IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-0733

STATE OF IOWA,
Plaintiff-Appellee,

vs.

FONTAE COLE BUELOW,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DUBUQUE COUNTY
THE HONORABLE MONICA L. ZRINYI WITTIG, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

Defendant Fontae Cole Buelow ("Defendant") requests Supreme Court retention. But the issues he raises in his brief are not novel and existing case law is sufficient to resolve his appeal. Defendant also either failed to preserve or waived two of the four issues presented on appeal, and a third issue raises a non-cognizable claim. As such, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(2).

STATEMENT OF THE CASE

Nature of the Case

Defendant appeals his conviction following a jury trial in which he was found guilty of one count of Murder in the Second Degree, in violation of Iowa Code section 707.3, a class B felony, and one count of Possession of a Controlled Substance (Cocaine), in violation of Iowa Code section 124.401(5), a serious misdemeanor. On appeal, Defendant argues that the district court erred when it excluded the victim's medical records at trial, replaced a juror with an alternate after deliberations had begun, and claims the district court "forced" him to choose between his right to a speedy trial and his rights under *State v. Plain*. Defendant also takes issue with the Iowa Supreme

Court's ruling that struck his original proof brief because he quoted directly from the victim's medical records.

Course of Proceedings

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

Facts from Trial and the Events Surrounding the Death of Samantha Link.

Throughout the evening of March 30, 2017, and early morning hours of March 31, 2017, Defendant and his girlfriend, Samantha Link, argued. Link, who was young and insecure, pestered Defendant about his former sexual partners. The argument escalated throughout the evening. Ultimately, Defendant ordered Link to leave their basement room and the home itself. Instead of leaving, Link struck Defendant, sparking a physical fight. State's Ex. 12.[1] Defendant forced Link up the stairs, which lead to the kitchen of the house. State's Ex. 11; Conf. App. Vol. I 115–28. The now physical fight continued to escalate in the kitchen and became so intense that Link's boots were kicked off, her hair was pulled out of a ponytail, and a dent was left in the dishwasher. After he pushed Link into the corner of the kitchen,

[1] State's Exhibit 12 is a video recording contained on a thumb drive and cannot be reproduced in the appendix.

Defendant—who is left-handed—furiously reached for a knife in the nearby butcher block, causing the block to fall over and spill out other knives. State's Exs. 46, 65, 74, 108; Conf. App. Vol. I 162, 164; Vol. II 9, 12. Defendant then stabbed Link three times, twice with such force that he plunged the knife five-and-a-half inches into her heart and into her right lung. Both wounds were immediately and independently fatal.

"Frantic" and "erratic," Defendant called 911 and claimed Link stabbed herself. 1-9-2018 Tr. 143:11–144:7, 169:1–17, 1-10-2018 Tr. 9:21–10:8, Trial Ex. 1-A(1); Conf. App. Vol. I 108–11. When officers arrived on the scene, they found Defendant standing in the doorway of the house. 1-9-2018 Tr. 142:20–24, State's Ex. 26, Track 1.[2] Defendant was detained and placed in the back of Officer Nathan Wall's squad car. 1-11-2018 43:15–44:17. While Defendant was being detained, officers repeatedly told him to relax, and Defendant responded, "Stab your fucking spouse in the face and you relax[.]" 1-18-2018 Tr. 91:13–15, State's Ex. 1-A(2); Conf. App. Vol. I 112–14.

[2] State's Exhibit 26 is a video recording contained on a DVD and cannot be reproduced in the appendix.

When officers entered the home, they discovered Link lying unresponsive on the kitchen floor. 1-9-2018 Tr. 144:15–146:4. Officers administered CPR, and used a portable device to administer electric shocks, but Link had no pulse and was pronounced dead not long after. 1-9-2018 Tr. 146:5–147:24, 170:13–171:6, 1-11-2018 Tr. 12:21–13:11, 28:22–24. On the countertop near where Link fell to the floor, a knife block was overturned, with one knife missing from the block. 1-9-2018 Tr. 148:25–149:9, State's Ex. 108, Conf. App. Vol. II 12. The missing knife was used to stab Link and was found in the living room, approximately ten feet from Link's body. 1-9-2018 Tr. 149:10–25, 171:7–19, 1-10-2018 Tr. 11:15–12:16, 184:13–24, State's Exs. 39, 83; Conf. App. Vol. I 160, Vol. II 10. While there were prints on the knife, "there were no latent prints suitable for identification[.]" 1-12-2018 Trial Tr. 29:16–33:13.

Defendant testified at trial that he and Link dated for six months and lived together in the basement of 870 Kane Street, a house owned by a friend, Billy Kafar. 1-18-2018 Tr. 6:15–8:13. On March 30, 2017, Defendant said he and Link spent the day together, watched movies, and smoked marijuana. 1-18-2018 Tr. 10:10–11:17. Around eight in the evening, Defendant and Link went to a Best

Western to use the hot tub. 1-18-2018 Tr. 12:4–13:21. On their way to the hotel, they purchased a bottle of vodka and ingested cocaine in Link's car. *Id.* Defendant and Link drank half the bottle of vodka while at the hotel. 1-18-2018 Tr. 14:12–18. Around ten o'clock, Defendant and Link left the hotel and went to a bar called Easy Street to meet friends and continue to drink. 1-18-2018 Tr. 15:11–18:7. Defendant testified that while at Easy Street, he and Link started arguing about his past relationships. 1-18-2018 Tr. 18:20–21:23. Link left Easy Street but returned 15-20 minutes later. 1-18-2018 Tr. 22:1–23:6. Things remained tense between Defendant and Link. 1-18-2018 Tr. 23:7–38:5.

Surveillance at Easy Street shows that there were times when Defendant and Link were "kissing and taking photos together, and then there are times like they seem they're in an argument. And it seems like that kind of goes back and forth a couple of times, kind of with the peak ending towards the last [] half hour or 45 minutes of the night, where they're physically separated from each other, not talking…and you can tell that something has caused them to not…talk[] to each other anymore." 1-12-2018 Tr. 97:13–98:8. Defendant sent Link several text messages throughout the night. Ex.

34; Conf. App. Vol. I 155–56. The final two were sent at 1:18 a.m. and 1:30 a.m. and stated, respectively, "I'm by myself looking stupid so I got 2 mins and I'm leaving nobody knows where u are like always," and "Now this girl in my face talkin how she win cuz u when the in the bathroom with here u made me look like a fool." *Id.*

Hannah Randall, a friend of Link's, was also at Easy Street and encountered Link in the parking lot. Link was sitting in her car and crying. 1-16-2018 Tr. 7:14–8:10. Link told Randall that she and Defendant were arguing, and that Defendant had thrown Link's phone. *Id.* Randall went inside and asked Defendant if he knew where Link's phone was. Defendant got upset and yelled at Randall, "she sent you over to ask me, fuck her, I don't know you, she can come ask for her phone[.]" 1-16-2018 Tr. 8:11–9:19, 15:1–12. Randall stated that both Defendant and Link were quite drunk. 1-16-2018 Tr. 10:1–17.

