ELECTRONICALLY FILED SEP 20, 2016 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 15-1560

STATE OF IOWA,
Plaintiff-Appellee
vs.

STEPHEN ROBERT JONAS,
Defendant-Appellant

APPEAL FROM THE IOWA DISTRICT COURT FOR
POLK COUNTY
THE HONORABLE PAUL D. SCOTT, JUDGE

APPELLEE'S BRIEF

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Iowa R. Crim. P. 2.24(2)(b)(6)
3 Charles A. Wright Federal Practice and Procedure § 553
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ROUTING STATEMENT

Jonas requests the Supreme Court retain this case to overrule *State v. Neuendorf,* 509 N.W.2d 743 (Iowa 1993) "and return to the previously longstanding rule under *State v. Beckwith,* 242 Iowa 228, 46 N.W.2d 20 (1951) and *State v. Reed,* 201 Iowa 1352, 208 N.W. 308 (1926)[]" holding that an error in denying a challenge for cause is presumed prejudicial. Appellant's Brief, p. 13. As an initial matter, because the district court did not abuse its discretion in denying Jonas' request to strike a juror for cause, it is unnecessary to address his request to overrule *Neuendorf.*

In *Neuendorf,* the Court abandoned the rule of *Beckwith* and *Reed* holding that an error in denying "a challenge for cause is not obviated by the fact that the juror in question is otherwise removed by exercise of a peremptory challenge[]" and is presumed prejudicial. *Neuendorf,* 509 N.W.2d at 746; *State v. Mootz,* 808 N.W.2d 207, 222 (Iowa 2012) (recognizing that *Neuendorf* also overruled *Reed*). Rather, the *Neuendorf* Court held, that "in order to obtain relief

under a legal theory that a juror is not impartial it must be shown that that juror actually served in the case. When that juror did not serve in the case, it must be shown that the jury that did serve was not impartial." *Neuendorf*, 509 N.W.2d at 747.

Neuendorf provides the proper balance between a defendant's statutory right to a certain number of peremptory strikes, which are not of constitutional dimension, and deleterious impact on judicial economy that would result from an automatic-reversal rule. It should not be overruled.

Because this case otherwise involves the application of existing legal principles, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

The defendant, Stephen Jonas, appeals the judgment and sentence imposed upon his conviction of second-degree murder in violation of Iowa Code sections 707.1 and 707.3 (2013).

Course of Proceedings

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

Facts

At approximately 10:00 a.m. on August 23, 2014, passersby observed a male body lying in blood next to a fence separating the Johnston Greenbelt Trail from an adjacent business and called 911. Trial Tr. p. 538, lines 14-17, p. 539, line 5-p. 540, line 17, p. 544, lines 1-16, p. 552, line 15-p. 553, line 18. The owner of the business, Kurt Paulson, was informed of the presence of the body and, upon inspection, realized it was his son, twenty-one-year old Zachery Paulson. Trial Tr. p. 541, line 21-p. 543, line 5, lines 23-25, p. 560, line 21-p. 561, line 1, lines 19-20, p. 572, lines 14-18, p. 573, lines 2-17.

Urbandale Police Officer Maurio Coleman was the first police officer to arrive on the scene. Court's Exhibit A. It was immediately apparent to Officer Coleman that Zach was deceased. Court's Exhibit A. Officer Coleman observed a ball peen hammer and a cell phone (later determined to belong to Zach) on a trailer close to Zach. Trial Tr. p. 831, line 21-p. 832, line 2, Court's Exhibit A. In observing Zach's body, Officer Coleman noticed he had numerous stab wounds to his chest and a large gash on his hand. Court's Exhibit A.

Polk County Medical Examiner Gregory Schmunk performed an autopsy on Paulson and concluded he had died of multiple stab

wounds; the manner of death was homicide. Trial Tr. p. 1213, lines 8-12, p. 1223, line 22-p. 1224, line 2, p. 1240, line 9-p. 1241, line 7. Dr. Schmunk observed that Zach had 22 stab wounds and 15 incised wounds. Trial Tr. p. 1225, lines 15-19. However, it was Dr. Schmunk's opinion that Zach's injuries would not have immediately caused his death. Trial Tr. p. 1241, lines 8-10. Rather, Dr. Schmunk believed that Zach could "easily have lived 5, 10, 15 minutes, possibly longer" after being stabbed. Trial Tr. p. 1241, lines 11-20.

During the investigation of Zach's death, police learned that he was a regular customer at Tapz, a bar in Urbandale, Iowa. Trial Tr. p. 882, lines 3-6. Tracy Taylor, the bar manager at Tapz and Zach's friend, told police that Zach recently had an interaction with another regular patron, Steve Jonas. Trial Tr. p. 893, lines 9-22, p. 894, lines 1-2, p. 895, lines12-14, p. 896, lines 6-21, p. 899, line 13-p. 900, line 5.

Taylor had received a text message from Zach at 3:45 a.m. on August 16, 2014, the Saturday prior to his murder. Trial Tr. p. 900, lines 20-24, p. 901, line 19-p. 902, line 15, State's Exhibit 190. He told Taylor that he had been at his father's shop with Jonas and Keith Toye and had a story to tell her. Trial Tr. p. 902, lines 2-6, 19-p. 903, line 25, State's Exhibit 190.

