at 524; *State v. Osterkamp*, 847 N.W.2d 612 (Iowa Ct. App. 2014). Albright did not raise the specific claim below that he now asserts on appeal. As such, he did not preserve the claim.

At the close of the State's evidence, defense counsel asserted:

> I do have one motion, Judge. Comes now, Mr. Albright, through counsel, and moves to dismiss this matter and hold it in arrest of judgment for the reason that all of the evidence that's been presented, even when it's viewed in the best light for the State, could not allow these people to form or find – engender a jury question.

Tr. Vol. III,p.42,Ls18-23. At the close of all evidence, the defense counsel again asserted:

> Comes now, the defendant, again through counsel, and moves for a directed verdict of acquittal on the grounds that all of the evidence, even in the best light for the State would not engender a jury question.

Tr. Vol. III,p.129,Ls21-24. On appeal, Albright now asserts that the evidence was insufficient to establish "confinement and/or removal" and that Hartman was "intentionally subjected to torture." Def. Brief at 34 and 45. Neither of these claims was asserted, let alone, mentioned below. Error has not been preserved on the sufficiency claim.

Recognizing this deficiency, Albright argues alternatively that if error was not preserved, counsel was ineffective. The State does not contest error preservation as to a claim of ineffective assistance of counsel and will respond to the clam in that manner. *State v.*

Ondayog, 722 N.W.2d 778, 784 (Iowa 2006) (ineffective assistance of counsel claims are not bound by traditional error preservation rules).

Standard of Review

Because ineffective-assistance-of-counsel claims are rooted in the Sixth Amendment, an appellate court reviews them de novo. *State v. Thorndike*, 860 N.W.2d 316, 319 (Iowa 2015).

Merits

Albright's first-degree kidnapping conviction must be affirmed. Albright cannot establish that counsel was ineffective in failing to challenge the State's evidence on the elements of "confinement and/or removal" and whether Albright "intentionally subjected Hartman to torture." The State had a compelling case against Albright and sufficiently established each of these elements. Thus, counsel effectively represented Albright at trial.

A. Ineffective assistance

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant claiming ineffective assistance must prove both

that counsel's performance was deficient and that prejudice resulted. *Id.* at 687.

The test for the first element is objective: whether counsel's performance was outside the range of normal competency. *Millam v. State,* 745 N.W.2d 719, 721 (Iowa 2008). Counsel is presumed to have acted competently and within the wide range of reasonable professional assistance. *DeVoss v. State,* 648 N.W.2d 56, 64 (Iowa 2002). To overcome this presumption, Albright must present an affirmative basis establishing inadequate representation. *Millam,* 745 N.W.2d at 721.

The test for the second element is whether the defendant can prove there is a reasonable probability that, without counsel's errors, the outcome of the proceedings would have been different. *Id.* at 722; *Ledezma v. State,* 626 N.W.2d 134, 143 (Iowa 2001). A reviewing court may dispose of an ineffective-assistance claim if the defendant fails to prove *either* the duty or the prejudice prong. *State v. Lane,* 743 N.W.2d 178, 184 (Iowa 2007). Albright cannot establish either prong of the test and his claim must be rejected.

B. Confinement and removal

1. Breach of duty

Albright must first demonstrate that counsel breached a duty in failing to move for judgment of acquittal on whether the State sufficiently established Albright confined and/or removed Hartman. To prove Albright committed first-degree kidnapping, the district court instructed the jury the State had to show:

> 1. On or about October 7, 2016, in Franklin County, Iowa, Defendant confined Kim Hartman or removed her from one place to another.
>
> 2. Defendant did so with the specific intent to inflict serious injury upon Kim Hartman.
>
> 3. Defendant knew he did not have the consent or authority of Kim Hartman to do so.
>
> 4. As part of the confinement or removal Kim Hartman was intentionally subjected to torture.

Jury Instr. 23; App. 40. The court's instructions also provided:

> A person is "confined" when her freedom to move about is substantially restricted by force, threat, or deception. The person may be confined either in the place where the restriction began or in a place to which she has been removed. No minimum time of confinement or distance of removal is required, but it must be more than slight. The confinement or removal must have significance apart from any other crime committed against the person and must substantially increase the risk of harm to the person, significantly reduce the risk to Defendant of detection, or significantly ease the escape of Defendant.

Jury Instr. 27; App. 44.

In kidnapping cases involving an underlying crime, the confinement or removal of the victim must have independent significance, and exceed any confinement or removal that is normally incidental to the commission of the underlying offense:

> The rationale behind the "incidental rule" arises from our recognition that confinement of a victim, against the victim's will, is frequently an attendant circumstance in the commission of many other crimes, notably robbery and sexual abuse. *State v. Mead*, 318 N.W.2d 440, 445 (Iowa 1982); *see* Natalie A. Kanellis, Note, *Kidnapping in Iowa: Movements Incidental to Sexual Abuse*, 67 Iowa L.Rev. 773, 780 (1982). We did not and do not believe the legislature intended to afford prosecutors the option of bootstrapping convictions for kidnapping, carrying life sentences, on two charges for crimes for which the legislature provides much less severe penalties. (Omitting authorities.)

State v. McGrew, 515 N.W.2d 36, 39 (Iowa 1994) (emphasis added); *see also State v. Rich*, 305 N.W.2d 739, 745 (Iowa 1981) ("The rationale for this conclusion is that we do not believe the legislature intended to afford the prosecution a choice of two penalties of such a disparate nature for the typical crime of sexual abuse.")

In *State v. Rich*, the court fashioned a three-part test to determine whether a defendant's confinement or removal of a victim has independent significance sufficient to justify a first-degree kidnapping conviction:

> Although no minimum period of confinement or distance of removal is required for a conviction of kidnapping, the confinement or removal must definitely exceed that normally incidental to the commission of sexual abuse. Such confinement or removal must be more than slight, inconsequential, or an incident inherent in the crime of sexual abuse so that it has a significance independent from sexual abuse. *Such confinement or removal may exist because it substantially increases the risk of harm to the victim, significantly lessens the risk of detection, or significantly facilitates escape following the consummation of the offense.*

State v. Rich, 305 N.W.2d at 745 (emphasis added).

