IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. MONTEZ GUISE, Defendant-Appellant.	)	S.CT. NO. 17-0589

APPEAL FROM THE IOWA DISTRICT COURT
FOR CERRO GORDO COUNTY
HONORABLE COLLEEN WEILAND, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 24th day of October, 2017, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Montez Guise, No. 6411891, Fort Dodge Correctional Facility, 1550 L St., Fort Dodge, IA 50501.

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Authorities

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because an issue raised involves a substantial issue of first impression in Iowa and presents a substantial question of enunciating or changing legal principles. Iowa R. App. P. 6.903(2)(d), 6.1101(2)(c), and 6.1101(2)(f). Specifically, Guise requests the court adopt guidelines to ensure the use of actuarial risk assessment instruments in sentencing proceedings comply with due process.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by the defendant-appellant, Montez Guise, from his conviction, judgment and sentence for second degree burglary, a class C felony in violation of Iowa Code section 703.1 and 713.5 (2015), following his guilty plea in the Cerro Gordo District Court.

Course of Proceedings: The State charged Montez Guise with burglary in the second degree, a class C felony in violation of Iowa Code sections 703.1 and 713.5 (2015) and false

imprisonment, a serious misdemeanor 710.7 (2015). (Trial Information) (App. p. 4-5).

Guise and the State reached a plea agreement by which Guise would plead guilty to second degree burglary and the State agreed not to amend the trial information to allege a habitual offender enhancement and to dismiss the false imprisonment charge. The State also agreed to recommend a suspended term of incarceration, probation and a suspended fine, while Guise agreed to pay court costs. (Written Guilty Plea) (App. p. 6-8). The court accepted Guise's plea, and he was released pending sentencing under pretrial supervision services. (Order for Release) (App. p. 9-10).

Before the sentencing hearing took place, the Department of Corrections filed a violation report, alleging Guise violated the no-contact order between him and his ex-girlfriend, missed an appointment with his probation officer, and resisted arrest when he was arrested for violating the no-contact order. (Pre-trial Report of Violation) (App. p. 11-12).

A presentence investigation report was prepared which recommended Guise be sentenced to incarceration rather than probation. (PSI, 16) (Conf. App. p. 50). On March 20, 2017, Guise was sentenced on the burglary charge as well as for a serious misdemeanor charge of interference with official acts stemming from his arrest on the violation of the no contact order. (Sentencing Tr. p. 3 L. 3-19) (PSI, p. 5) (Conf. App. p. 39).

The court declined to follow the recommendation of the parties and sentenced Guise to a term of incarceration. The court suspended the fine, assessed court costs and a law enforcement initiative surcharge, and determined Guise was unable to repay his court-appointed attorney fees. (Sent. Tr. p. 14 L. 15 – p. 15 L. 12; Sentencing Order) (App. pp. 13-15). Guise filed a timely notice of appeal. (Notice of Appeal) (App. p. 16).

Facts: To provide a factual basis for his guilty plea to second degree burglary, Guise admitted that "on or about December 31, 2016 in Cerro Gordo County, Iowa, [he] had the

intent to commit an assault and having no right, license or privilege to do so, [he] entered an occupied structure in which one or more persons were present which was not open to the public." Specifically he "entered the residence of 1419 North Federal Avenue, number three, Mason City, Iowa, with the intent to commit an assault after a NCO – or no contact order – had issued preventing you from being in contact with . . . M.S." (Plea Tr. p. 16 L. 1-12; Guilty Plea ¶ 9) (App. p. 6). He also agreed that the court could rely on the minutes of testimony to the extent necessary to establish a factual basis. (Guilty Plea ¶ 9; Plea Tr. p. 16 L. 21- p. 17 L. 5) (App. p. 6).

According to the minutes of testimony, Guise, in violation of a no contact order, kicked down the door of his girlfriend's house. He pushed his girlfriend, breaking and throwing objects, and refused to allow his girlfriend or her friend to leave the house or answer the door when police arrived. (Minutes: Stiles Rep., Williams Rep., Wernet Rep., Gualpa Stmt., Shepard Stmt.,) (Conf. App. pp. 8, 9, 10, 24-25, 26-27). Further facts will be discussed as necessary.