When Taylor saw Zach the next Friday, August 22, 2014, at Tapz he told her the story he referred to in his text. Trial Tr. p. 904, lines 9-16. Jonas had given him a hug goodbye when he left the shop the previous Saturday morning and reached for Zach's bottom. Trial Tr. p. 904, line 17-25. Zach pushed him away. Trial Tr. p. 904, lines 17-25. Jonas wanted one more hug and again reached for Zach's bottom; again Zach pushed him away. Trial Tr. p. 905, lines 2-5. When Jonas stated that he was aroused, Zach asked him to leave. Trial Tr. p. 905, lines 2-5.

Taylor described Zach as "uncomfortable with the situation." Trial Tr. p. 905, lines 9-13. Zach also told her he had ignored a couple of texts he had received from Jonas. Trial Tr. p. 905, lines 14-22.

Zach left Tapz around 2:15 a.m. on August 23, 2014. Trial Tr. p. 820, lines 16-19, p. 829, lines 6-7, p. 908, lines 23-24, State's Exhibit 190. He texted Taylor that he was at his father's shop and invited her there. State's Exhibit 190. At 2:31 a.m. Zach texted Taylor again with the following message: "And im an idiot." Trial Tr. p. 910, lines 2-19, State's Exhibit 190.

Investigators retrieved a surveillance video from Tapz that showed Jonas was also there on August 22-23, 2014; however, Jonas

was not seen interacting with Zach. Trial Tr. p. 828, line 24-p. 829, lines 21, State's Exhibit 152. Jonas left Tapz at 1:30 a.m. Trial Tr. p. 829, lines 11-12, State's Exhibit 152.

In the early morning hours of August 24, 2014, Clive Police Detective Joe Nielson and Special Agent Matthew Clifton, with the Iowa Division of Criminal Investigations, spoke to Jonas at his residence. Trial Tr. p. 956, lines 1-4, p. 964, line 23-p. 965, line 3, p. 968, line 21- p. 969, line 7. Jonas agreed to come to the Clive Police Department for an interview and drove there in his truck. Trial Tr. p. 970, line 25-p. 971, line 4, p. 1038, lines 4-p. 1039, line 5, p. 1027, lines 15-21, p. 1040, line 18-p. 1041, line 11.

Investigators asked Jonas about a bruise on his chin; he told them it was caused when he tripped on some stairs. Trial Tr. p. 1073, lines 6-12. Jonas told Detective Nielson and Agent Clifton that he knew Zach. State's Exhibit 185. Eventually, Jonas revealed that he had been at the Paulson shop on August 15-16, 2014, with Zach and Keith Toye. He said he had left at the same time as Toye and did not mention a hug. State's Exhibit 185. Jonas denied being at the Paulson shop on August 22-23, 2014. Trial Tr. p. 1073, lines 13-16, State's Exhibit 185.

Jonas consented to the search of his truck. State's Exhibit 185, Trial Tr. p. 1140, line 17-p. 1142, line 6. Investigators took samples from substances in the truck that appeared to be blood. Trial Tr. p. 669, lines 10-19. Later testing showed that Zach's blood was present in several areas of Jonas' truck. Trial Tr. p. 1168, line 1-p. 1169, line18, p. 1171, lines 2-10, State's Exhibit 146. Investigators also retrieved video surveillance from a nearby business in which they saw a blue truck, similar to Jonas', entering at the Paulson business at 2:18 a.m. and leaving at 3:14 a.m. on August 23, 2014. Trial Tr. p. 810, line 25-p. 811, line 10, p. 812, line 22-p. 813, line 14, State's Exhibit 210.

Police interviewed Jonas a second time on around 8:10 p.m. on August 24. Trial Tr. p. 1070, line 22-p. 1071, line 1. They asked him if there was any reason his truck would have been at the Paulson shop on August 23, 2014. After first confirming that there was video establishing that his truck was there, Jonas admitted he had been. Jonas then provided the full story of the August 16, 2014 encounter with Zach; however, he indicated he thought Zach showed some interest in him. He told investigators that he had gone to the Paulson

shop in the early morning hours of August 23 to talk to Zach about it. State's Exhibit 186.

Jonas described an uneventful conversation with Zach inside the shop. He explained that he had suggested going outside to get some air. When the two exited the shop, Jonas claimed he saw Zach place what looked like a hammer in the pocket of his shorts. Jonas went to his truck to retrieve cigarettes and he grabbed a recently purchased Bear Grylls' knife. State's Exhibit 186.

When Jonas walked closer to Zach, Zach hit him in the chin. Jonas said he fell but was able to get up, grab his knife from his pocket and stab Zach. He claimed Zach continued to hit Jonas with the hammer; therefore, he continued to stab Zach. Jonas thought he had struck Zach with the knife five to six times. When he left, Zach was moaning. State's Exhibit 186.

Jonas told police where he had disposed of his bloody shirt, his jeans, and his shoes; however, after an exhaustive search, police were unable to locate any of these items. Trial Tr. p. 815, line 10-p. 816, line 10, p. 1017, lines 2-13, State's Exhibit 186. In a search of Jonas' residence, police discovered blood in the bathroom that was

consistent with Zach's DNA sample. Trial Tr. p. 1017, line 1-p. 1019, line 11, p. 1172, line 24-p. 1173, line 8, State's Exhibit 146; App. 16.