The court will analyze all of the surrounding circumstances to determine whether any of the *Rich* factors have been satisfied. *See State v. Griffin*, 564 N.W.2d 370, 373 (Iowa 1997) ("By ordering [the victim] to take off her clothes prior to the sexual assault, Griffin was able to keep her confined to the motel room prior to the assault, lowering his chances of detection and increasing the risk of harm to [the victim]."); *State v. Hardin*, 359 N.W.2d 185, 190 (Iowa 1984)

("From the evidence introduced at trial the jury could have found beyond a reasonable doubt that defendant assaulted the victim in her car, then dragged her out of the car and forced her into his residence where his actions would be less detectable and where he might batter her at will. In the house the risk of detection would be less likely, the risk of harm to the victim more likely."); *State v. Tryon*, 431 N.W.2d 11, 14-15 (Iowa Ct. App. 1988) (affirming a first-degree kidnapping conviction and noting that silencing a victim by binding and gagging her significantly reduced the risk of detection.); *State v. Bitzan*, 2013 WL 3273813, at *3-4 (Iowa Ct. App. 2013) (affirming a kidnapping conviction when a defendant forced the victim from the sink area of a rest stop to behind a stall, where she was somewhat more secluded, less likely to be detected, and the defendant was more likely to assault the victim without interruption.); *State v. Ristau*, 340 N.W.2d 273, 275-76 (Iowa 1983) (concluding that the defendant's act of taking the victim two miles to a dark and secluded place 60 to 70 feet away from the parking lot and sidewalk "indicates he sought seclusion as a means of avoiding detection" and that "[t]he remoteness of the location where the attack took place substantially increased the risk of harm to the victim if she attempted to defend herself or escape.").

In *State v. Davis*, 584 N.W.2d 913, 916-17 (Iowa Ct. App. 1998), the court looked to five factors in making the "more than incidental" inquiry. Those factors were (1) the character of the confinement; (2) the length of time involved; (3) the location of the confinement; (4) the nature of the threat to the victim; and (5) the termination of the confinement. *State v. Davis*, *id.* at 916-17. Although the cases discuss the "incidental rule" at great length, the State submits that it should not apply in cases such as this where torture is alleged.

Going back to *Rich*, a case involving sexual abuse, the requirement was and remains that "the confinement or removal must definitely exceed that normally incidental to the commission of sexual abuse." *Rich*, 305 N.W.2d at 745. *Rich* continues that:

> Such confinement or removal may exist because it substantially increases the risk of harm to the victim, significantly lessens the risk of detection, or significantly facilitates escape following the consummation of the offense.

Id.; State v. Robinson, 859 N.W.2d 464, 482 (Iowa 2015) (the underlying crime must be substantially more heinous to give rise to a kidnapping conviction). This case, however, does not involve a sexual assault. Rather, it was charged as first-degree kidnapping because it involved torture. Torture, which is defined as the "intentional infliction of severe physical or mental pain," is not a separate offense,

like a sexual assault is. In fact, torture is not defined in either chapter 702 (definitions) or chapter 710 (kidnapping). Rather, it is defined by case law. In *State v. White*, 668 N.W.2d 850, 857 (Iowa 2003) this court found:

> It would be contrary to legislative intent and common sense to find "torture must include an element of physical injury. It is reasonable to assume the legislature was aware of the duality of the term "torture" and would have explicitly limited it to physical torture if that was what the legislature had intended the term to mean. *In re A.G.*, 258 Ill. Dec.835, 757 N.E.2d at 524, 528-29. Furthermore, other Iowa Code sections lend support to the conclusion that "torture" encompasses mental anguish unaccompanied by physical injury. Iowa Code section 702.18 defines "serious injury" to include "[d]isabling mental illness," *or* extensive bodily injury. Iowa Code § 702.18(1)(a), (b). We conclude "torture" as it is used in Iowa Code section710.2 includes mental anguish unaccompanied by physical or sexual assault. In other words, "torture" is either physical and/or mental anguish.

White, 668 N.W.2d at 857. If torture is not a separate offense, the incidental rule need not apply.

This assertion is not without precedent. In *State v. Misner*, 410 N.W.2d 216, 223 (Iowa 1987), this court noted:

> . . . the difficulty in clearly identifying when a kidnapping occurs and is properly charged. At one extreme is the classic kidnapping case in which an individual is abducted for the express purpose of holding the person for ransom or as a hostage. In such cases kidnapping is the central crime and any other confinement or movement is sufficient to support the charge. *The "merely incidental rule" can have no role when there is no underlying crime.*

> At the other extreme is the case in which a person is moved or confined wholly as part of a murder, sexual abuse, or other crime. In such cases the movement or confinement has no independent significance, but rather is only that confinement or movement necessarily inherent in the type of crime committed. We conclude the *Rich* principles prevent kidnapping charges from being prosecuted in such cases.

Misner, 410 N.W.2d at 223 (emphasis added). The facts in this case are more akin to a "classic kidnapping." Albright held Kimberly Hartman as his hostage while he engaged in an hours-long series of beatings and diatribes. State submits that when, as in this case, the State alleges torture as the alternative to establish first-degree kidnapping, the "merely incidental rule" does not apply because there is no underlying crime of torture.

Confinement at the house in Meservey

Even if the court finds that the "merely incidental rule" applies to first-degree kidnapping cases involving torture, the confinement and removal of Kimberly Hartman was accomplished through hours of physical violence and threats at the house in Meservey between 1:30 a.m. and 3 p.m. The character of the confinement was such that Albright engaged in multiple acts of abuse when he slapped and punched Kimberly Hartman, knocked her head against the ground, prevented her from leaving the house, struck her with a cordless drill,

allowed his German shepherd to bite her, and burnt her wrist with a stun gun, and cut her ear with a knife. *See Tyron, id.* at 14 (recognizing assault and threats of violence as forms of confinement). These acts occurred between 1:30 a.m. and 3 p.m. on October 7, 2016. Although the confinement occurred in the home she shared with Albright, he prevented her from leaving the home by grabbing her, throwing her on the ground, and blocking her exit. Albright made it impossible for her to leave the remote, ramshackle house. There was only one vehicle – Albright's truck which he had the keys to – and only one cell phone which Albright had in his possession. Given these circumstances, there was no way for Hartman to seek out or go for help. She was confined to the house.