Randall offered Link a ride home, but Link declined. 1-16-2018 Tr. 10:23–11:10. Taylor Swim testified that after the bar closed, she was sitting in Link's car with Link and Hillary Adkinson. 1-16-2018 Tr. 33:12–25. Swim stated that Link wanted to leave with the two women, but Defendant "did not want her to, and she seemed kind of distraught about the situation that was going on between them." *Id.*

While the women were talking, Defendant approached the car and started yelling. 1-16-2018 Tr. 11:20–12:13, 34:5–35:11. Swim described Link as "calm, but upset." 1-16-2018 Tr. 34:25–35:11. Adkinson described Defendant's encounter with Swim as "rude." 1-16-2018 Tr. 24:2–25:4. Speaking to Link, Defendant "said something along the lines of, Now look what you did. You made me look stupid…And [Link] said, No, you made yourself look stupid." 1-16-2018 Tr. 24:22–25:4.

Earlier in the evening, Madilin Nadermann spoke with Defendant at Easy Street. 1-16-2018 Tr. 40:23–41:13. While Nadermann was speaking with Defendant, Link became upset and began to yell and "charge" at Nadermann. 1-16-2018 Tr. 42:11–43:25. Defendant was able to calm Link down. 1-16-2018 Tr. 44:1–17. Later in the night, near bar close, Nadermann had a friendlier encounter with Link in the restroom. 1-16-2018 Tr. 44:22–47:24. The two women discussed Defendant, and Nadermann described Link as "sloppy drunk," "falling back into the mirror" and "leaning back and forth." 1-16-2018 45:5–46:7. The two women hugged, then walked out of the restroom together. 1-16-2018 47:11–24.

Even though Defendant and Link were still arguing, when the bar closed, the couple left together and headed home. 1-18-2018 Tr. 38:6–39:8, 40:8–42:1. At home, they went to the basement where their room was located and continued to argue. 1-18-2018 Tr. 42:2–16. Defendant testified he asked Link to leave the house. 1-18-2018 Tr. 42:17–44:15. In response, Defendant said Link "started punching [him] in the face." 1-18-2018 Tr. 44:16–45:4. Defendant testified Link had never hit him before, and he was "shocked" and "pissed." *Id.* Defendant denied hitting Link, but said he pinned her to the ground and yelled at her. 1-18-2018 Tr. 45:1–25. In response, Link bit Defendant on the cheek, so Defendant pressed his thumb into her eyelid. 1-18-2018 Tr. 45:1–25. Defendant and Link continued to fight, and Defendant started to drag Link up the stairs. 1-18-2018 Tr. 47:17–48:18.

Defendant testified that Link then started to walk up the stairs, walked into the kitchen, grabbed a knife, and turned towards him. 1-18-2018 Tr. 51:16–52:8. Defendant stated he thought Link was going to attack him, so he "retreated" and held the basement door in case he needed to shut it to protect himself. 1-18-2018 Tr. 52:9–20. Defendant testified that Link then stabbed herself once in the

stomach. 1-18-2018 Tr. 52:21–25. Instead of calling 911, Defendant called Billy Kafar. 1-12-2018 Tr. 161:8–163:25, 1-18-2018 Tr. 53:1–54:13, Ex. 35; Conf. App. Vol. I 157–59. When Kafar did not pick up, Defendant called 911. Defendant denied ever touching the knife used to kill Link. 1-18-2018 Tr. 89:3–7.

The night of Link's death, Defendant spoke at length with Officer Wall, as well as other officers. State's Exs. 26 and 29.[3] Defendant told Officer Wall that Link stabbed herself once in the stomach and likened it to a "Japanese sacrifice" and a "two-handed dedication." 1-11-2018 Tr. 56:25–57:5, 100:2–22, State's Ex. 26, Track 3 at 03:01:40. Defendant told Officer Wall that Link did not make any suicidal statements or express that she wanted to her harm herself, so he was very surprised when she stabbed herself. State's Ex. 26, Track 3 at 03:18:00. While speaking with Officer Wall, Defendant noticed blood on his right hand and stated, "I'm left-handed, though? That makes me look good." 1-11-2018 Tr. 57:13–25, State's Ex. 26, Track 3 at 03:02:15. Defendant also said, "I thought that bitch was dead," and referred to "Link's injury as a blessing in disguise." 1-18-

[3] State's Exhibit 29 is also a video recording contained on a DVD and cannot be reproduced in the appendix.

2018 Tr. 92:20–93:12. While speaking with other officers, Defendant told them that he would "kill your wife and see how you feel[.]" 1-18-2018 Tr. 93:13–24.

Blood spatter on Defendant's face and shirt is visible throughout the interview. 1-11-2018 Tr. 58:14–59:2, State's Ex. 184. This blood belonged to Link. 1-12-2018 Tr. 50:7–52:1. There were also scratches on his face, cheek, armpit, and chest, and an abrasion near his jawline. 1-11-2018 Tr. 126:7–127:25, State's Ex. 184. Throughout the interview with officers, Defendant was often light-hearted, relaxed, and laughing. 1-11-2018 Tr. 65:8–66:4, State's Exs. 26 and 29. Defendant's urine tested positive for alcohol, benzodiazepines, metabolized cocaine, and marijuana. 1-16-2018 Tr. 56:14–17, 70:21–72:20.

Defendant's story to police on the night Link died varied from his trial testimony in several crucial respects. First, Defendant initially denied striking Link in any way, and he did not tell police about the physical altercation in the basement. State's Ex. 26, Tracks 1 & 3, State's Ex. 29, Track 2. Instead, Defendant told police that after Link struck him, he took her by the shoulders and pushed her upstairs. *Id.* He adamantly denied that he otherwise touched her. *Id.*

Defendant was asked directly if Link would have any injuries other than the stab wound, and he said that she "may have some grab marks" on her shoulders, but he expressly denied she would have any injuries on her face. State's Ex. 26, Track 1 at 2:34:10. Second, Defendant did not tell police that Link fell on the stairs. *Id.* At trial Defendant testified that Link fell on the stairs several times, presumably to explain the extensive bruising on her face.