Jonas was charged with the first-degree murder of Zach. Trial Information; App. 4. He filed a notice that he intended to present a justification defense. Notice of Defense; App. 6.

At his murder trial Jonas testified and asserted that he believed he was going to be killed by Zach when he was struck by the hammer. Trial Tr. p. 1418, line 12-p. 1425, line 8, p. 1430, lines 15-17, p. 1441, line 22-p. 1442, line 5. He claimed that he did not have an opportunity to escape; however, on cross-examination Jonas conceded that he could have left the property when he saw Zach pocket a hammer. Trial Tr. p. 1429, lines 11-1, p. 1481, lines 1-17. Jonas admitted that he had lied to police. Trial Tr. p. 1438, lines 13-15, p. 1441, lines 2-6.

The jury found Jonas guilty of second-degree murder. Criminal Verdict; App. 20. Jona's motion for new trial was denied. Motion for New Trial, Sentencing Tr. p. 7, line 1-p. 9, line 18; App. 23.

Additional facts will be set forth below as relevant to the State's argument.

ARGUMENT

I. The District Court Did Not Err in Overruling Jonas' Motion to Strike a Potential Juror for Cause.

Preservation of Error

The State agrees that Jonas preserved error by moving to strike Juror Stanger for cause and obtaining the district court's ruling on the motion. Trial Tr. p. 161, lines 10-20, p. 162, lines 1-15. *State v. Manna*, 534 N.W.2d 642, 644 (Iowa 1995) ("issues must be presented to and passed upon by the district court before they can be raised and decided on appeal").

Standard of Review

The "district court is vested with broad discretion" in ruling on for-cause challenges to jurors. *State v. Tillman,* 514 N.W.2d 105, 107 (Iowa 1994).

Merits

Iowa Rule of Criminal Procedure 2.18(5)(k) provides that a challenge for cause may be made by the State or defendant to a juror who has "formed or expressed such an opinion as to the guilt or innocence of the defendant as would prevent the juror from rendering a true verdict upon the evidence submitted on the trial." A defendant charged with a Class "A" felony is also entitled to ten peremptory

strikes (plus one when selecting alternate jurors). Iowa R. Crim. P. 2.18(9) and 2.18(15).

Jonas urges that the district court abused its discretion in denying his request to strike Juror Stanger because he expressed bias about his homosexuality. By denying the request, Jonas argues, he lost the use of one of his peremptory strikes.[1] He contends that this error should be presumed prejudicial.

District court did not abuse its discretion in denying Jonas' request to strike juror for cause. A question on the jury survey asked jurors whether the fact that the defendant is gay would affect their ability to be fair and impartial; Stanger answered the question yes. Trial Tr. p. 151, lines 14-17, p. 155, lines 4-9. When the State asked him about this response, Stanger agreed that he could make a decision based upon the evidence and the court's instructions. Trial Tr. p. 151, lines 19-22.

When defense counsel asked about Stanger about his response to the question, Stanger replied, "Somewhere in the back of my mind something would come up. I just-- I'm just being honest with you, yes." Trial Tr. p. 155, lines 4-12. Defense counsel inquired, "So is it

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[1] Stanger did not serve on the jury. Trial Tr. p. 471, line 23-p. 472, line 4.

fair to say that you are not going to be able to give Mr. Jonas a fair trial because of that?" Trial Tr. p. 155, lines 20-21. Stanger answered, "I would say that young man would probably do better without me on the jury, just to be honest with you. I would try to be fair. I'm 50 years old and I would try to be fair, but he probably would have better jury selection than myself." Trial Tr. p. 155, line 19-p. 156, line 1. Defense counsel continued his questioning:

> Q: Because is that a factor you will not be able to exclude?
>
> A: I don't know if I'd be able to. I would try to exclude it, but, you know, somewhere in the back something is going to come up I guess.
>
> Q: So, if I can restate what you told us, it would not be fair to Mr. Jonas to have you on the jury –
>
> A: Correct—
>
> Q: --because of that fact you could not be completely fair and impartial?
>
> A: It would come – yes, yes.

Trial Tr. p. 156, lines 2-12.

The State and Stanger then engaged in the following exchange:

> Q: Are you telling me you couldn't listen to the circumstantial evidence and make a decision based upon the evidence?

> A: Again, I would sit there and somewhere along the way something would come up in the back of my mind. I will try. Honestly, I will try that, but the young man would probably do better with someone else.
>
> Q: Have you formed an opinion now as to guilt or innocence?
>
> A: I have not, no, sir.
>
> Q: And, you know, you have served on a jury before. You know that the State has the burden of proof and you're supposed to make your decisions based upon the evidence and the Judge's instructions. I'm just saying, can you do that? I know you have personal feelings. Can you set those aside and make a decision based on that?
>
> A: Again, I would try, but I'm sure there would be something that would come up.
>
> Q: You don't know what that would be?
>
> A: Yeah. I – again, I'm 50 years old. I work with truckers and guys in oil refineries and in oil wells. It's just permeated my life. So I will try to be honest and fair, but again, there would be something that would come up. I'm just being honest.

Trial Tr. p. 156, line 17-p. 157, line 16.

The district court also asked Stanger about his ability to be unbiased.