The nature of the threat was serious as Albright subjected to multiple assaults of different types over a lengthy period of time. The torturous acts that he committed at the house ended only when he forced her into the truck so he could keep her in his sight when he drove to the veterinarian's office. If the "merely incidental rule" applies to first-degree kidnapping by torture, the State presented compelling evidence that Albright's acts increased the risk of harm to Hartman by keeping her holed up apart from anyone else with no

means to communicate with anyone and significantly lessened the risk of detection isolating her from anyone who could help her so he could engage in the severe and prolonged beatings.

Removal to the truck

Albright also contends that the evidence did not establish that the "removal of Hartman from the Meservey house to the truck" had any significance apart from the assault in the truck. Def. Brief at 40. He contends that the removal did not "substantially" increase the risk to Hartman, significantly reduce the risk of Albright's detection, or significantly ease the escape of Albright. The opposite is true.

By removing Hartman to the truck and forcing her to stay with him, he prevented her from seeking assistance from a neighbor or removing herself from the terror he perpetrated on her. Additionally, torture includes severe mental pain and the assault in the truck was separate from the death threats that he made whereby he told her he would bury her up to her neck in a cornfield so a farmer would drive over her with his combine, cut her head off and no one would ever find her. Hartman believed he would kill her because he was enraged and he previously suggested she kill herself with a noose he provided.

In addition, by having her in the truck with him, Albright significantly reduced the risk of detection. He took back roads to get to Sheffield so he would encounter fewer people. He forced her to get in the truck with him so she could not leave to report the vicious attacks he committed against her. Further, when she finally escaped, he took the truck and successfully avoided law enforcement for nearly two weeks. Because the evidence establishes that Albright confined and/or removed Hartman, counsel had no duty to challenge the State's evidence on this element. *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2003) (trial counsel has no duty to raise and issue that has no merit). Counsel breached no duty.

2. *Prejudice*

Albright must also show he was prejudiced by counsel's alleged failure. To do so, he must show that had counsel challenged the State's evidence on confinement and/or removal, there was a reasonable probability of a different outcome. Because the State had a compelling case against him as set forth above and incorporated herein, Albright cannot demonstrate prejudice. This claim must be rejected.

C. Intentionally subjected to torture

1. Breach of duty

Albright next contends that counsel should have moved for judgment of acquittal and alleged that the State's evidence did not prove she was tortured. Counsel breached no duty in failing to challenge the State's case because the evidence established that she was subjected to both severe physical and mental pain during the hours-long ordeal.

As set forth above, the court instructed the jury that torture is the "intentional infliction of severe physical or mental pain." Jury Instr. 28; App. 45. Hartman suffered extreme physical abuse that left her fearing for her safety. She was beaten about her head and face for hours. She sustained two fractures to her nose. Albright cut with a knife behind her ear. She suffered puncture wounds from Albright's German shepherd when the dog latched onto her leg and bit her which she described as "painful." He burnt her with a stun gun. She was badly bruised and suffered swelling so severe that her eyes were swollen shut she looked like she had been in a boxing match.

In addition to the physical injuries she suffered, she was also subject to mental anguish from being demeaned as "worthless", a

"cheating c**t", "good for nothing" and a "whore." Tr.Vol.II,p.25,L.15-p.26,L22,p.33,L212-34,L8. Hartman did not want to get in the truck with Albright because she feared he would get rid of her. Her fears were justified because he said "he would bury [her] up to [her] neck in a cornfield and let a combine take [her] head off and nobody would ever find [her]." Tr.Vol.II,p. 40,Ls19-25. She believed he would do it because he was so angry. Tr.Vol.II,p.41,Ls1-4.

These facts demonstrate establish that Hartman was subjected to both physical torture and mental torture. Although counsel could have challenged the State's evidence on whether Albright intentionally subjected her to torture, his failure to do so does not amount to a breach of duty. Counsel had no duty to make a meritless objection because the evidence establishing the torture was overwhelming. *State v. Rice*, 543 N.W.2d 884,888 (Iowa 1996). Thus, counsel breached no duty.

2. Prejudice

Albright must also establish prejudice. To do so, he must demonstrate that had counsel challenged the State's evidence on torture, he would not have been convicted of kidnapping. As argued above, and incorporated herein, the State produced compelling

evidence that Albright intentionally subjected Hartman to torture. As such, his claim must fail.

II. The defendant suffered no prejudice from the district court's instruction on kidnapping in the second degree.

Preservation of Error

The State does not contest error preservation as defense counsel objected to the district court instructing the jury on kidnapping in the second degree. Tr. Vol. IVp.7,L12-10,L16.

Standard of Review

An appellate court reviews challenges to jury instructions for correction of errors at law. *State v. Hanes*, 790 N.W.2d 545, 548 (Iowa 2010). Our review is to determine whether the challenged instruction accurately states the law and is supported by substantial evidence. *State v. Predka*, 555 N.W.2d 202, 204 (Iowa 1996). Error in a particular instruction does not require reversal unless the error was prejudicial to the complaining party. *State v. Spates*, 779 N.W.2d 770, 775 (Iowa 2010).

Merits

The district court instructed the jury on second-degree kidnapping over Albright's objection. Although the court may have

erred in instructing the jury on this crime, Albright is not entitled to relief because he cannot show he was prejudiced by it.

The supreme court has long held the paramount consideration in determining whether a crime is a lesser included offense of a greater crime is the "impossibility test." *State v. Miller*, 841 N.W.2d 583, 588 (Iowa 2014). Under the impossibility test, courts determine whether "the greater offense cannot be committed without also committing all elements of the lesser offense." *Id.* (quoting *State v. Coffin*, 504 N.W.2d 893, 894 (Iowa 1993). Subsumed within the impossibility test and "an aid to applying the impossibility test" is the "elements test"—the "usual method to ascertain whether it is possible to commit the greater offense without committing the lesser." *Id.* (citing *State v. Turecek*, 456 N.W.2d 219, 223 (Iowa 1990)). The elements test states:

> [T]he lesser offense is necessarily included in the greater offense if it is impossible to commit the greater offense without also committing the lesser offense. *If the lesser offense contains an element not required for the greater offense, the lesser cannot be included in the greater.* This is because it would be possible in that situation to commit the greater without also having committed the lesser.