ARGUMENT

I. THE DISTRICT COURT VIOLATED GUISE'S DUE PROCESS RIGHTS BY CONSIDERING AND RELYING UPON THE IOWA RISK REVISED (IRR) ASSESSMENT WHEN IMPOSING SENTENCE. IN THE ALTERNATIVE THE DISTRICT COURT ABUSED ITS DISCRETION BY CONSIDERING THE RISK ASSESSMENT WITHOUT AN UNDERSTANDING OF THE PURPOSE AND LIMITATIONS OF THE ASSESSMENT.

A. Preservation of Error. The general rule of error preservation is not applicable to void, illegal or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). A defendant may raise the issue of the sentencing court's consideration of an improper factor on direct appeal despite the absence of an objection in the trial court. Id.

B. Standard of Review. A violation of a constitutional right to due process is reviewed de novo. State v. Clark, 814 N.W.2d 551, 560 (Iowa 2012). Review of a sentence imposed in a criminal case is for correction of errors at law. Iowa R. App. P. 6.907; State v. Formaro, 638 N.W.2d 720, 724 (Iowa 2002). "A sentence will not be upset on appellate review unless the

defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as the trial court's consideration of impermissible factors." State v. Witham, 583 N.W.2d 677, 678 (Iowa 1998); State v. Sailer, 587 N.W.2d 756, 762 (Iowa 1998).

C. Discussion. A sentencing hearing "must measure up to the essentials of due process and fair treatment." State v. Ashley, 462 N.W.2d 279, 281 (Iowa 1990). See also Kent v. United States, 383 U.S. 541, 562, 86 S.Ct. 1045, 1057 (1966).

A defendant has a constitutional due process right to be sentenced on accurate information. Townsend v. Burke, 334 U.S. 736, 741, 68 S.Ct. 1252, 1255 (1948) ("this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such conviction cannot stand.").

In explaining the reasons for the sentence in this case, the court stated:

Mr. Guise, Miss Flander has probably talked to you about the three goals that I am supposed to aim for when I am deciding a sentence for you. They are your rehabilitation, protection of society, and deterrence, meaning trying to convince you and other people not to perform criminal acts, so those three goals I keep in mind when I apply what I've learned about you from the case file, from the presentence investigation, and from what you folks have told me today.

The whole of that information convinces me that you cannot be rehabilitated in the community and that you are a danger to society if we keep you in the community. You may well have a good heart, I have no reason to think otherwise, but both things can be true. You can be dangerous to us, you can be difficult to rehabilitate in the community when you still have a good heart because sometimes intentions are not enough. Your criminal history is significant in itself but includes a number of probation and parole revocations. When you were on pretrial release for this matter, you had a new charge and resisted arrest -- or interfered with official acts, I should say, when the police tried to execute a warrant for you when you had been released when you'd been convicted for this. That doesn't bode well for us being able to help you with treatment and the other things that you need in society and in the community. *The presentence investigator also noted that you need intensive -- I don't want to say supervision. I have to get the right word that they used. It is supervision. That your risk level is such that you should be supervised at an intensive level.* So for that reason, I'm not accepting the plea agreement.

(Sent. Tr. p. 13 L. 7 – p. 14 L. 14).

The court's reference to the need for intensive supervision relates to the a statement in the PSI: "As part of the PSI interview process an Iowa Risk Revised was completed indicating the Defendant should be supervised at an intensive level." (PSI, p. 15) (Conf. App. p. 49).

Although the Iowa Supreme Court has not yet addressed the proper use of risk assessment tools in sentencing,[1] courts in Indiana and Wisconsin have addressed the issue and provide some guidance.