> THE COURT: My question for you is this: Does the fact that the defendant, Mr. Jonas, has identified himself as a gay man, does that

fact alone cause you to be biased or prejudiced against him in determining whether he's guilty or innocent in this case?

A: Again, I don't think it would be determined whether he was guilty or innocent, but I would still have a bias there some place, yes.

THE COURT: Okay. So are you – if I instruct you as to what the law is, are you going to be able to follow what the law says?

A: Yes.

THE COURT: Are you – does the fact that the defendant, again, is gay, does that cause you to not be able to listen to the evidence and keep an open mind with respect to guilty or not guilty, the facts of this case? [. . .]

A: I understand that, you know, again the facts are going to be the facts and my – and that's what we will hear and that's what we will determine. But, again, somewhere down in the –

THE COURT: Well, the law doesn't require that you forget the fact that Mr. Jonas is gay, so that's why I'm concerned about the fact that you are telling us that there is something that might pop up in the back of your head. You don't have to forget the fact that he has identified himself as being gay.

Is that what you're telling the Court is that you are not going to be able to forget the fact that he's gay. Or do you think that the fact that he's gay means that more likely than not that he – that you are not going to be able to give him a fair trial?

> A: I think, again, the gentleman would probably do better without me on the jury. I think there could be something in the back of my mind that would – again, I'd listen to the facts. I would try my best, but it's who we are.

Trial Tr. p. 158, line 4-p. 159, line 16.

In denying Jonas' request to strike Stanger for cause, the district court observed that Stanger had maintained that he could be fair and unbiased despite his feelings about the gay defendant. Trial Tr. 158, lines 1-6. It determined Stanger could remain on the jury. Trial Tr. p. 162, lines 7-9.

In contrast, the district court did grant Jonas' request to strike a juror for cause where the juror stated he could not be fair and impartial and would be less likely to believe Jonas because he was gay. Trial Tr. p. 227, lines 2-p. 229, line 20. The distinction between this juror and Stanger is that Stanger continued to state he was able to be fair and impartial, or would try to be, despite what may be in the back of his mind about the fact the defendant is gay. Stanger may have had some bias about homosexuals; however, his bias would not prevent him from rendering a verdict based upon the evidence.

A "prospective juror's indication of concern about the ability to set aside a prejudice or preconceived belief about some facet of the

case does not automatically warrant exclusion for cause. Disqualification is not required if the trial court is reasonably satisfied that the prospective juror is willing and able to be fair and to follow its instructions." *People v. Griffin,* 985 P.2d 15, 20 (Colo. App. 1998).

For example, in *State v. Winfrey*, 221 N.W.2d 269, 273 (Iowa 1974), a juror "related the fact he and his wife had had trouble with two young blacks while they were living in a black neighborhood. They moved because of that trouble." The Supreme Court found the district court did not abuse its discretion in denying the defendant's challenge for cause because the juror "also stated he could be fair and impartial to [the black] defendant." *Winfrey,* 221 N.W.2d at 273.

Here, the district court was satisfied Stanger could be fair and impartial despite his underlying feelings about homosexuality. It did not abuse its discretion in denying Jonas' request to strike Stanger for cause. *See People v. Simon*, 100 P.3d 487, 494 (Colo. App. 2004), as modified on denial of reh'g (May 13, 2004) (no abuse of discretion to deny strike for cause where juror expressed religious objections to homosexuality).

Neuendorf. In the event that the reviewing court determines the district court abused its discretion in denying his request to strike

Stanger for cause, Jonas requests the Court to overrule *State v. Neuendorf,* 509 N.W.2d 743 (Iowa 1993). In *Neuendorf,* the Supreme Court found that the district court abused its discretion in denying the defendant's motion to strike a juror for cause. The defendant then used a peremptory strike to remove this juror and she was not seated. The Court determined that the district court's error did not automatically require reversal of the defendant's conviction. Rather, because there was no evidence that the jury that convicted the defendant was not impartial, the defendant was not entitled to reversal. *Neuendorf*, 509 N.W.2d at 746-47.

As Jonas notes, *Neuendorf* overruled prior case law holding that such an error required automatic reversal. *See State v. Beckwith,* 242 Iowa 228, 46 N.W.2d 20 (1951) and *State v. Reed*, 201 Iowa 1352, 208 N.W2d. 308 (1926). In doing so, the Iowa Supreme Court joined the United States Supreme Court and a majority of jurisdictions that have rejected an automatic-reversal rule. *See United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000), Joe Lin, *State v. Hickman: Redefining the Role of Peremptory Challenges,* 46 Ariz. L. Rev. 849, 854 (Winter 2004) ("harmless error review is the majority rule among the various United States jurisdictions").

In *Martinez-Salazar,* the Supreme Court explained that "peremptory challenges are not of constitutional dimension." *Martinez-Salazar,* 528 U.S. at 779. The Court rejected the reasoning that reversal is required when an error in denying a challenge of cause reduces an "allotment of peremptory challenges by one." *Id.* at 781. It noted that "[a] hard choice is not the same as no choice." *Id.* The Court maintained that rather than losing a peremptory challenge, the defendant "used the challenge in line with a principal reason for peremptories: to help secure the constitutional guarantee of a trial by an impartial jury." *Id.* at 781-82.