State v. Jeffries, 430 N.W.2d 728, 740 (Iowa 1988) (emphasis added). In using this test, we look to the statutory elements rather than to the charge or the evidence. *Id.*

As set forth above, the district court instructed the jury that to commit first-degree kidnapping, the State had to show:

> 1. On or about October 7, 2016, in Franklin County, Iowa, Defendant confined Kim Hartman or removed her from one place to another.
>
> 2. Defendant did so with the specific intent to inflict serious injury upon Kim Hartman.
>
> 3. Defendant knew he did not have the consent or authority of Kim Hartman to do so.
>
> 4. As part of the confinement or removal Kim Hartman was intentionally subjected to torture.

Jury Instr. 23; App. 40. To prove kidnapping in the second degree, the State had to show:

> 1. On or about October 7, 2016, in Franklin County, Iowa, Defendant confined Kim Hartman or removed her from one place to another.
>
> 2. Defendant did so with the specific intent to inflict serious injury upon Kim Hartman.
>
> 3. Defendant knew he did not have the consent or authority of Kim Hartman to do so.
>
> 4. Defendant was armed with a dangerous weapon at the time he confined Kim Hartman or removed her from one place to another.

Jury Instr. 24.; App. 41. It appears from a comparison of the elements that the offenses that kidnapping in the second degree contains an element that the kidnapping in the first degree does not. That is, the element of being armed with a dangerous weapon. Thus, it does not meet the impossibility test and is not a lesser included offense.

Assuming that second-degree kidnapping is not a lesser included offense of first-degree kidnapping, Albright cannot show he was prejudiced by the instruction for two reasons. First, because the jury convicted Albright on the greater offense of first-degree kidnapping, it makes no difference that the court instructed the jury on second-degree kidnapping. The jury deemed the evidence sufficient on the greater and any of the lesser alternatives did not factor into the jury's consideration. Also, given the compelling evidence of first-degree kidnapping by torture discussed above in Issue I, and incorporated herein, Albright cannot show prejudice. Albright severely beat, burnt, and cut Hartman with a knife. He allowed his dog to bite her leg and he demeaned her over a twelve-hour period of time by calling her derogatory names and telling her she was "worthless." She believed he was going to kill her. In light of

this evidence, Albright cannot demonstrate prejudice from the instruction on second-degree kidnapping. If anything, the alleged error was beneficial to him. The jury was instructed on a lower level of the offense to which Albright was not entitled. This is not prejudice.

III. Trial counsel effectively represented the defendant.

Error Preservation

The State does not contest error preservation as to a claim of ineffective assistance of counsel. *Ondayog*, 722 N.W.2d at 784 (ineffective assistance of counsel claims are not bound by traditional error preservation rules).

Standard of Review

Because ineffective-assistance-of-counsel claims are rooted in the Sixth Amendment, an appellate court reviews them de novo. *Thorndike*, 860 N.W.2d at 319.

Merits

Albright cannot show that trial counsel was ineffective. As to each of his claims that counsel was ineffective in failing to object to prior bad acts evidence, he cannot demonstrate either a breach of duty or prejudice. As such, each of his claims must fail and his convictions must be affirmed.

As set for the above, the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant claiming ineffective assistance must prove both that counsel's performance was deficient and that prejudice resulted. *Id.* at 687. Each of Albright's ineffective assistance claims must be rejected.

A. Prior Abuse of Hartman

Albright initially argues that counsel was ineffective in failing to object to the State's introduction of the abuse Albright inflicted on Hartman before October 7th. He contends that the admission of this evidence violated Iowa Rule of Evidence 5.404(b). That rule provides:

> Rule 5.404. Character evidence; crimes or other acts.
> Character evidence.
>
> * * * *
>
> *b. Crimes, wrongs, or other acts.*
>
> (1) *Prohibited use.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in in accordance with the character.

> (2) *Permitted uses*. This evidence may be admissible for another purpose such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

Iowa R. Evid. 5.404(b).

The rule excludes evidence that serves no purpose except to show the defendant is a bad person, from which the finder of fact is likely to infer defendant committed the crime or crimes for which the defendant is on trial. *Putman*, 848 N.W.2d at 8; *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001). However, if the evidence is relevant to establish a legitimate issue in the case, it is prima facie admissible regardless of any tendency to establish the defendant's bad character. *Rodriguez*, 636 N.W.2d at 239; *State v. Bayles*, 551 N.W.2d 600, 604 (Iowa 1996); *State v. Richardson*, 400 N.W.2d 70, 72-73 (Iowa Ct. App. 1986).

In determining whether to admit evidence of prior bad acts, the Court uses a three-step analysis. *Putman*, 848 N.W.2d at 8-9 (*citing State v. Sullivan*, 679 N.W.2d 19, 25 (Iowa 2004)). The Court must first determine whether the evidence is relevant and material to a legitimate, disputed, factual issue. *Putman*, 848 N.W.2d at 9; *Sullivan*, 679 N.W.2d at 25. "Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to

the determination of the action more probable or less probable than it would be without the evidence.'" *Putman*, 848 N.W.2d at 9 (*quoting* Iowa R. Evid. 5.401). The general test of relevancy is "whether a reasonable [person] might believe the probability of the truth of the consequential fact to be different if [the person] knew of the proffered evidence." *Putman*, 848 N.W.2d at 9; *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988).

Second, there must be "clear proof the individual against whom the evidence is offered committed the bad act or crime." *Sullivan*, 679 N.W.2d at 25; *Putman*, 848 N.W.2d at 9. The other act need not be established beyond a reasonable doubt and corroboration is unnecessary. *Putman*, 848 N.W.2d at 9; *State v. Taylor*, 689 N.W.2d 116, 130 (Iowa 2004). The purpose of the rule requiring clear proof of the prior act is to prevent the fact finder from engaging in speculation or drawing inferences based on mere suspicion. Thus, evidence of prior bad acts need only be clear and complete enough to allow the fact finder to find the defendant did that act, without resorting to speculation or mere suspicion. *State v. Spargo*, 364 N.W.2d 203, 209 (Iowa 1985); *Putman*, 848 N.W.2d at 9. "[A] victim's testimony, standing alone, satisfies the requirement of clear proof." *State v.*

Richards, 879 N.W.2d 140, 152 (Iowa 2016); *accord, Putman*, 848 N.W.2d at 9; *Rodriquez*, 636 N.W.2d at 243.