The Indiana Supreme Court considered whether and in what manner may a judge consider the results of various assessment tools in Malenchik v. State, 928 N.E.2d 564, 568

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[1] The court addressed the admissibility of the results of several risk assessments combined with expert testimony in a sexually violent predator trial. In re Detention of Holtz, 653 N.W.2d 613, 619-620 (Iowa Ct. App. 2002). The court found no error in the admission of the actuarial risk assessment tool based on the record as a whole. "By this ruling, we are not concluding that actuarial risk assessment instruments are reliable per se or have our approval when used alone and not in conjunction with a full clinical evaluation. We note this was not the situation or issue presented in the instant case. The instruments *were* used in conjunction with a full clinical evaluation and their limitations were clearly made known to the jury." Id.

(Ind. 2010). In Malenchik, the defendant argued it was improper for the sentencing court to consider the risk assessment scores because the tests themselves were not scientifically reliable, were not relevant to legitimate sentencing considerations, and violated "Indiana's constitutional requirement that the penal code be founded on principles reformation and not vindictive justice." Id. at 567.

The Indiana Supreme Court ultimately concluded that the tests were scientifically sound and could be utilized by a sentencing court when crafting an appropriate sentence: "[W]e hold that legitimate offender assessment instruments do not replace but may inform a trial court's sentencing determinations and that, because the trial court's consideration of the defendant's assessment model scores was only supplemental to other sentencing evidence that independently supported the sentence imposed, we affirm the sentence." Malenchik, 928 N.E.2d at 566. But first, the court discussed the limitations and purposes of the risk assessment tools.

> While there may be strong statistical correlation of assessment results and the risk or probability of recidivism, the administrator's evaluation as to each question may not coincide with that of the trial judge's evaluation based on the information presented at sentencing. The nature of the LSI–R is not to function as a basis for finding aggravating circumstances, nor does an LSI–R score constitute such a circumstance. But LSI–R scores are highly useful and important for trial courts to consider as a broad statistical tool to supplement and inform the judge's evaluation of information and sentencing formulation in individual cases. The LSI–R manual directs that it is not "to be used as a substitute for sound judgment that utilizes various sources of information." Significantly, the manual explicitly declares: "This instrument is not a comprehensive survey of mitigating and aggravating factors relevant to criminal sanctioning and was never designed to assist in establishing the just penalty."

Id. at 572 (internal citations omitted).

> It is clear that neither the LSI–R nor the SASSI are intended nor recommended to substitute for the judicial function of determining the length of sentence appropriate for each offender. But such evidence-based assessment instruments can be significant sources of valuable information for judicial consideration in deciding whether to suspend all or part of a sentence, how to design a probation program for the offender, whether to assign an offender to alternative treatment facilities or programs, and other such corollary sentencing matters. The scores do not in themselves constitute an aggravating or mitigating circumstance because neither the data selection and evaluations upon

> which a probation officer or other administrator's assessment is made nor the resulting scores are necessarily congruent with a sentencing judge's findings and conclusion regarding relevant sentencing factors. Having been determined to be statistically valid, reliable, and effective in forecasting recidivism, the assessment tool scores may, and if possible should, be considered to supplement and enhance a judge's evaluation, weighing, and application of the other sentencing evidence in the formulation of an individualized sentencing program appropriate for each defendant.

Id. at 573. Thus, the Indiana Supreme Court held that the results of LSI–R and SASSI offender assessment instruments are appropriate supplemental tools for judicial consideration at sentencing. These evaluations and their scores are not intended to serve as aggravating or mitigating circumstances nor to determine the gross length of sentence, but a trial court may employ such results in formulating the manner in which a sentence is to be served." Id. at 575.

More recently, the Wisconsin Supreme Court reviewed the pros and cons of evidence-based sentencing upon a certified question from the Wisconsin Court of Appeals in State v. Loomis, 881 N.W.2d 749, 752-56 (Wis. 2016), cert. denied

Loomis v. Wisconsin, ___ S.Ct. ___, No. 16-6387, 2017 WL 2722441 (June 26, 2017). The court acknowledged criticism of the "efficacy of evidence-based sentencing and . . . concern[s] about overselling the results." Loomis, 881 N.W.2d at 759. Specifically, critics "urge that judges be made aware of the limitations of risk assessment tools, lest they be misused." Id.