The Court also noted this use of the peremptory, to cure an error by the trial judge, "comports with the reality of the jury selection process. Challenges for cause and rulings upon them [ ] are fast-paced, made on the spot and under pressure. Counsel, as well as court, in that setting, must be prepared to decide, often between shades of gray, by the minute." *Id.* (internal quotation marks omitted).

As in *Martinez-Salazar* and *Neuendorf,* the district court's ruling did not "result in the seating of any juror who should have been dismissed for cause." *Id.* Both courts acknowledge that reversal

would be warranted if a juror who should have been struck for cause sat on the jury. *Id.; Neuendorf*, 509 N.W.2d at 747.

There is no indication the trend of jurisdictions is toward an automatic-reversal rule despite the cases cited by Jonas. In fact, quite recently, in *State v. Novotny,* 320 P.3d 1194 (Colo. 2014), the Colorado Supreme Court overruled its prior automatic reversal rule. *See also Pickens v. State,* 783 S.W.2d 341, 345 (Ark. 1990); *State v. Hickman*, 68 P.3d 418 (Ariz. 2003)*; Dawson v. State,* 581 A.2d 1078, 1093-94 (Del. 1990), *vacated on other grounds by Dawson v. Delaware,* 503 U.S. 159 (1992)*; Trotter v. State,* 576 So. 2d 691, 693 (Fla. 1990); *State v. Graham,* 780 P.2d 1103, 1108 n.3 (Haw. 1989)*; People v. Gleash,* 568 N.E.2d 348, 353 (Ill. Ct. App. 1991); *Vaughn v. State,* 559 N.E.2d 610, 614 (Ind. 1990); *State v. Ramos,* 808 P.2d 1313, 1315 (Idaho 1991)*; Mettetal v. State,* 602 So. 2d 864, 869 (Miss. 1992)*; State v. Tranby,* 437 N.W.2d 817, 824 (N.D. 1989)*; State v. DiFrisco,* 645 A.2d 734, 751-53 (N.J. 1994); *State v. Broom,* 533 N.E.2d 682, 695 (Ohio 1988); *State v. Green,* 392 S.E.2d 157, 160 (S.C. 1990)*; State v. Middlebrooks,* 840 S.W.2d 317, 329 (Tenn. 1992); *State v. Menzies,* 889 P.2d 393, 398 (Utah 1994); *State v.*

Lindell, 629 N.W.2d 223 (Wis. 2001); and *Klahn v. State*, 96 P.3d 472, 483 (Wyo. 2004).

As the Arizona Supreme Court observed in *State v. Hickman*, 69 P.3d 418 (Ariz. 2003), "[i]f important constitutional errors are subject to harmless error review, then, logically, a trial court's erroneous denial of a challenge for cause and the defendant's subsequent use of a peremptory challenge to cure that error should be subject to harmless error review." 68 P.3d at 425. Citing *Martinez-Salazar's* description of the pace of voir dire and "shades of gray" often distinguishing jurors, the Court reasoned that it is "incongruous that a defendant should receive a new trial simply because the trial judge made a mistake that had no impact on the reliability of the jury's verdict." *Id.* Granting a new trial when the defendant was tried before an impartial jury "would be an exercise of form over substance." *Id.* at 426. An automatic reversal rule "is costly to the victims and to the judicial system, and it generates public cynicism and disrespect for the judicial system." *Id.*

When Wisconsin had an automatic-reversal rule, the dissent to the case applying it, *State v. Ramos,* set forth the predicament that

may result from doing so. Justice Crooks wrote that the *Ramos* majority,

> effectively created a "win-win" situation for defendants. Pursuant to *Gesch*, if a circuit court erroneously fails to excuse a juror for cause, the defendant may refuse to exercise a peremptory challenge, wait until the jury renders its verdict, appeal if he or she does not like the result, and then receive a new trial. Pursuant to the majority's decision in this case, even if a defendant uses a peremptory challenge to strike the "for cause" juror in such situations, the defendant may wait until the jury renders its verdict, appeal if he or she does not like the result, and then receive a new trial. Therefore, *Gesch*, combined with the majority's opinion today, will result in a tremendous waste of judicial resources and taxpayers' money in this case and in future cases as well.

State v. Ramos, 564 N.W.2d 328, 340 (1997) (Crooks, J., dissenting) overruled by *State v. Lindell*, 629 N.W.2d 223 (Wis. 2001).

For the reasons relied upon by the Court in *Martinez-Salazar, Hickman*, and the *Ramos'* dissent, there is no need to revive the automatic-reversal in Iowa.

II. The State Proved Beyond a Reasonable Doubt that Jonas Did Not Act With Justification.

Preservation of Error

Jonas unsuccessfully moved for a judgment of acquittal at the close of the State's case and at the close of the defense's case. Trial Tr.

p. 1255, line 6-p. 1259, line 6, p. 1561, lines 6-14. Jonas specifically argued the State had not proved that he acted without justification. Trial Tr. p. 1255, line 6-22. The State agrees Jonas preserved error on this issue.[2] *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996) (motion for judgment of acquittal must be make reference to specific grounds in district court to preserve error).