Third, the court must determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. *Putman*, 848 N.W.2d at 9; *Sullivan*, 679 N.W.2d at 25. For the purpose of this balance, "prejudice" relates to the likelihood of an undue tendency to suggest decision on an improper basis. The types of prejudice Iowa Rule of Evidence 5.404(b) seeks to avoid are as follows. First, the overstrong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such an act. Second, the tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished for other offenses. Third, the injustice of attacking one necessarily unprepared to demonstrate that the attacking evidence is fabricated. *Richardson*, 400 N.W.2d at 73 (*citing State v. Cott*, 283 N.W.2d 324, 326 (Iowa 1979)).

In weighing probative value against the danger of unfair prejudice, the Court considers several factors. *Putman*, 848 N.W.2d at 9. The Court considers the need for the evidence in light of the issues and the other evidence available to the prosecution, whether

there is clear proof the defendant committed the prior bad acts, the strength or weakness of the evidence on the relevant issue, and the degree to which the fact finder will be prompted to decide the case on an improper basis. *Putman*, 848 N.W.2d at 9-10, 14; *Taylor*, 689 N.W.2d at 124. If the danger of the evidence's prejudicial effect substantially outweighs its probative value, the evidence must be excluded. *Putman*, 848 N.W.2d at 10.

In reviewing whether the district court properly weighed the probative value against prejudicial effect, the Court recognizes the process "'is not an exact science,'" and the Court therefore gives "a great deal of leeway to the trial judge who must make this judgment call.'" *Putman*, 848 N.W.2d at 10 (*quoting State v. Newell*, 710 N.W.2d 6, 20–21 (Iowa 2006)). "Analyzing and weighing the pertinent costs and benefits [of admitting prior acts evidence] is no trivial task. Wise judges may come to differing conclusions in similar situations …." *Rodriguez*, 636 N.W.2d at 240 (*quoting* 1 John W. Strong, *McCormick on Evidence*, § 185, at 647-48 (5th Ed. 1999)).

The State introduced the evidence relating to the prior assaults to establish intent. To prove kidnapping, the State had to show Albright had the "specific intent to inflict serious injury" and as part

of the confinement or removal, "intentionally subjected [Hartman] to torture. Jury Inst. 23; App. 40. Likewise, to prove willful injury, the State had to show he "specifically intended to cause a serious injury to Kim Hartman." Jury Instr. 30; App. 46. When, as in this case, a defendant's intent is at issue, the State may properly introduce this evidence to prove its case.

In *State v. Taylor*, 689 N.W.2d 116, 125 (Iowa 2004), the court held that "the State was required to prove the defendant intended to cause pain and injury to his wife or to have physical contact that would be insulting or offensive." The court continued:

> We also think there is a logical connection between a defendant's intent at the time of the crime, when the crime involves a person to whom he has an emotional attachment, and how the defendant has reacted to disappointment or anger directed at that person in the past, including acts of violence, rage, and physical control. In other words, the defendant's prior conduct directed to the victim or the defendant's probable motivation and intent in subsequent situations. *See State v LaRue*, 594 N.W.2d 328, 335(S.D.1999) (When an accused had a close relationship with the victim, prior aggression, threats or abusive treatment of the same victim by the same perpetrator are admissible when offered on relevant issues under Rule404(b).")

Id. The *Taylor* court noted that the most obvious example of the legitimate use of prior bad acts evidence is the "admission of evidence

of a defendant's prior assaults of a victim in a prosecution of the defendant for the subsequent murder of a victim." *Id.*

In *State v. Richards*, 879 N.W.2d 140, 148 (Iowa 2016), the supreme court held that "intent is one valid, non-character theory of admissibility." Iowa R. Evid. 5. 404(b). The court continued that "the State may only utilize other acts evidence to prove intent if intent is legitimately disputed." *Id.*; *State v. Newell*, 710 N.W.2d 6, 22 (Iowa 2006); *see also State v. Rodriquez*, 636 N.W.2d 234, 242 (Iowa 2001).

Albright contends that his intent was not in dispute and admitted he hit Hartman. Def. Brief at 71-72. Albright's defense was to admit the willful injury and with it the specific intent to commit a serious injury. He was willing to admit to the lower level offense to prevent his conviction on the higher level of the offense. Even if he did admit to having the specific intent to commit a serious injury, Albright's intent was still at issue as to the kidnapping. That is, he disputed whether he "intentionally subjected Hartman to torture." Because his intent was at issue with regard to the kidnapping, intent was an issue and the admission of the abuse Albright perpetrated on Hartman prior to October 7th was relevant.

The evidence of the prior abuse was also relevant under the "inextricably intertwined doctrine." *State v. Nelson*, 791 N.W.2d 414, 422 (Iowa 2010). That is, "when acts are so closely related in time and place and so intimately connected that they form a continuous transaction, the whole transaction may be shown to complete the story of what happened." *Id.* In this case, the nature of Hartman and Albright's relationship was abusive. He believed she was cheating on him and he took out his anger in the physical and mental abuse of her. The prior acts were relevant to establish the nature of their relationship.

In addition, the evidence of the prior abuse was relevant to explain why she did not flee from Albright when she was alone in the truck at the veterinarian's office. She knew, based upon their prior relationship, what would befall her if she did. She was trying to stay alive and do what he told her to do so he would not become more enraged and subject her to additional abuse. *Newell*, 710 N.W.2d at 20-21; *Taylor*, 689 N.W.2d at 124-25; *Rodriquez*, 636 N.W2d at 243. The past physical and mental abuse would explain this to the jury

The question then becomes whether there was "clear proof the individual against whom the evidence is offered committed the bad

act or crime." *Sullivan*, 679 N.W.2d at 25. Without question, Hartman's testimony satisfies this requirement. *Richards*, 879 N.W.2d at 151 (a victim's testimony, standing alone, satisfies the requirement of clear proof); *State v. Jones*, 464 N.W.2d 241, 243 (Iowa 1990). Albright's attempts to discredit Hartman's testimony about the prior abuse through cross-examination do not negate the fact that the prior act need not be established beyond a reasonable doubt nor does it need to be corroborated. *Taylor*, 689 N.W.2d at 130 (the prior act need not be established beyond a reasonable doubt, nor is corroboration necessary).