> "In the main, [supporters] have been reticent to acknowledge the paucity of reliable evidence that now exists, and the limits of the interventions about which we do possess evidence. Unless criminal justice system actors are made fully aware of the limits of the tools they are being asked to implement, they are likely to misuse them."

Id. 759-60, quoting Cecelia Klingele, The Promises and Perils of Evidence–Based Corrections, 91 Notre Dame L. Rev. 537, 576 (2015) (hereinafter "Klingele"). The Loomis court "heed[ed] this admonition," noting the DOC's acknowledgement that "'risk scores are not intended to determine the severity of the sentence or whether an offender is incarcerated.'" Id. at 760.

The Loomis Court, focusing exclusively on the use of the risk assessment tool at sentencing and considering the due process arguments regarding accuracy, determined that use of

a COMPAS risk assessment must be subject to certain cautions in addition to the limitations set forth. Loomis, 881 N.W.2d at 763.

> Specifically, any PSI containing a COMPAS risk assessment must inform the sentencing court about the following cautions regarding a COMPAS risk assessment's accuracy: (1) the proprietary nature of COMPAS has been invoked to prevent disclosure of information relating to how factors are weighed or how risk scores are to be determined; (2) risk assessment compares defendants to a national sample, but no cross-validation study for a Wisconsin population has yet been completed; (3) some studies of COMPAS risk assessment scores have raised questions about whether they disproportionately classify minority offenders as having a higher risk of recidivism; and (4) risk assessment tools must be constantly monitored and re-normed for accuracy due to changing populations and subpopulations. Providing information to sentencing courts on the limitations and cautions attendant with the use of COMPAS risk assessments will enable courts to better assess the accuracy of the assessment and the appropriate weight to be given to the risk score.

Id. at 763-64.

The court also addressed Loomis' argument that the use of the COMPAS instrument violated due process because the test

score is based on group data[2] but a defendant is entitled to an individualized sentence, and the court again limited the use of the instrument in the sentencing decision. Loomis, 881 N.W.2d at 764.

> Next, we address the permissible uses for a COMPAS risk assessment at sentencing. Then we set forth the limitations and cautions that a sentencing court must observe when using COMPAS.
>
> Although it cannot be determinative, a sentencing court may use a COMPAS risk assessment as a relevant factor for such matters as: (1) diverting low-risk prison-bound offenders to a non-prison alternative; (2) assessing whether an offender can be supervised safely and effectively in the community; and (3) imposing terms and conditions of probation, supervision, and responses to violations.

Id. at 767.

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[2] The COMPAS Practitioner's Guide explained "that "[r]isk assessment is about predicting group behavior . . . it is not about prediction at the individual level." Risk scales are able to identify groups of high-risk offenders—not a particular high-risk individual." Id. The Wisconsin DOC explained that "staff are predicted to disagree with an actuarial risk assessment (e.g. COMPAS) in about 10% of the cases due to mitigating or aggravating circumstances to which the assessment is not sensitive." Thus, "staff should be encouraged to use their professional judgment and override the computed risk as appropriate." Id.

Thus, a COMPAS risk assessment may be used to "enhance a judge's evaluation, weighing, and application of the other sentencing evidence in the formulation of an individualized sentencing program appropriate for each defendant." Id. at 768. "Additionally, we set forth the corollary limitation that risk scores may not be used as the determinative factor in deciding whether the offender can be supervised safely and effectively in the community." Id.

Because the risk assessments were designed to address treatment needs and identify the risk of recidivism, but sentencing encompasses broader purposes, "using a risk assessment tool to determine the length and severity of a sentence is a poor fit." Id. at 769. Thus the court identified the necessary limitations to the consideration of risk assessments when imposing sentence, specifically heeding the recommendations of the National Center for State Courts. See id. at 768. See also Pamela M. Casey et al., National Center for State Courts (NCSC), Using Offender Risk and Needs Assessment Information at Sentencing: Guidance for Courts

from a National Working Group (2011), found at http://www.ncsc.org/Services-and-Experts/~/media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Sentencing%20Probation/RNA%20Guide%20Final.ashx.