Standard of Review

Review of a challenge to the sufficiency of the evidence is on assigned error. *State v. McPhillips*, 580 N.W.2d 748, 753 (Iowa 1998). The reviewing court will uphold the denial of a motion for judgment of acquittal if there is substantial evidence in the record to support the defendant's conviction. *Id.* at 752. Substantial evidence is evidence that could convince a trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996). In determining whether there is sufficient evidence, the court considers all the evidence. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980). However, the court views the evidence in a light most favorable to the State and makes all

[2] Jonas argues that if error was not preserved, his counsel provided ineffective assistance.

reasonable inferences that may be drawn from the evidence. *McPhillips*, 580 N.W.2d at 752.

Merits

Jonas argues the State failed to present sufficient evidence to prove beyond a reasonable doubt that he did not act with justification. "A person is justified in the use of reasonable force when the person reasonably believes that such force is necessary to defend oneself or another from any imminent use of unlawful force." Iowa Code § 704.3 (2013). "When the defense is raised, the burden rests upon the State to prove --beyond a reasonable doubt-- that the alleged justification did not exist." *State v. Rubino*, 602 N.W.2d 558, 565 (Iowa 1999).

"The State can meet its burden by proving any of the following facts: 1. The defendant initiated or continued the incident resulting in injury; or 2. The defendant did not believe he was in imminent danger of death or injury and that the use of force was not necessary to save him; or 3. The defendant had no reasonable grounds for such belief; or 4. The force used was unreasonable." *Id.*

The State proved at least three of the four facts in this case. First, the jury could have reasonably rejected the premise that Zach

swung a hammer at Jonas. Jonas lied about other aspects surrounding the events of August 23, 2014; he could have been lying about Zach being the initiator of the fight. The presence of a hammer in the area surrounding a workshop is not unusual. Nor is the presence of Zach's blood on the hammer unusual based upon the location in which it was found (DNA testing showed that the only identifiable DNA on the hammer was a statistical match to Zach). Trial Tr. p. 1164, line 3-p. 1165, line 1; App. ___.

Next, the State proved Jonas continued the *incident* resulting in injury. The incident could have been avoided had Jonas, after observing Zach pocket a hammer, simply driven away when he went to his truck to get cigarettes. However, instead of ending the evening, Jonas grabbed a knife and returned to where Zach was standing. State's Exhibit 186. By grabbing his knife, Jonas demonstrated awareness that a fight might ensue and yet he continued the incident by returning to talk to Zach.

Next, the force Jonas used was more than necessary to fend off Zach's alleged attack. Zach sustained 22 stab wounds and 15 incised wounds. Trial Tr. p. 1225, lines 15-19. Dr. Schmunk described the various injuries to Zach. These injuries included a stab wound to his

left eyebrow that "penetrated down into the globe of—or into the region of the eye[,] a four-inch slash to his cheek, stab wounds to his right lower chest, stab wounds that entered his abdominal cavity, and a "deep incised wound to the right thumb" that "nearly severed the right thumb off." Trial Tr. p. 1228, line 9-p. 1231, line 17, p. 1232, line 19-p. 1234, line 19, 1236, line 15-p. 1237, line 4. Moreover, Dr. Schmunk opined that the wound to Zach's thumb would have rendered it unusable. Trial Tr. p. 1237, lines 8-16. Jonas stated in his second interview with police that Zach held the hammer in his right hand when he was struck by it. State's Exhibit 186. This indicates that Zach was right-handed and would not have presented a deadly threat to Jonas due to this injury.

In contrast, the blow Jonas received a bruise/abrasion to his chin but there were no injuries to the inside of his mouth or to his teeth. Trial Tr. p. 1077, lines 14-23, p. 1078, lines 19-25, p. 1222, line 17-p. 1223, line 10, State's Exhibit 179. *See People v. Williams*, 599 N.E.2d 1033, 1042 (Ill. Ct. App. 1992) (due to "the number and severity of the wounds, the jury could have decided that defendant had formed the intent to kill" victim and reject justification defense); *Harvey v. State*, 541 N.E.2d 556, 559 (Ind. Ct. App. 1989) ("jury

could logically conclude, given the disproportionate amount of force employed and the circumstances leading to the stabbing, that Harvey did not reasonably respond out of fear or apprehension of death or great bodily harm"); *State v. Bell*, 442 So. 2d 715, 717 (La. Ct. App. 1983), *writ denied*, 444 So. 2d 1244 (La. 1984) ("Even assuming the victim pulled the knife, we are convinced defendant could have defended himself by less drastic measures. In short, his actions (of repeatedly stabbing the victim in the back) were not necessary to save himself from any perceived danger.")

Further, Jonas' actions following the stabbing demonstrate guilty knowledge that is inconsistent with his justification defense. According to Jonas, Zach was still moaning when he left him; however, Jonas did not call 911. Rather, Jonas returned to his residence, removed his clothes, and then disposed of these clothes and his knife in such a manner that they were never found. Trial Tr. p. 815, line 10-p. 816, line 10, State's Exhibit 186. This behavior is not consistent with the actions of a person who felt justified in defending himself. *See Williams*, 599 N.E.2d at 1043 ("defendant's efforts to depict a homicide/burglary and his changing of his clothes and attempts to mislead the police by making false statements were

sufficient to permit the jury to reject the self-defence claim"); *State v. Ray*, 70 So. 3d 998, 1005 (La. Ct. App. 2011), (jury did err in rejecting justification defense based in part on fact that defendant "disposed of the murder weapon and gave two false statements to the police before finally confessing to the murder"); *State v. Kirby*, 697 S.E.2d 496, 502 (N.C. Ct. App. 2010) ("Defendant's flight after the shooting is clear evidence from which the jury could reasonably infer that defendant knew that he had not killed in self-defence, otherwise he would have stayed and waited for the police to come, or he would have called the police himself.").