The final consideration is whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. The danger of unfair prejudice does not outweigh its probative value. The evidence was "inextricably intertwined" with the injuries and torture Hartman suffered on October 7th. Thus, the acts amounted to a continuous transaction. Even if it could be argued that the acts were not intertwined, the testimony regarding the prior acts was nearly identical to what he had been charged with committing on October 7th. That is to say, the jury would not find

Albright's actions any more egregious if the same or similar abuse occurred before.

Because the evidence of the prior abuse was relevant and its probative value outweighed the danger of unfair prejudice, counsel had no duty to object to its admission. *Rice*, 543 N.W.2d at 888.

Albright must also demonstrate prejudice. To do so, counsel must show that had counsel objected to the admission of the prior acts of abuse, the district court would have sustained the objection, and he would not have been convicted of willful injury and first-degree kidnapping. Even if counsel had lodged an objection, the district court would have overruled it as the prior acts were relevant and not unfairly prejudicial. Moreover, as argued above, and incorporated herein, the State had a strong case against Albright. The testimony of Hartman coupled with the nature and extent of her injuries, and Albright's own admissions that he assaulted her. No prejudice occurred.

B. Prior conviction

Albright also claims counsel was ineffective in failing to object to Exhibit 35 (text messages) and introducing his prior conviction for domestic abuse assault during his testimony. Counsel's decision not

to object to the reference to his prison "number" and his prior conviction were strategic. Because counsel reasonably determined that both strategies were intended to cast Albright in a more positive light with the jury and were consistent with his theory of the case, he cannot show counsel was ineffective.

Counsel's decision not to object to Exhibit 35 was strategic. Exhibit 35 was a screen shot of text messages Albright sent to Hartman which said: "My state number if you want to write me. 1065220." Exh. 35; App. 19. By not objecting, counsel wanted to convey Albright's remorse for his actions, his acknowledgement that he had done something wrong and would likely go to prison for it. By admitting his failings, counsel could have thought this would cast Albright in a more favorable light with the jury.

Additionally, the message was consistent with his defense. Albright admitted he hit Hartman "several" times. Tr. Vol.III,p.102,L16-p.103,L9. He was willing to admit to the willful injury and accepted he would have to go to prison. The substance of the text message was the same as his defense. He had done something wrong and was willing to accept the consequences. For this reason, the admission of the exhibit was not unfairly prejudicial.

Similarly, as to counsel's decision to introduce Albright's prior conviction for domestic abuse was strategic. During his direct examination of Albright, counsel said:

COUNSEL: I want you to think back to some earlier years because I think Ms. Roan has a right to ask you this. Have you ever gone to prison?

DEFENDANT: Yes.

Tr.Vol.III, p. 105,Ls13-23. Albright admitted he had gone to prison for an enhanced domestic abuse assault. Tr.Vol.III, p. 105,Ls13-23. Counsel must have believed that the State could impeach him with the prior conviction under Rule 5.609 and determined that the probative value outweighed the danger of unfair prejudice. Because of this, counsel strategically determined that it would be better for Albright to admit to the prior conviction during his testimony so that the jury could see that Albright was willing to acknowledge his past misgivings and move forward. This strategy dovetailed with his defense. That is, he admitted to striking Hartman and was willing to face conviction on the willful injury. Tr. Vol.IIIp.106,Ls3-23, Vol.IVp.32,L8-p.35,L3.

Defense counsel was faced with a difficult decision given the strength of the State's case, the physical evidence, the victim's

testimony, and his admission. Counsel had to decide whether to question Albright about the prior conviction or sit back and let the State impeach him with it. By doing the former, he could limit Albright's exposure with the jury. By doing the latter, he would risk have the jury think he was hiding something. Under these circumstances, counsel's actions were reasonable albeit unsuccessful.

Albright must also demonstrate prejudice from counsel's actions in failing to object to Exhibit 35 (text messages) and in introducing his prior conviction. To do so, he must show that had counsel objected to Exhibit 35, the district court would have sustained the objection, and he would not have been convicted of willful injury and kidnapping. This would not have happened given the strength of the State's case as argued above and incorporated herein.

Likewise, Albright must also show that had counsel decided not to introduce his prior conviction he would not have been convicted. Again, the State's evidence was compelling if not overwhelming. Given this and his own admissions that he beat Hartman, he cannot demonstrate prejudice.

C. Cumulative error

Finally, Albright argues that while counsel's errors may not individually amount to ineffective assistance, the cumulative effect of multiple errors may make out a Sixth Amendment violation. Def. Brief at 84. That did not occur in this case.

As argued above, the evidence of Albright's prior assaults were "inextricably intertwined" with the abuse Hartman suffered on October 7, 2016, and were relevant. Even if the court find's they were not intertwined, they were relevant to establish his intent to torture Hartman during the hours-long ordeal. This evidence was also not unfairly prejudicial because it was similar to the evidence that the jury heard about the events of October 7th and that evidence was compelling.

Further, as to counsel's decision not to object to the admission of Exhibit 35 was reasonable trial strategy as was his decision to introduce Albright's prior conviction for domestic abuse assault. While it may have been unsuccessful, counsel had a tough decision to make given the State's evidence. Counsel opted to be upfront with the jury rather than hide his prior conviction. Albright is unable to demonstrate prejudice from counsel's actions under any situation.

There was no error because the individual claims are meritless. Stated simply, zero plus zero equals zero.

IV. The district court acted properly in ordering restitution for court costs and in finding he had the reasonable ability to pay the costs.

Ripeness

Albright's reasonable ability-to-pay claim is not properly before this Court because it is not yet ripe. Nor has Albright exhausted his remedies below, as required. For those reasons, this Court should dismiss Albright's restitution claim. *See Iowa Coal Min. Co., Inc. v. Monroe County*, 555 N.W.2d 418, 432 (Iowa 1996) ("If a claim is not ripe for adjudication, a court is without jurisdiction to hear the claim and must dismiss it."); *State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999) (declining to grant relief on a defendant's ability-to-pay challenge where the plan of restitution was not yet complete and the defendant had not yet petitioned the district court for modification under Iowa Code section 910.7).