> Thus, a sentencing court may consider a COMPAS risk assessment at sentencing subject to the following limitations. As recognized by the Department of Corrections, the PSI instructs that risk scores may not be used: (1) to determine whether an offender is incarcerated; or (2) to determine the severity of the sentence. Additionally, risk scores may not be used as the determinative factor in deciding whether an offender can be supervised safely and effectively in the community.
>
> Importantly, a circuit court must explain the factors in addition to a COMPAS risk assessment that independently support the sentence imposed. A COMPAS risk assessment is only one of many factors that may be considered and weighed at sentencing.
>
> Any Presentence Investigation Report ("PSI") containing a COMPAS risk assessment filed with the court must contain a written advisement listing the limitations. Additionally, this written advisement should inform sentencing courts of the following cautions as discussed throughout this opinion:
>
> • The proprietary nature of COMPAS has been invoked to prevent disclosure of information relating to how factors are weighed or how risk scores are determined.

> • Because COMPAS risk assessment scores are based on group data, they are able to identify groups of high-risk offenders—not a particular high-risk individual.
>
> • Some studies of COMPAS risk assessment scores have raised questions about whether they disproportionately classify minority offenders as having a higher risk of recidivism.
>
> • A COMPAS risk assessment compares defendants to a national sample, but no cross-validation study for a Wisconsin population has yet been completed. Risk assessment tools must be constantly monitored and re-normed for accuracy due to changing populations and subpopulations.
>
> • COMPAS was not developed for use at sentencing, but was intended for use by the Department of Corrections in making determinations regarding treatment, supervision, and parole.
>
> It is important to note that these are the cautions that have been identified in the present moment. For example, if a cross-validation study for a Wisconsin population is conducted, then flexibility is needed to remove this caution or explain the results of the cross-validation study. Similarly, this advisement should be regularly updated as other cautions become more or less relevant as additional data becomes available.

Loomis, 881 N.W.2d at 768-770. See also Klingele at 576 (in order to remain accurate, risk assessment tools "must be

constantly re-normed for changing populations and subpopulations.").

The district court improperly considered and relied on the risk assessment scores contained in the Iowa Risk Revised.

> "[C]onsider" and "rely" ... are not interchangeable. "Rely" is defined as "to be dependent" or "to place full confidence." . . . "Consider" is defined as "to observe" or to "contemplate" or to "weigh."

State v. Loomis, 881 N.W.2d at 772 n.2 (Roggensack, J., concurring) (internal citations omitted). Under the circumstances of this case, it is necessary to discuss consideration and reliance separately.

First, it was improper for the district court to consider the risk assessment scores in determining the appropriate sentence. The district court was not aware of the intended purpose or limitations of the Iowa Risk Revised (IRR) risk assessment tool. (PSI, p. 15) (Conf. App. p. 49). In fact, the PSI contained no information about the assessment tool except

that it "indicated the Defendant should be supervised at an intensive level."[3]

The district court was not provided with sufficient cautions for and limitations of the risk assessment tool to allow the court to consider the results. The PSI must be required to specifically inform the sentencing court of the limitations of the assessment tools. Cf. Loomis, 881 N.W.2d 769-70. The record does not specifically demonstrate the limitations. However, at a minimum, the written advisement should

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[3] The Iowa Risk Revised is a screening tool used by the Department of Corrections for assessing risk. "It takes into consideration several factors; for example - age, criminal history, gang affiliation, prior revocations in the community. The assessment helps determine risk of violence and victimization as well as predicting general recidivism. It includes several dynamic factors [including] employment, housing instability, substance abuse, prior revocations." See Iowa Board of Corrections Agenda, April 7, 2017, attached handouts, p. 40, available at https://doc.iowa.gov/sites/default/files/documents/2017/04/april_7_2017_board_of_corrections_handouts_-_mpcf_1.pdf. It "assist[s] in developing offender case plans, levels of supervision, and treatment programs. Automated scoring saves staff time and improves accuracy." See LSA, Budget Unit Brief FY 2017, Iowa Corrections Offender Network, Rev. 09/06/2016, available at https://www.legis.iowa.gov/docs/publications/FT/15690.pdf.