Third, at trial Defendant claimed the door to the basement was open when Link stabbed herself. But Defendant originally told police that he was guarding himself with the door and that it was at least partially shut. State's Ex. 29, Track 2. The evidence at trial showed there was no blood on the basement door, either on the inside or outside of the door, nor on the door frame or on the tiles in front of the door. 1-10-2018 Tr. 68:2–69:4. This is critical since it makes it nearly impossible that Link's blood would have ended up on Defendant if he had been standing in the doorway, especially if the door had been partially shut. Finally, Defendant failed to mention that he called Kafar first, and instead told police he immediately called 911. *Id.*

State Medical Examiner Dr. Dennis Klein ruled Link's death a homicide. 1-16-2018 Tr. 84:22–85:4. Link's autopsy revealed three stab wounds to her chest and "two sharp-force incised wounds on [her] right ring and right little fingers." 1-16-2018 Tr. 85:12–18, State's Ex. 14, App. Vol. I 153. Two of the three stab wounds were "independently fatal." 1-16-2018 Tr. 86:7–10. Two of the wounds were "deep stab wounds that penetrated through the chest wall…one actually went so far into the chest that it [] went into the heart. And then the second one went in deep enough that it actually went into…the right lung, on the opposite side." 1-16-2018 Tr. 86:11–87:8. The third wound did not "penetrate through the wall of the chest." *Id.* The wounds on Link's right hand were a "sharp-force injury" that Dr. Klein classified as a "classic…defensive-type wound[.]" 1-16-2018 Tr. 93:9–95:17.

In addition to the three stab wounds to her chest and the two cuts to her right hand, Link sustained numerous other injuries, including large bruises "on the forehead, on the nose, and then two discreet areas inside the mouth…just below the lower lip, and on the left side of the lower [] inside oral area," inside her scalp, and on the back of her right hand, as well as scratch marks on her stomach,

abrasions on her left chest, and small contusions on her lower extremities. 1-16-2018 Tr. 95:18–96:19, 106:9–24, 111:11–112:12, State's Exs. 107, 123–26, 145–49, 156–58; Conf. App. Vol. II 11, 13–24. The forehead had a large hemorrhage, which indicated "a significant impact site[.]" 1-16-2018 Tr. 108:14–109:21. Dr. Klein stated these injuries were not consistent with injuries sustained when people fall and instead are seen "when people are struck." 1-16-2018 Tr. 96:20–97:11. The toxicology report showed that Link had a blood alcohol level of 0.22, as well as Alprazolam, Fluoxetine, marijuana, and cocaine in her system. 1-16-2018 Tr. 88:16–89:22.

Dr. Klein also examined Link's clothing and found that defects in her shirts match the stab wounds in her chest. 1-16-2018 Tr. 98:5–99:13. Dr. Klein said that "statistically, if you have defects through clothing, it tends to favor homicide. It's just found more commonly in homicides. In suicides, the person is more – the cases are more likely that the person will move the clothing out of the way, and then inject the knife into themselves." *Id.*

Dr. Klein determined that the stab wounds to the chest were "primarily vertical to slightly oblique," with oblique as an angle between vertical and horizontal. 1-16-2018 Tr. 102:18–104:4. Dr.

Klein also determined "that the sharp portion of the entrance wound was down, and the blunt side of the blade was up[.]" *Id.* In order for these wounds to be self-inflicted, Link would had to have held the knife in "a very awkward position." *Id.* With self-inflicted stab wounds, Dr. Klein said it is typical that "a majority of those wounds are horizontal because…it's much less awkward and much more natural to go in as a horizontal than a vertical type [] configuration." *Id.*

Dr. Klein considered "multiple factors" to determine whether Link's death was a homicide versus a suicide. These factors included: the knife being found eight to twelve feet from Link's body, the multiple stab wounds, that the stab wounds went through Link's clothing, the fact that stabbing suicides are rare, especially among women, that the orientation of the stab wounds were vertical or oblique instead of horizontal, that the wounds went through cartilage because "self-inflicted wounds [will]…take the path of least resistance, and it will go through tissue" instead of cartilage, the cuts to Link's right hand, and, finally, the "major blunt force injuries" to her head. 1-16-2018 Tr. 104:5–106:24. Dr. Klein stated he was "not aware of an article that would add up all of those factors" and

determine that the death was a result of suicide rather than homicide. 1-16-2018 Tr. 133:15–134:17.

Michael Halverson performed blood stain pattern analysis on the blood stains in the kitchen and on Defendant and Link's clothing. Halverson determined that the blood stain found on the kitchen floor near Link's right hand was not caused by the knife. 1-12-2018 Tr. 185:15–188:14. Instead, it is likely Link's right hand caused the stain when her body was moved by officers when they rendered aid. *Id.* Halverson also analyzed the shirt Defendant was wearing when he stabbed Link. 1-12-2018 Tr. 188:15–25. Because of the limited quantity of stains on Defendant's shirt, Halverson could not determine whether the stains were "cast-off stains," which "is a blood stain pattern that results from blood drops being released from an object due to its motion." 1-12-2018 Tr. 180:24–181:14, 188:15–189:4. However, Halverson did determine that the stains were "spatter stains" and not "transfer stains." 1-12-2018 Tr. 189:5–192:9. "Spatter stains" are "blood stains that move through the air[,]" while a "transfer stain is a blood stain resulting from a blood buried surface onto another surface." 1-12-2018 Tr. 181:15–184:14.

Depending on the environment, spatter stains "don't travel very far…[it] could be a few feet, it could be 10 feet, but it's certainly not going to be…100 feet[.]" 1-12-2018 Tr. 193:23–195:10. Halverson concluded that Defendant's shirt "was in close proximity to [] Link's blood while the blood was in a liquid state." 1-12-2018 Tr. 192:20–193:22, 211:10–212:5. The blood stains on Link's clothing show that she was in an upright position when she was stabbed. 1-12-2018 Tr. 195:11–196:14. Also, at the time Link was stabbed, she was wearing two sweatshirts, which is "an absorbent material" and that "can certainly limit the number of spatter stains…the thicker the clothing…the more likely it is to interfere with the spattering of blood and [] limit the blood that you would see, maybe on the wall, or on the floor of the scene." 1-12-2018 Tr. 196:15–197:19.

Defendant hired two expert witnesses to testify at trial. Dr. Bradley Randall, a forensic pathologist, mostly agreed with Dr. Klein's autopsy report, but disagreed with a few findings. Dr. Randall called the cuts to Link's right hand "atypical defensive wounds." 1-17-2018 Tr. 31:6–32:21. Instead, Dr. Randall's opinion was that Link sustained the wounds when her hand slipped off the handle of the knife while stabbing herself. 1-17-2018 Tr. 32:22–33:16. Dr. Randall

testified that he believed the manner of death was suicide because "the circumstances are more suggestive of it being suicide than homicide." 1-17-2018 Tr. 38:12–39:1. Unlike Dr. Klein, Dr. Randall did not elaborate on this statement, nor did he provide a list of factors or circumstances he relied on to form this opinion.