A district court is not required to consider a defendant's reasonable ability to pay until "the plan of restitution contemplated by Iowa Code section 910.3 [i]s complete . . . ." *Jackson*, 601 N.W.2d at 357; *see also State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999);

State v. Campbell, No. 15-1181, 2016 WL 4543763, at *4 (Iowa Ct. App. Aug. 31, 2016) (stating that the sentencing court is not required to consider the defendant's ability to pay until it has issued "the order constituting the plan of restitution"). Until that obligation is triggered, a defendant's challenge on ability-to-pay grounds is premature. *See Jackson*, 601 N.W.2d at 357 (stating that it was precluded from granting the defendant the relief he sought).

At the time Albright filed his notice of appeal, the plan of restitution was not complete. Not. of Appeal (8/14/17); App. 55; *See also* Trial court docket. The district court ordered that Albright pay court costs, but did not include even a temporary amount of costs in its sentencing order. Judg. and Sent. (8/11/17); App. 52-54. Nor did the court enter any supplemental orders setting forth the amount of the court costs. Until the district court has "at a minimum, an estimate of the total amount of restitution," it had no obligation to assess Albright's ability to pay costs. *See Campbell*, 2016 WL 4543763, at *4. And Albright may not challenge the district court's failure to make an ability-to-pay determination until that obligation exists. *See*, *e.g.*, *State v. Brown*, No. 16-1118, 2017 WL 2181568, at *4 (Iowa Ct. App. May 17, 2017) (concluding that the defendant's ability-

to-pay challenge was premature because "the trial court had not yet entered a plan of restitution that would trigger the trial court's obligation to determine [the defendant's] reasonable ability to pay"); *State v. Alexander*, No. 16-0669, 2017 WL 510950, at *3 (Iowa Ct. App. Feb. 8, 2017) (holding that the district court's restitution order was "incomplete and not directly appealable" where the district court had "expressly reserved the amounts to be included in the plan of restitution for a later determination"); *State v. Kemmerling*, No. 16-0221, 2016 WL 5933408, at *1 (Iowa Ct. App. Oct. 12, 2016) ("Because the total amount of restitution had not yet been determined by the time the notice of appeal was filed, any challenge to the restitution order in this case is premature."); *see also State v. McMurry*, No. 16-1722, 2017 WL 4317302, at *4 (Iowa Ct. App. Sept. 27, 2017) (stating that a preliminary restitution order with no restitution amount would not be properly before the court).

Nor is Albright entitled to directly appeal the district court's reasonable ability to pay finding—or lack thereof—until he moves under Iowa Code section 910.7 for modification of the plan of restitution or plan of payment, or both. *See State v. Richardson*, 890 N.W.2d 609, 626 (Iowa 2017) (reaffirming *Jackson*'s principle "that

ability-to-pay challenges to restitution are premature until the defendant has exhausted the modification remedy afforded by Iowa Code section 910.7").

The State notes, however, that in recent cases, the Court of Appeals remanded the case to the district court for hearing when a court determines that a defendant has the reasonable ability to pay before a plan of restitution is entered. *State v. Johnson*, 887 N.W.2d 178, 184 (Iowa Ct. App. 2016) (because the sentencing court made a finding in its written order that Johnson was reasonably able to pay court-appointed attorney fees, it is "incorporated in the sentence" and may be directly appealable); *State v. Pace*, No. 16-1785, 2018 WL1629894, at *3 (Iowa Ct. App. 2018). The State submits that these cases are contrary to *State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999) and *State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999), and should be overruled.

Thus, until the district court completes the plan of restitution and Albright exhausts his remedies under Iowa Code section 910.7, his claim is not ripe and not directly appealable. *See Jackson*, 601 N.W.2d at 357.

Preservation of Error

Albright incorrectly asserts that his restitution claim is a challenge to an illegal sentence that he may bring at any time. *See* Appellant's Brief at 86. While that may be true of a defendant's challenge to the amount of restitution found in the sentencing order, *see State v. Janz*, 358 N.W.2d 547, 549 (Iowa 1984), it is not the case for a reasonable-ability-to-pay challenge, particularly when the district court made no finding of the defendant's ability to pay in its sentencing order. *See Campbell*, 2016 WL 4543763, at *3; *see also State v. Bullock*, No. 15-0982, 2017 WL 4049276, at *2 (Iowa Ct. App. Sept. 13, 2017) (stating that a reasonable-ability-to-pay challenge "does not automatically bring his claim within the ambit of an illegal sentence"). "The ability to pay is an issue apart from the amount of restitution and is therefore not an 'order incorporated in the sentence' and is therefore not directly appealable as such." *State v. Jose*, 636 N.W.2d 38, 45 (Iowa 2001) (alteration omitted).

Albright cannot yet bring his reasonable-ability-to-pay claim because events below have not yet triggered the district court's obligation to make such a finding. Once the district court enters a supplemental order completing the plan of restitution, Albright will

have the opportunity to challenge the district court's finding (or lack thereof) that he has the reasonable ability to pay those amounts. After exhausting that remedy, Albright may then bring his claim back to this Court.

Standard of Review

This Court reviews restitution orders for correction of errors at law. *Jose*, 636 N.W.2d at 43. When reviewing a restitution order, the Court "determine[s] whether the court's findings lack substantial evidentiary support, or whether the court has not properly applied the law." *State v. Bonstetter*, 637 N.W.2d 161, 165 (Iowa 2001). To the extent that Albright raises a constitutional claim, the Court's review is de novo. *See State v. Love*, 589 N.W.2d 49, 50 (Iowa 1998).

A defendant seeking "to upset an order for restitution" for court costs and attorney fees "'has the burden to demonstrate a failure of the trial court to exercise discretion or abuse of discretion.'" *State v. Kaelin*, 362 N.W.2d 526, 528 (Iowa 1985) (quoting *State v. Storrs*, 351 N.W.2d 520, 522 (Iowa 1984)); *State v. Ihde*, 532 N.W.2d 827, 829 (Iowa Ct. App. 1995).

Merits

Restitution is mandatory in every criminal case in which the defendant is found or pleads guilty. Iowa Code § 910.2(1). The sentencing court is required to order pecuniary damages to the defendant's victims and to the clerk for fines, penalties, and surcharges. *Id.*; *Id.* §§ 910.1(3) & (4). To the extent the defendant is reasonably able to pay, the court must also impose other payments such as contributions to a local anticrime organization, reimbursements to the crime victim compensation program, restitution to public agencies, court costs including correctional fees, and court-appointed attorney fees. *Id.* § 910.2(1). If the court finds that the defendant is unable to pay certain costs and fees, it may instead order that the defendant perform community service. *Id.* § 910.2(2).