include: (1) the risk assessment scores are based on group data and not specific to this individual defendant; (2) the existence of validation studies, including any cross-validation for an Iowa population; (3) the extent of the disclosure of the information used to determine the score such as question and answers with the formulas used; and (4) the purpose of the tool and that the risk assessment tools were not developed for use at sentencing. Without sufficient cautions and limitations provided, the consideration of the IRR assessment violated Guise's due process rights. In the alternative it was an abuse of discretion on the part of the sentencing court.

Additionally, the reliance on the risk assessment scores violated Guise's due process rights. As the Wisconsin Court in Loomis determined, the sentencing court cannot use the scores to: (1) to determine whether an offender is incarcerated; or (2) to determine the severity of the sentence. Loomis, 881 N.W.2d at 769. The district court improperly relied on the risk assessment scores to determine Guise should be incarcerated. (Sent. Tr. p. 13 L. 17 – p. 14 L. 14) ("That your risk level is such

that you should be supervised at an intensive level. So for that reason, I'm not accepting the plea agreement.").

Guise requests the court adopt guidelines for use of actuarial risk assessment tools in sentencing proceedings which is consistent with due process guaranteed by the United States Constitution and the Constitution of the State of Iowa. U.S. Const. amend. XIV; Iowa Const. art. I, § 9. Guise must be granted a new sentencing hearing where a corrected Presentence Investigation Report can be considered. Only with correct information regarding the accuracy of the risk assessment and the purpose of such tools, along with sufficient written cautions and limitation, can Guise's right to due process be protected during the sentencing proceeding.

D. If error was not preserved trial counsel was ineffective by failing to challenge the sentencing procedure and sentence imposed which violated Guise's constitutional right to due process. If error was not preserved, trial counsel breached an essential duty. Trial counsel had a duty to protect Guise's due process rights at sentencing. Appellant recognizes

the issue raised is one of first impression in Iowa. An attorney has a duty to keep abreast of developments in the law. Cf. State v. Vance, 790 N.W.2d 775, 789 (Iowa 2010) (discussing information attorney would have discovered if had researched Belton). Had counsel kept abreast with sentencing law and policy from around the country or pending certiorari petitions in the United States Supreme Court counsel would have been aware of the Loomis case. http://sentencing.typepad.com/sentencing_law_and_policy/2015/09/wisconsin-appeals-court-urges-states-top-court-to-review-use-of-risk-assessment-software-at-sentenci.html; http://sentencing.typepad.com/sentencing_law_and_policy/2016/07/wisconsin-supreme-court-rejects-due-process-challenge-to-use-of-risk-assessment-instrument-at-senten.html; http://www.scotusblog.com/case-files/cases/loomis-v-wisconsin/. The Wisconsin Supreme Court decision is persuasive and provides minimal due process protection at sentencing. This argument was worth raising. State v. Westeen, 591 N.W.2d 203, 210 (Iowa 1999).

If error was not preserved, Guise was prejudiced by counsel's failure. Appellant hereby incorporates by reference the argument outlined above. As the argument is legally meritorious, defense counsel breached an essential duty by failing to specifically make the above argument. Cf. State v. Greene, 592 N.W.2d 24, 29 (Iowa 1999) (counsel is not incompetent for failing to pursue a meritless issue.).

If error was not preserved, Guise was prejudiced by counsel's failure to adequately protect his due process rights at sentencing. As argued above, Guise is entitled to a new sentencing hearing.

II. THE DISTRICT COURT CONSIDERED AN IMPROPER FACTOR WHEN IT RELIED THE UNPROVEN ALLEGATION THAT GUISE ASSAULTED HIS GIRLFRIEND.

A. Preservation of Error: A defendant may raise the issue of the sentencing court's reliance on improper factors on direct appeal despite the absence of an objection in the trial court. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994); State v. Young, 292 N.W.2d 432, 434-35 (Iowa 1980)

(improper factor claim reviewed despite lack of objection at sentencing).