During his testimony, Dr. Randall read from several leading scholarly articles and forensic textbooks regarding the difference between suicidal and homicidal stab wounds. None of them supported his position. One stated that with "a female victim, numerous wounds, and the presence of one or more vertical chest wounds suggests homicide." 1-17-2018 Tr. 45:15–23. Another stated, "[m]ultiple stab wounds were found in 10 percent of homicides and zero percent of suicides[.]" 1-17-2018 Tr. 46:16–21. And another, "[m]ultiple stab wounds most or all penetrating internal organs are usually indicative of homicide." 1-17-2018 Tr. 47:21–48:10.

Dr. David Bean, a psychiatrist, also testified for Defendant. Dr. Bean stated that he reviewed Link's medical records for the last 12 months of her life. 1-17-2018 Tr. 82:7–11. Dr. Bean described Fluoxetine, a drug found in Link's system at the time of her death, as an "anti-depressant medication." 1-17-2018 Tr. 84:25–86:22. Dr.

Bean also described Alprazolam, another drug found in Link's system at the time of her death, as an "anti-anxiety" medication "used appropriately for people who are feeling anxious and have an anxiety disorder type diagnoses." 1-17-2018 Tr. 86:23–87:16. Dr. Bean testified that "suicidal thoughts are one of the cardinal signs in individuals with depression," and mixing alcohol with these medications can cause someone to "impulsively suicide[.]" 1-17-2018 Tr. 84:25–86:22, 87:17–88:20. Dr. Bean did not express an opinion on whether Link committed suicide.

Facts Surrounding the Replacement of a Juror With an Alternate After Deliberations Had Begun.

After the case was submitted to the jury, the district court dismissed the three alternate jurors. 1-18-2018 Tr. 192:3–22. The case was submitted at 5:25 p.m. on a Thursday, so the jury did not begin its deliberations until the next day. 1-18-2018 Tr. 193:6–7. On the first day of deliberations, at 1:45 p.m., the jury sent a note saying it was unable to come to an agreement on the murder charge. 1-19-2018 Tr. 3:3–25. The district court instructed the jury to keep deliberating because "it's too soon for them to say that they are hung." *Id.* At 2:35 p.m., the jury sent a second note asking for the definition

of self-defense, and the district court instructed it that self-defense was not asserted in this case. 1-19-2018 Tr. 4:16–5:15.

At 3:38 p.m., the jury sent a third note that stated, "We believe this may constitute a mistrial because one of the jurors failed to live up to his legal obligation by refusing at the outset to participate in deliberations." 1-19-2018 Tr. 5:18–6:3. The district court also stated that a deputy outside of the deliberation room heard "yelling and screaming[.]" *Id.* at 6:4–13. The district court and the parties agreed to bring the jurors into the courtroom and have the district court remind them that their oath required them to deliberate. *Id.* at 5:18–13:21. The district court then sent the jury home for the weekend and asked it to come back Monday morning ready "to fully participate in the deliberation process." *Id.* at 13:6–21.

The same day, the district court made a record outside of the presence of the jury and the parties. The district court stated that it had contacted the three alternate jurors and "asked them to please maintain their oath as previously instructed, that they were not to speak to anyone concerning their jury service until the verdict was rendered in this matter." *Id.* at 14:1–15. The district court told all three alternates that they may be called on to replace a juror. *Id.* at

14:16–15:4. The district court also ensured that the jurors had kept their oath and had not discussed the case with anyone. 1-22-2018 Tr. 4:16–5:6.

On Monday morning, the district court met with the parties. The district court explained that a new rule of Iowa Criminal Procedure might allow for a juror to be replaced after deliberations had begun, but the district court "would only [replace the juror] by agreement, and based on the understanding that we would be rendering some kind of finding that the one individual is not providing appropriate conversation or discourse with the other jurors, and therefore, would render a disqualification." *Id.* at 3:3–8:1. Because Defendant would be the "most affected by what happens here," the district court asked his trial counsel their "opinions about what we should or should not do at this point." *Id.* at 8:2–16. Trial counsel requested "two minutes" to discuss the issue with Defendant. *Id.* The district court told them to "take the time that you need. This is a very important issue, so I don't want to rush it." *Id.* at 8:17–23.

After meeting with Defendant, trial counsel stated that "going over all of the options of what his rights are, [Defendant] has decided to replace the juror with our first alternate that would be called." *Id.*

at 9:5–16. The State agreed with Defendant. *Id.* The district court then decided to replace the non-deliberating juror with the first alternate and instructed the jury that deliberations must start "anew," and it should "do everything from the beginning." *Id.* at 9:17–16:25.

The Course of Proceedings Regarding the Admissibility of Link's Medical Records at Trial.

Early in the case, Defendant moved under Iowa Code section 622.10(4) for access to Link's medical records. 05-17-2017 622.10 Motion; Conf. App. Vol. I 9–13. The district court granted the request and reviewed Link's records in camera. 06-28-2017 Order; Conf. App. Vol. I 14–16. After reviewing the records, the district court turned the records over to both parties and stated it would "consider dissemination to experts upon further discussion with counsel." 09-13-2017 Order, Conf. App. Vol. I 17–18. The parties briefed this issue and also whether the information contained within Link's records should be admitted at trial. The district court allowed expert witnesses to review medical records that were within one year of Link's death, and stated it "will permit the Defendant the ability to present relevant testimony as to the named victim's demeanor and mental health status that is close in time to the date of this occurrence and not too remote as to be irrelevant and less able to prove any

specific state of mind on the date in question." 12-18-2018 Order; Conf. App. Vol. I 36–42.

Prior to trial, the district court held a hearing on the motions in limine filed by the parties. Although it was not a final ruling, the district court indicated that Link's records could not be admitted at trial because they were more prejudicial than probative and because they were improper character evidence. 01-05-2018 Tr. 44:19–51:12. The district court said that "this is not a trial as to the nature of the named victim's alleged mental health." *Id.* at 46:9–22. However, the district court did permit Defendant's expert witnesses to rely on one year's worth of Link's medical records to form their opinions and to testify regarding forensic analysis, mental health disorders, and the effects of alcohol, street drugs, and medication. *Id.* at 45:21–48:15. The district court stated that Dr. Bean could testify to "the theory of suicide versus the theory of homicide…[and] that a person who is deemed to have bipolar disorder or major depressive disorder as characteristics, what happens with regard to medications and how those medications impact the person in general." *Id.* at 47:6–20. The district court also found "that the evidence of the named victim's

mental state within a specified period of time may be explored in trial." 12-18-2017 Order; Conf. App. Vol. I 36–42.