Everyone involved in the criminal case has a role in compiling the restitution figures. The county attorney is required to provide the court with "a statement of pecuniary damages to victims of the defendant . . . ." *Id.* § 910.3. If the amount is not available at the time of sentencing, the county attorney has thirty days after that date to provide the statement to the court. *Id.* It is the clerk of court's job to

provide the court with a statement of court-appointed attorney fees and court costs including correctional fees. *Id.*

At sentencing or "at a later date to be determined by the court," *the sentencing court* is required to "set out the amount of restitution . . . and the persons to whom restitution must be paid." *Id.* (emphasis added). "If the full amount of restitution cannot be determined at the time of sentencing, the court shall issue a temporary order determining a reasonable amount for restitution identified up to that time." *Id.* The court must then "issue a permanent, supplemental order, setting the full amount of restitution[,]" and "further supplemental orders, if necessary." *Id.* Together, these orders are "known as the plan of restitution." *Id.*; *see State v. Harrison*, 351 N.W.2d 526, 528 (Iowa 1984) (stating that a restitution order "must include a plan of restitution setting out the amounts and kind of restitution in accordance with the priorities established in section 910.2").

"After sentencing in which a plan of restitution is ordered, the next step is establishing a plan of payment." *Harrison*, 351 N.W.2d at 528. The plan of payment is a schedule of payments that will allow the defendant to carry out the plan of restitution. *Id.* When a

defendant is incarcerated, the director of the Iowa department of corrections is required to "prepare a restitution plan of payment or modify any existing plan of payment." Iowa Code § 910.5(1)(d). Unlike when a defendant is placed on probation, however, an incarcerated defendant's "plan of payment is not initially made subject to court approval or change." *See Harrison*, 351 N.W.2d at 528-29 (comparing Iowa Code sections 910.4 and 910.5).

Nevertheless, at any time during the defendant's probation, parole, or incarceration, the defendant "may petition the court on any matter related to the plan of restitution or restitution plan of payment and the court shall grant a hearing" if one is warranted. Iowa Code § 910.7(1). The court may modify the plan of restitution or plan of payment, or both. *Id.* § 910.7(2).

At issue here is the sentencing court's finding that Albright had the reasonable ability to pay court costs without knowing the amount of those costs. The parties agree that the sentencing court is constitutionally required to make an ability-to-pay finding. *See Harrison*, 351 N.W.2d at 529 (emphasis and alterations omitted) ("We believe that section 910.2 requires the sentencing court to order restitution in the plan of restitution 'for court costs, court-appointed

attorney fees or the expense of a public defender when applicable' only 'to the extent that the offender is reasonably able to make such restitution'"); *see also Goodrich v. State*, 608 N.W.2d 774, 776 (Iowa 2000) (stating that "[t]he 'reasonable able to pay' requirement enables section 910.2 to withstand constitutional attack"); Appellant's Brief at 91-92. The question is when the court is required to make that determination.

The State acknowledges that the case law is less than clear at points, but it urges the Court to abide by *Swartz* and *Jackson*, and conclude that the sentencing court "is not required to give consideration to the defendant's ability to pay" until "the plan of restitution contemplated by Iowa Code section 910.3 [i]s complete . . . ." *Jackson*, 601 N.W.2d at 357; *Swartz*, 601 N.W.2d at 354. In the case of a defendant serving a term of imprisonment, the court's determination of whether the defendant is reasonably able to pay costs and fees "is more appropriately based on [his] ability to pay the current installments than his ability to ultimately pay the total amount due." *State v. Van Hoff*, 415 N.W.2d 647, 649 (Iowa 1987).

Under the current law, if the district court sets forth the full amount of restitution and payment plan in its sentencing order, it

should make a reasonable-ability-to-pay finding at that time.. *See Harrison*, 351 N.W.2d at 529; *Van Hoff*, 415 N.W.2d at 649. In that case, the defendant may directly appeal the finding. *See State v. Kurtz*, 878 N.W.2d 469, 472 (Iowa Ct. App. 2016). If, however, the district court postpones entry of the plan of restitution because the amount is not available, a defendant must wait until such time as the amount is available and the plan of payment is set before any action can be taken. *See* Iowa Code §§ 910.2 & 910.3. The defendant, however, may not appeal those findings until he challenges them in the district court under Iowa Code section 910.7. *See Jackson*, 601 N.W.2d at 357.

Alternatively, even if the court finds that Albright may directly appeal the district court's order, the court's reasonable ability to pay determination must be upheld. At the time the court sentenced Albright and found that he had the reasonable ability to pay court costs, no amounts were provided. Thus, the court made a proper determination that he had the reasonable ability to pay. That is, he had the reasonable ability to pay nothing if nothing was provided.

Even if the court understood that additional amounts would be forthcoming, the court still acted within its discretion. The district

court sentenced Albright to a life sentence for his first-degree kidnapping conviction. Judg. And Sent. (8/11/17); App. 52-54. If Albright is serving a life sentence, and the reasonable ability to pay requires only that an offender make payments toward the whole amount due, Albright would be able to make installment payments toward the obligation for the rest of his life. *Van Hoff*, 415 N.W.2d at 649. The district court committed no error. The restitution order must stand.

CONCLUSION

Albright's convictions and sentences must be affirmed.

REQUEST FOR NONORAL SUBMISSION

This case involves routine challenges to the sufficiency of the evidence, the court's jury instructions, ineffective assistance of counsel, and a restitution challenge. Oral argument is not necessary to resolve these claims. In the event argument is scheduled, the State requests to be heard.

Respectfully submitted,

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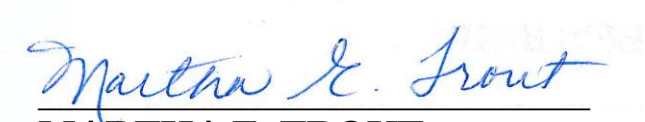

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CERTIFICATE OF COMPLIANCE

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 14, 2018

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