B. Standard of Review: Review of a sentence imposed in a criminal case is for correction of errors at law. Iowa R. App. P. 6.907; State v. Formaro, 638 N.W.2d 720, 724 (Iowa 2002). "A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as the trial court's consideration of impermissible factors." State v. Witham, 583 N.W.2d 677, 678 (Iowa 1998); State v. Sailer, 587 N.W.2d 756, 762 (Iowa 1998).

C. Discussion: When sentencing a defendant, a court may not consider facts, allegations, or offenses that are not established by the evidence or admitted by the defendant. Witham, 583 N.W.2d at 678; State v. Black, 324 N.W.2d 313, 316 (Iowa 1982). Offenses and allegations that are not proven by the State or admitted to by the defendant, but considered by the court, amount to improper sentencing considerations. See

Black, 324 N.W.2d at 315–17; State v. Gonzalez, 582 N.W.2d 515, 517 (Iowa 1998).

To constitute reversible error, there must be some showing that the sentencing judge was not "merely aware" of the improper factor but also "impermissibly considered" or "relied on" it in rendering the sentence. State v. Ashley, 462 N.W.2d 279, 282 (Iowa 1990). Where such a showing is made, however, the reviewing court will vacate the defendant's sentence and remand for resentencing even if it was "merely a secondary consideration." State v. Grandberry, 619 N.W.2d 399, 401 (Iowa 2000); See also State v. Lovell, 857 N.W.2d 241, 243 (Iowa 2014).

In this case, Guise pled guilty to second degree burglary, specifically admitting that he entered his girlfriend's house in violation of a no contact order with the intent to commit an assault. (Plea Tr. p. 16 L. 1-12; Guilty Plea ¶ 9) (App. p. 6). Although the minutes contained allegations of assaultive behavior once he was inside the house, Guise only admitted the minutes to extent they were necessary to establish the elements

of the crime to which he pled. (Plea Tr. p. 16 L. 21 – p. 17 L. 7; Guilty Plea ¶ 9) (App. p. 6). However, the court relied on the "underlying assault" when it sentenced Guise.

The court initially imposed a domestic abuse surcharge. (Sent. Tr. p 14 L. 21 – 25). Defense counsel informed the court that the domestic abuse surcharge did not apply in this case, and the court responded, "I'm sorry, I was thinking about the underlying assault. You're right. But it's a burglary, so you're right." (Sent. Tr. p. 15 L. 13 – 17).

The court's statement demonstrates that it was considering allegations of assault in the minutes when it imposed Guise's sentence.[4] The "underlying assault" was never admitted by Guise and was not necessary to establish the elements of the crime he pled to. Accordingly, it was improper for the court to consider the assault accusations when it

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[4] A victim impact statement read during the sentencing hearing also contained allegations of assault. (Sent. Tr. p. 5 L. 10 – p. 8 L. 6). However, a court acts improperly if it relies on portions of the statement referencing unproven and unadmitted offenses. State v. Sailer, 587 N.W.2d 756, 759-764 (Iowa 1998).

imposed sentence in the instant case. See Black, 324 N.W.2d at 315–16; Witham, 583 N.W.2d at 678.

The appellate court will set "aside a sentence and remand[the] case to the district court for resentencing if the sentencing court relied upon charges of an unprosecuted offense that was neither admitted to by the defendant nor otherwise proved." State v. Sailer, 587 N.W.2d 756, 762 (Iowa 1998) (quoting Black, 324 N.W.2d at 315) (internal quotation marks omitted). Because the record affirmatively establishes the sentencing court considered an unproven offense, Guise's sentence should be vacated and his case remanded for resentencing in front of a different judge. See Lovell, 857 N.W.2d at 242–43.

CONCLUSION

For the above argued reasons, Guise's sentence should be vacated and his case remanded for resentencing. In addition, Guise also requests the court establish guidelines for the use of risk assessments in sentencing decisions.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $3.85, and that amount has been paid in full by the Office of the Appellate Defender.

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