The district court did not allow specific instances of Link's mental health to be admitted at trial because it found that those instances were not relevant, were more prejudicial than probative, and that they were improper character evidence and hearsay. 01-05-2018 Tr., 12-18-2018 Order, 01-04-2018 Order; Conf. App. Vol. I 36–42, 76–77.[4]

ARGUMENT

I. The District Court Did Not Abuse Its Discretion When It Excluded Evidence of Link's Prior Suicide Attempts.

Preservation of Error

This issue was extensively litigated by the parties at the district court, and the district court ruled on the issue both prior to and during trial. As such, the State does not contest error preservation.

[4] At the district court, the State argued that evidence of Link's prior suicide attempts were too remote in time to be relevant, were more prejudicial than probative, and were hearsay and improper character evidence. 01-05-2018 Tr., 09-22-2017 Motion to Prevent Dissemination of Victim's Records; 01-15-2018 Motion to Exclude Medical History; Conf. App. Vol. I 19–20, 102–07.

Standard of Review

Evidentiary rulings are generally reviewed for an abuse of discretion. *State v. Helmers*, 753 N.W.2d 565, 567 (Iowa 2008). "A court abuses its discretion when it [is] exercised [] on 'grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *Id.* (internal citation omitted).

Merits

On appeal, Defendant argues that the district court erred when it excluded Link's medical records on the grounds that they were hearsay and improper character evidence. Defendant does not address the district court's rulings that the records were also irrelevant under Iowa Rule of Evidence 5.401 and were more prejudicial than probative under Rule 5.403. The State agrees the specific records at issue on appeal are not hearsay.[5] However, the

[5] On appeal, Defendant asserts that he should have been permitted to introduce evidence of Link's prior suicide attempts to establish his suicide defense at trial. The State agrees that Link's statements in her medical records regarding her suicide attempts were made for the purposes of medical diagnosis and treatment. However, the district court granted Defendant access to seemingly all of Link's medical records—including records from when she was an infant and child—which was likely overbroad under Iowa Code section 622.10. Because the records are many, there may be instances where the information contained therein is hearsay, so the entirety of Link's records are not excepted from the hearsay rules. Thus, the State's concession

district court properly excluded the records under the remaining three rules. Finally, even if the district court erred by excluding Link's records, such error is harmless.

Before turning to the legal argument, the State notes that Defendant mischaracterizes the content of Link's medical records in his brief. Defendant claims, without citation, that Link "had a long history of suicidal behavior." App. Br. at 18. This is not so. Over a short period of time in 2014, Link attempted suicide at least twice. 06-15-2014 Mercy Medical Center Emergency/Urgent Care Notes by Kronlage and Gudenkauf;[6] University of Wisconsin 2014 Medical Notes; Conf. App. Vol. II 34–37. Shortly thereafter, Link was diagnosed with bipolar disorder and treated for the same.[7] 06-15-

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regarding Link's medical records is solely that her statements regarding her prior suicide attempts are not hearsay.

[6] Defendant did not include Link's medical records from Mercy Medical Center or Advanced Wellness in the appendix. These records are located in the restricted district court filings, which are no longer available to the parties per court order.

[7] In his brief, Defendant states that Link "suffered from Borderline Personality Disorder." App. Br. at 47. While this diagnosis is reflected in some of Link's older medical records, it was not listed as a diagnosis in more recent records. *Compare* University of Wisconsin 2014 Notes and Medical Associates 2014 Notes of Justmann, *with* Medical Associates Clinic 2016–2017 Notes of Kassas and Advanced Wellness 2016 Notes of Schlosser; Conf. App. Vol. II 34–55, Vol. III 66–86, ---. Thus, it is unclear whether this is an accurate diagnosis.

2014 Mercy Medical Center Emergency/Urgent Care Notes by Kronlage and Gudenkauf, University of Wisconsin 2014 Medical Notes, Medical Associates 07-24-2014, 08-28-2014, 09-29-2017 Notes of Justmann; Conf. App. Vol. II at 34–55, Vol. III 35, 44–59. While Link continued to experience some depression and anxiety, after her diagnosis, she never again attempted suicide. In the summer of 2016, while Link occasionally felt sad and experienced suicidal thoughts, she did not have any plans to commit suicide and was not considered to be at risk for suicide. Medical Associates Clinic 2016–2017 Notes of Kassas; Conf. App. Vol. III 66–86. The day before her death, Link visited her psychiatrist where it was noted that her depression was low, she was doing quite well, and she was not experiencing suicidal thoughts or tendencies. Medical Associates Clinic 03-29-2017 Note of Kassas; Conf. App. Vol. III at 66–72.

Additionally, Link never "threatened suicide in a manner consistent with how [Defendant] says she actually committed suicide[.]" Defendant provides no citation to the record for this claim.[8] To the extent Defendant is relying on the deposition of

[8] The State notes that overall Defendant's brief lacks citations to the record that would support purported facts and allegations. Although much of this material will be reproduced in a confidential

Michael Harkey for this assertion, this is a distortion of his testimony. *See* 09-19-2017 Deposition Transcript of Michael Harkey (attached to Defendant's 12-27-2017 Motion to Expand Use of Victim's Medical Records); Conf. App. Vol. I 55–75. In fact, Harkey repeatedly stated that Link was not suicidal.[9] Harkey Depo 8:13–9:16, 10:14–23; Conf. App. Vol. I 62–64.

A. Link's prior suicide attempts were not relevant, were more prejudicial than probative, and were improper character evidence.

Defendant argues that it is incorrect to label Link's mental health illness and history as "character evidence" because doing so conflates Link's mental health with bad behavior and trivializes a medical condition. The State agrees that mental health illnesses should not be equated with bad behavior, nor are they a "blameworthy character trait," and recognizes that mental health illnesses do not fit neatly within the traditional framework of

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appendix, this does not alleviate Defendant of his responsibility under Iowa Rules of Appellate Procedure 6.903(2)(f) & (2)(g)(3) to provide citations to the record. Failing to cite the record in support of his allegations puts the State at a significant disadvantage in terms of responding to these allegations. To the extent Defendant has failed to properly support his allegations with record citations, these arguments should be deemed waived. Iowa R. App. P. 6.903(2)(g)(3).

[9] A review of Link's medical records show that Harkey was frequently physically abusive of Link.

character evidence. Instead, Rules 5.401, 5.403, and 5.404 work together to determine whether this type of evidence is admissible. If evidence of a mental health issue—here, risk of suicide—is highly relevant, it is less likely to be character evidence. But if the evidence is less relevant, the more likely it is to be prejudicial or used only to show action in conformity therewith or both.[10]

Defendant's argument is essentially this: Link had a diagnosable medical condition, and this medical condition has certain exact symptoms. Therefore, because Link had this medical condition, she must have had certain, specific symptoms, and on the night she died, she acted in a manner that is directly attributable to these symptoms. By his analogy, just as an amputee will have a propensity to limp, so too must a person with a mental health disorder have a propensity to commit suicide. App. Br. at 44.