Given Jonas' opportunity to avoid a confrontation, the quantity and nature of the stab wounds inflicted upon Zach in response to an alleged blow, Jonas' failure to call for help, his disposal of his clothes and knife, and his failure to tell the truth about the incident when first interviewed by investigators, the State proved beyond a reasonable doubt that Jonas did not act with justification when he killed Zach.

III. Counsel Was Not Ineffective for Failing to Object to Alleged Prosecutorial Misconduct.

Preservation of Error

A claim of ineffective assistance is an exception to the normal rules of error preservation. *State v. Lucas*, 323 N.W.2d 228, 232 (Iowa 1982).

Standard of Review

The court reviews ineffective-assistance-of-counsel claims de novo. *State v. Williams*, 574 N.W.2d 293, 300 (Iowa 1998).

Merits

Jonas argues his counsel was ineffective for failing to object to alleged prosecutorial misconduct, amounting to a due process violation, during the closing arguments. Therefore, "[i]n analyzing the defendant's ineffective-assistance-of-counsel claim, [the] first step is to assess whether the record demonstrates, as a matter of law, the existence or absence of a meritorious due process violation." *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003).

No due process violation. Proof of misconduct is the "initial requirement for a due process claim based on prosecutorial misconduct." *Graves*, 668 N.W.2d at 868-69. Here, Jonas claims the

prosecutor engaged in misconduct by voicing of his "personal opinion and unfairly disparage[ing]" him. Appellant's Brief, p. 62.

The examples provided by Jonas do not constitute misconduct. "[A] prosecutor is [. . .] free 'to craft an argument that includes reasonable inferences based on the evidence and ... when a case turns on which of two conflicting stories is true, [to argue that] certain testimony is not believable.'" *Graves,* 668 N.W.2d at 876 (quoting *State v. Davis*, 61 P.3d 701, 710-711 (Kan. 2003)).

In determining the propriety of an argument the Court considers the following questions:

> (1) Could one legitimately infer from the evidence that the defendant lied? (2) Were the prosecutor's statements that the defendant lied conveyed to the jury as the prosecutor's personal opinion of the defendant's credibility, or was such argument related to specific evidence that tended to show the defendant had been untruthful? And (3) Was the argument made in a professional manner, or did it unfairly disparage the defendant and tend to cause the jury to decide the case based on emotion rather than upon a dispassionate review of the evidence?

Graves, 668 N.W.2d. at 874–75.

Here, a juror could legitimately infer from the evidence that Jonas lied. In fact, it wasn't necessary for the jury to infer Jonas'

deceit, he admitted that he had originally lied to police and that he threw away his bloody clothes and the knife he used. Trial Tr. p. 1438, lines 13-15, p. 1439, lines 11-22.

The prosecutor's argument was made in a professional manner and it was not based upon personal opinion. The prosecutor did not attempt to invoke the jury's emotions. *See* Sentencing Tr. p. 17, line 14-p. 18, line 2.

However, assuming there was prosecutorial misconduct, the second element in a claim of prosecutorial misconduct requires the defendant to prove "the misconduct resulted in prejudice to such an extent that the defendant was denied a fair trial." *Graves*, 668 N.W.2d at 868-69. To determine whether the petitioner was prejudiced by the prosecutorial misconduct the court considers: "(1) the severity and pervasiveness of the misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence, (4) the use of cautionary instructions or other curative measures, and (5) the extent to which the defense invited the misconduct." *Id.* at 877. These factors are assessed within the context of the whole trial. *Id.* at 869.

As for the fourth and fifth considerations, there were no cautionary instructions pertaining to prosecutor's specific closing arguments and Jonas did not invite the alleged misconduct. The prosecutor's remarks were significant to the central issue of the case, whether Jonas had acted in self-defense.

However, the other two considerations, severity and pervasiveness of the misconduct and the strength of the State's case, support a conclusion that Jonas was not prejudiced by the prosecutor's alleged misconduct. "The most important factor under the test for prejudice is the strength of the State's case." *State v. Carey*, 709 N.W.2d 547, 559 (Iowa 2006).

The alleged misconduct was limited to closing argument, it was not pervasive throughout the trial. The alleged misconduct was within the bounds of acceptable argument based upon Jonas' admissions that he lied to police when first interviewed. Importantly, the State's case against Jonas was strong. Jonas did not deny that he killed Zach by stabbing him. Rather, Jonas relied upon a justification defense. As set forth in Division II, the State presented ample evidence to disprove Jonas' defense.

If the prosecutor committed misconduct, it was not prejudicial misconduct.

Counsel was not ineffective. To prove counsel was ineffective, the defendant must show: (1) trial counsel failed to perform an essential duty; and (2) prejudice resulted from counsel's error. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998). The Court can affirm on appeal if either element is absent. *McPhillips,* 580 N.W.2d at 754.

Counsel did not breach an essential duty. To prove the first prong of an ineffective assistance of counsel claim, the defendant must prove his counsel's performance was not within the normal range of competence. *Id.* The court presumes counsel is competent. *State v. Spurgeon*, 533 N.W.2d 218, 219 (Iowa 1995). The defendant "must overcome the strong presumption that counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency." *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987).

Because there was no misconduct and no due process violation, counsel had no duty to object to the prosecutor's closing argument.

State v. Griffin, 691 N.W.2d 734, 737 (Iowa 2005) ("counsel has no duty to raise an issue that has no merit").

Jonas was not prejudiced by counsel's alleged breach. "The defendant establishes prejudice by showing there is a 'reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Hopkins,* 576 N.W.2d 374, 378 (Iowa 1998) (citing *Strickland,* 466 U.S. at 694). A "'reasonable probability is a probability sufficient to undermine confidence in the outcome of the defendant's trial.'" *State v. Bugely,* 562 N.W.2d 173, 178 (Iowa 1997) (citing *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986)).

In *State v. Rai,* No. 09-1207, 2010 WL 2925851, at *7 (Iowa Ct. App. July, 28, 2010), wherein the defendant made a similar ineffective-assistance-of-counsel claim based upon the failure to object to prosecutorial misconduct, the Court of Appeals observed that "'prejudice' seemingly enters into the calculus twice—first, in deciding whether prosecutorial misconduct occurred, and, second, in determining whether the defendant was prejudiced by it for ineffective assistance purposes." The Court reasoned that "the supreme court seemingly merged the two inquiries into one,

emphasizing that '[t]he most important factor is *the strength of the State's case against the defendant.*'" *Rai,* No. 09-1207, 2010 WL 2925851, at *7 (quoting *State v. Boggs*, 741 N.W.2d 492, 509 (Iowa 2007)).

Because Jonas cannot demonstrate that he was prejudiced by the alleged misconduct for due process purposes, he cannot demonstrate the result of his trial was undermined by any alleged breach of duty by counsel.

IV. The District Court Did Not Err in Denying Jonas' Motion for New Trial.

Preservation of Error

The State agrees that Jonas preserved error on this issue by filing a motion for new trial and obtaining the district court's ruling upon it. Motion for New Trial, Sentencing Tr. p. 7, line 1-p.9, line 18. *State v. Manna*, 534 N.W.2d 642, 644 (Iowa 1995) ("issues must be presented to and passed upon by the district court before they can be raised and decided on appeal").

Standard of Review

"In ruling upon motions for new trial, the district court has a broad but not unlimited discretion in determining whether the

verdict effectuates substantial justice between the parties." Iowa R. Civ. P. 6.904.

Merits

Jonas urges the district court erred in denying his motion for new trial because it did not sufficiently weigh the the evidence to determine whether it was contrary to a finding that the State had disproved his justification defense beyond a reasonable doubt.

Pursuant to Iowa Rule of Criminal Procedure 2.24(2)(b)(6), the district court may grant a new trial "[w]hen the verdict is contrary to law or evidence." In ruling upon "a motion for new trial based on the ground that the verdict was contrary to the weight of the evidence, the district court must 'weigh the evidence and consider the credibility of the witnesses.'" *State v. Scalise,* 660 N.W.2d 58, 65-66 (Iowa 2003) (quoting *Ellis*, 578 N.W.2d at 658). "The court is not to approach the evidence from the standpoint "most favorable to the verdict." *Id.* "Rather, the court must independently consider whether the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted." *Id.*

The Iowa Supreme Court has cautioned that "'the power to grant a new trial on this ground should be invoked only in exceptional

cases in which the evidence preponderates heavily against the verdict.'" *State v. Ellis,* 578 N.W.2d 655, 659 (Iowa 1998) (quoting 3 Charles A. Wright, Federal Practice and Procedure § 553, at 245-48 (2d ed.1982)). In addressing Jonas' motion for new trial, the district court opined:

> This is not one of those cases. This is not a close call. The evidence, in the Court's view, is overwhelming. In considering and weighing the credibility of the witnesses, I found that the verdict is not contrary to the weight of the evidence. I believe that the Government did prove beyond a reasonable doubt that Mr. Jonas did not act in self-defence.

Sentencing Tr. p. 8, lines 12-19. The district court specifically weighed the evidence and made a finding that the State proved "beyond a reasonable doubt that Mr. Jonas did not act in self-defence." Sentencing Tr. p. 8, lines 12-19. The district court did not err in denying Jonas' motion for new trial. *See People v. Fernandez,* 304 A.D.2d 504, 505 (N.Y. Sup. App. Div. 2003) (finding verdict was not contrary to weight of evidence where "the complainant reached for the knife first, and even if we were to accept defendant's version of the events wherein the complainant was the initial aggressor, we would still conclude that the jury properly rejected defendant's justification defense. Defendant ended up with the knife and inflicted

severe injuries on the complainant, while defendant remained virtually uninjured.")

CONCLUSION

For all the reasons set forth above, the State respectfully requests this Court affirm Jonas' conviction of second-degree murder.

REQUEST FOR NONORAL SUBMISSION

The State believes that this case can be resolved by reference to the briefs without further elaboration at oral argument.

Respectfully submitted,

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