But while it is universally true that a person without a leg will limp, it is not universally true that those with a particular mental

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[10] Categorizing a victim's mental health illness generally as "character evidence" is not intended to minimize the medical nature of mental disorders. By analogy, it comes the closest to character evidence. *See* Iowa Practice Guide on Evidence, Laurie Kratky Doré, § 5.404:3(A) n.4 (2012–2013 ed.) (organizing evidence of a victim's suicidal disposition under character evidence).

health condition will have an identical set of symptoms. Mental illnesses do not affect people who have them in the same way, nor do they produce the exact same symptoms in each person. *See* Adam Santeusanio, Lay Witness Opinion Testimony on Mental State and Depression: A Call for Reform, 38 U. Ark. Little Rock. L. Rev. 477, 477 (2015) (noting that "[d]epressive disorders are caused by an array of environmental, genetic, and physiological factors, and symptoms of depression can range from 'feelings of worthlessness' to psychomotor retardation and suicidal ideation."); *see* DSM-IV-TR (4th ed. 2007), at 356 (listing criteria for a major depressive episode, which requires a showing of five or more of nine listed symptoms); at 362 (listing criteria for a mood disturbance within a manic episode, which requires a showing of three or more of seven listed symptoms).

Because mental illnesses, such as bipolar disorder or depression, produce a wide array of symptoms that vary per individual, allowing an expert witness to speculate about what symptoms a victim may have experienced at the time of death has the substantial likelihood of creating a mini-trial on the victim's mental health and would be properly excluded under Rule 5.403. *See State v. Wilson*, 406 N.W.2d 442, 448 (Iowa 1987) (finding that a district

court properly excludes evidence under Rule 5.403 if issues of a victim's character could cause the trial to disintegrate into two trials).

While the State does not believe that Rule 5.404 is an absolute ban on the use of a victim's previous suicide attempts, Defendant's approach goes too far. He suggests that if a victim has ever attempted suicide—even if it was many years in the past—this evidence should be admissible at trial. However, this evidence should only be admissible if the suicide attempt or ideations happened near in time to the victim's death. If the suicidal behavior happened near in time to a victim's death, it may be probative evidence of the victim's state of mind at the time of death and would not be properly characterized as "character evidence" because it is not being used to show propensity; rather, it is direct, relevant evidence of a victim's state of mind. But if the suicidal behavior is remote in time to the victim's death, it is *not* probative of the victim's state of mind at the time of the event and could only be used to show conduct in conformity therewith.

Here, Defendant asserts that because Link attempted suicide three years before her death, these attempts should have been admitted to show that she committed suicide on the night she died. If

there was evidence that these suicide attempts happened near in time to Link's death, they might be considered direct evidence of her state of mind on the night she died. But Link last attempted suicide three years before she died. Because these events are so remote in time, they cannot be evidence of her state of mind on the night she died, and its only use is as propensity evidence. Even Defendant admits in his brief that he "sought to prove [] Link's *propensity* for self-harm and erratic behavior as a result of her medical condition[.]" App. Br. at 42 (emphasis added). This is character evidence and should not be permitted. *See* Iowa R. Evid. 5.404(a)(1) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.").

This idea is reflected in *State v. Meyer*, an early Iowa Supreme Court decision regarding the use of a victim's "predisposition toward self-destruction" as a defense in a murder trial. 163 N.W. 244, 246 (Iowa 1917). The Supreme Court found that "[s]uch predisposition may be shown by acts or declarations of the deceased *within such reasonable time before the killing as that there may have been some tendency to establish such a condition of mind when this happened*."

Id. (emphasis added). *Meyer* relies on *Commonwealth v. Trefethen*, 31 N.E. 961, 157 Mass. 180 (Mass. 1892), which is widely considered to be the leading case on whether evidence of a victim's suicidal disposition is admissible during a murder trial and on which the holdings of many subsequent cases, in a variety of jurisdictions, are based.[11] In *Trefethen*, the day before she died, the victim sought the advice of a "trance medium" and told this person that she was unmarried, pregnant, and was going to drown herself. 31 N.E. at 962. The victim was later discovered dead by drowning. *Id.* The district court excluded the victim's statement to the medium, and the Massachusetts Supreme Court decided this was error. In doing so, it stated that:

> If the declaration…had been made by the deceased two or three years before her death, when she was not pregnant with child, and did not know defendant, it might well have been held by the presiding judges to have been of no significance in this case.
>
> In the case at bar the evidence offered was that the declaration of the deceased was made the day before her death, and was made in a conversation concerning her pregnancy, which continued until her death. The declaration, therefore, was not made at a time

[11] *State v. Beeson*, 136 N.W. 317 (Iowa 1912), also relies on *Trefethen*.

> remote from the time of her death, and there had been no change of circumstances which made it inapplicable to the condition of the deceased at the time of her death.

Id. at 962–63. It appears most jurisdictions follow this approach. *See* 83 A.L.R. 434 ("In prosecutions for homicide where suicide of the deceased is relied on as a defense, his declarations or threats indicating a suicidal disposition, but not relating to actual attempts, have generally been held admissible for the purpose of showing his state of mind and as tending to support the theory of suicide, at least if the circumstances are as suggestive of suicide as of homicide, *and the declarations were uttered within a reasonable time before his death*, they being regarded as not within the hearsay rule." (emphasis added)).

In *State v. Seacat*, the Kansas Supreme Court followed this approach and stated that "in prosecutions for homicide a deceased's declarations or threats indicating a suicidal disposition, *if made within a reasonable time before his or her death*," are not precluded by the hearsay rule and would be relevant "unless the facts preclude the possibility of suicide." 366 P.3d 208, 221 (Kan. 2016) (internal quotation marks and citations omitted) (emphasis in original). In *Seacat*, the victim repeatedly asserted her desire to commit suicide in

statements three and four years before her death. *Id.* at 220–21. The Kansas Supreme Court found these "incidents [] too remote in time and the evidence [] too tenuous to support the conclusion that [the victim] was disposed to commit suicide" at the time of her death. *Id.*

Iowa courts have always been committed to the idea that the timing of evidence is an essential component of whether it is relevant at trial. *See State v. Engeman*, 217 N.W.2d 638, 639 (Iowa 1974) ("While remoteness in point of time does not necessarily render evidence irrelevant, it may do so where the elapsed time is so great as to negative all rational or logical connection between the fact sought to be proved and the remote evidence offered in proof thereof." (internal quotation marks and citation omitted)). In *State v. Pittman*, the Iowa Court of Appeals found that "evidence regarding the victim's demeanor one week, and one month, before her death" was not too remote in time as to be irrelevant of whether she was suicidal at the time of her death. No. 02-1318, 2004 WL 355886, at *3 (Iowa Ct. App. Feb. 27, 2004).

In addition, Defendant's view overlooks the effect mental health treatments may have on the symptoms experienced by an individual with a particular mental health disorder. Using his own example, an

amputee who obtains treatment—a prosthetic leg—may no longer limp, just as a person with an illness that creates suicidal tendencies who obtains treatment—medication—may no longer be suicidal. Here, just a day before her death, Link met with her psychiatrist, who reported she was taking her medications, was feeling much improved, was low on the scale for depression and anxiety, and had no suicidal thoughts. Medical Associates 3-27-2017 Note of Kassas; Conf. App. Vol. III 66–72.

Individuals who have a mood disorder, or are otherwise mentally ill, are not ticking timebombs of self-destruction. Without a showing that a victim is currently suffering from suicidal thoughts or had very recently attempted suicide, evidence of their mental health is not relevant and could only be used as improper character evidence to show propensity. Because evidence of Link's prior suicide attempts was so remote in time, the evidence was not relevant to her state of mind on the night she died and could only be used by Defendant as improper propensity evidence. The district court properly excluded this evidence under Rules 5.401 and 5.404. And because the array of symptoms experienced by an individual who has a mental illness is different for each person, it would have been improper to allow Dr.

Bean to testify regarding Link's state of mind on the night she died. Allowing this testimony had the strong possibility of creating a mini-trial, in which the jury would have been required to determine whether Link was, in fact, experiencing certain symptoms associated with her diagnoses on the night she died. The district court also properly excluded this evidence under Rule 5.403. The application of just one of these rules is sufficient to exclude the evidence, but as all three apply, it is clear the district court did not abuse its discretion when it excluded these records at trial.

B. Exclusion of Link's prior suicide attempts is harmless error.

Even assuming the district court erred by excluding evidence of Link's prior suicide attempts, this Court should affirm because the error was harmless. "A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party[.]" Iowa R. Evid. 5.103(a). Thus, "Rule 5.103(a) requires a harmless error analysis where nonconstitutional error is claimed." *State v. Newell*, 710 N.W.2d 6, 19 (Iowa 2006) (internal citation omitted). "[T]he test for determining whether the evidence was prejudicial and therefore required reversal [is] this: 'Does it sufficiently appear that the rights of the complaining party have been

injuriously affected by the error or that he has suffered a miscarriage of justice?'" *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004) (internal quotation marks and citation omitted). Prejudice is presumed unless the contrary is affirmatively established. *Id.*

First, Defendant was able to fully respond to the evidence presented by the State without the inadmissible evidence. The district court allowed him to present a suicide defense, which included a forensic pathologist who testified that he believed the physical evidence supported suicide, a psychiatrist who testified regarding the anti-depressant and anti-anxiety medications in Link's system and how depression, anxiety, and those particular medications may affect an intoxicated person, lay testimony regarding Link's behavior on the night she died, and his own testimony that she was angry and stabbed herself after he ended their relationship.

Second, the physical evidence at trial established that suicide and homicide were not equally plausible; rather it strongly favored homicide. Cell phone video recorded ten minutes before Link died showed she had no bruises or injuries to her face. But the autopsy showed multiple severe bruises to her face, the back of her head, her skull, her hand, and her legs. These wounds show that in the ten

minutes before she died, Link was severely beaten by Defendant. Link also sustained two independently fatal stab wounds to her chest, oriented in such a way as to make it highly unlikely they could be self-inflicted.

The knife used to stab her was found ten feet away from her body, and Defendant denies ever touching or moving it. There was no blood on the carpet surrounding the knife and very little blood between Link's body and the knife or on the carpet in general. State's Exs. 83–90; Conf. App. Vol. II 10.[12] Considering Link suffered two immediate and independently fatal stab wounds, it is highly unlikely that she staggered to the living room and dropped the knife, before staggering back to the kitchen, where she collapsed and died—all while managing to drip little blood from her multiple wounds onto the carpet. It is equally implausible that Link tossed the knife after incurring these severe wounds, especially since such a toss would result in cast-off stains from the knife to the surrounding tile, carpet, and walls. No such stains appear in the record.

[12] The State failed to designate State's Exhibits 84–90, so they do not appear in the appendix.

Defendant was also spattered with Link's blood. Blood spatter is blood that flies through the air, so there are only two ways for Link's blood to appear on Defendant's face, hand, and shirt: either he stabbed her, or he was standing near her when she stabbed herself. Defendant's statements to police and his testimony at trial was that he was standing in the doorway to the basement when Link stabbed herself. However, there is no blood on or near this doorway or the door frame or on the floor surrounding the door. In order for Defendant's version of events to be true, Link's blood would have had to travel through the air and land only on him and not his surroundings. Considering the imprecise nature of blood spatter, this is virtually impossible.

And after he stabbed Link, Defendant called a friend instead of 911. When first responders arrived, Defendant told them he would "stab your fucking spouse in the face and you relax[.]"As shown in the multiple police videos, Defendant told officers that Link stabbed herself once in the stomach, which is false, and repeatedly tells officers a story about what happened between him and Link before she died, but leaves out several key details, most importantly, the

physical altercation with Link in the basement. Instead, he adamantly denies ever assaulting her.

Finally, Defendant was permitted to present his suicide defense at trial, but Link's most recent medical records reveal that she was doing well, her depression and anxiety were low, and she did not suffer from any suicidal ideations or plans. This evidence would have been a mighty blow to Defendant's suicide defense. And the physical evidence at trial proved that Defendant murdered Link. As such, the exclusion of Link's previous suicide attempts at trial is harmless error. *See State v. Jaeger*, 973 P.2d 404, 410–11 (Utah 1999) (finding the district court's exclusion of the victim's mental health records to be harmless error when the defendant was permitted to raise a suicide defense and the physical evidence strongly supported homicide).

II. Defendant Waived His Argument that the District Court Erred When It Replaced a Non-Deliberating Juror with the First Alternate.

Preservation of Error and Merits

Next, Defendant argues that the district court erred when it replaced a juror, who was alleged by the jury foreperson to have refused "at the outset to participate in deliberations," with the first

alternate after the jury began its deliberations. Jury Question No. 3; App. Vol. IV 28. Defendant states that this issue was preserved "solely through a motion for a new trial." App. Br. at 49. A motion for a new trial is not sufficient to preserve error. Rather, Defendant was required to raise an objection at the time the district court and the parties contemplated the issue. *See State v. Steltzer*, 288 N.W.2d 557, 559 (Iowa 1980) (finding that a motion for new trial is not sufficient to preserve error because "[o]bjections should be raised at the earliest time at which error became apparent in order to properly preserve error." (internal citations omitted)). Consequently, this Court should not consider Defendant's appeal on this issue because error was not preserved.

And as Defendant acknowledges in his brief, he has also waived any argument that the district court erred by replacing the juror because he expressly agreed to this replacement. When the jury foreperson alerted the district court that one juror refused to deliberate, the district court met with the parties to discuss what should be done. The district court and the parties agreed that the entire panel should be reminded that they took an oath to deliberate, and at Defendant's suggestion, the parties agreed the jury should also

be told they could be held in contempt if they refused to deliberate.[13] 1-19-2018 Tr. 7:22–8:5, 11:6–12:20.

Over the weekend, the district court did additional research on the issue of a non-deliberating juror and met with the parties on Monday morning. It stated it learned that Iowa had adopted a new rule of criminal procedure that might allow for a juror to be replaced with an alternate after jury deliberations had begun. The district court was clear that this was a new rule, and there was minimal case law in Iowa that contemplated the issue. However, the district court indicated it had looked at *State v. Escobedo*, 573 N.W.2d 271 (Iowa Ct. App. 1997), and reviewed the federal rules, as well as cases from other jurisdictions that dealt with the issue. The district court was also clear that it would not replace the non-deliberating juror unless everyone agreed to do so. The district court stated that "we now have three options *if we elect to take any action*. So I guess, since you, [Defendant], are most affected by what happens here in light of your

[13] In his brief, Defendant asserts that the district court erred when it informed the jury it could be held in contempt if it did not follow its oath, even going so far as to state that this "threat" was an improper outside influence on the jury. App. Br. at 56 n.16. However, the record shows that Defendant was the one who suggested that the district court inform the jury of the possibility of contempt, so to the extent he alleges any error in this instruction, he has similarly waived it.

Constitutional rights being potentially impinged upon, I would like your attorneys' opinions about what we should *or should not do* at this point." 1-22-2018 Tr. 8:2–8 (emphasis added). Defendant and his trial counsel discussed the issue in private and decided "after discussion with our client, and our going over all of the options of what his rights are, he has decided to replace the juror with our first alternate that would be called." *Id.* at 9:5–9.

Prior to making this decision, the district court notified the parties that it had received a letter from the "ousted juror," and stated that it did not "know if you want me to read it, or if we just want to make a decision without having looked at this document. So you think about that, too. I'm not going to read it until we talk about it." *Id.* at 8:17–9:1. After telling the district court they wanted to replace the non-deliberating juror, Defendant's trial counsel stated that "I don't think we should look at that" letter. *Id.* at 11:25–13:6.

The record is clear that the district court neither made a unilateral decision to replace the non-deliberating juror, nor did it require Defendant to decide among untenable choices. Instead, the district court, after outlining its research and the options available—which included taking no action at all—asked Defendant his opinion

on what should be done. When Defendant returned to the courtroom with trial counsel, no argument was made, and no opinion was given; rather, trial counsel unequivocally stated it was Defendant's choice to replace the non-deliberating juror with the first alternate. Defendant and his trial counsel never hesitated in this decision, never expressed disagreement with the district court's handling of the matter, never suggested an alternate course, and did not "merely acquiesce" with the district court's decision.[14] App. Br. at 60.

Even though Defendant undoubtedly waived any objection to the replacement of the non-deliberating juror, Defendant asserts he should be exempt from the rules of error preservation and waiver because at the time of his trial, Iowa law was "unclear" on the procedure by which to replace a juror during deliberations. *Id.* at 49. The law was not as unclear as Defendant claims. While Defendant correctly notes that Iowa Rule of Criminal Procedure 2.8(15) was amended in 2016 to remove language that previously prevented district courts from replacing a juror once deliberations had begun,

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[14] The State agreed with Defendant's suggestion to replace the non-deliberating juror with the first alternate. In doing so, the State said that it "is clear from the actions of this juror that he is disqualified [for] failing to follow his oath." 1-22-2018 Tr. 14:1–8. Trial Counsel stated, "Yes, and I believe the same." *Id.*

this issue has been contemplated by federal and state courts for decades, including Iowa courts. *See* Iowa R. Crim. P. 2.18(15) (2009).[15]

In *State v. Escobedo*, the Court of Appeals stated that the previous version of Rule 2.18(15) barred a district court from replacing a juror after deliberations had begun. 573 N.W.2d at 276. The Court of Appeals also found that if the defendant had requested a mistrial based on the district court's replacement of a juror during deliberations, he would have been entitled to it. *Id.* But because the defendant "did not request the trial court to declare a mistrial, but instead acquiesced in the replacement of the dismissed juror with a previously dismissed alternate juror[,]" the defendant waived any error on this claim because "[n]early all error, including jury irregularities, may be waived." *Id.* at 276–77. *Escobedo* is a published case and has been controlling precedent for over 20 years.

Applying *Escobedo*, the Court of Appeals in *State v. Miller* found the defendant did *not* waive his objection when the district court replaced a juror with an alternate after deliberations had begun

[15] The current version of Rule 2.8(15) was in effect during Defendant's trial.

because the defendant twice moved for a mistrial based on the manner in which the district court handled the juror substitution. No. 09-1231, 2012 WL 5540844, at *4–7 (Iowa Ct. App. Nov. 15, 2012). The Court of Appeals in *Miller* also drew two other important distinctions with *Escobedo*. First, in *Escobedo*, the defendant "acquiesced in the court's expressed intent to use a dismissed alternate juror," while in *Miller*, after it denied the defendant's motions for mistrial, the district court presented him with a "Hobson's choice," of either waiting a week for a juror to return from a funeral or proceeding with an alternate." *Id.* at *5–7. Second, because the defendant in *Miller* requested a mistrial, there was no "concern that double jeopardy would bar retrial," which was a concern in *Escobedo*, where a mistrial had not been requested. *Id.* at *6.

These longstanding cases clearly outline what a defendant must do to preserve this issue for appeal, and it is disingenuous for Defendant to now argue that he should be exempt from waiver because Iowa law was "unclear." This is especially so considering that Rule 2.18(15) became less restrictive, not more. If these procedures were sufficient when Rule 2.18(15) did not permit a juror to be

replaced once deliberations had begun, surely they were sufficient to alert Defendant to what he was required to do to challenge the issue now that such a replacement is permitted in the rule.[16] *See State v. Schoelerman*, 315 N.W.2d 67, 71–72 (Iowa 1982) ("A normally competent attorney who undertakes to represent a criminal defendant should either be familiar with the basic provisions of the criminal code, or should make an effort to acquaint himself with those provisions which may be applicable.…").

Moreover, even issues of first impression must be preserved. *See In re Detention of Anderson*, 895 N.W.2d 131, 138 (Iowa 2017) (finding issue of first impression was minimally preserved at the district court so could be raised on appeal). "In order for error to be preserved, the issue must be both raised and decided by the district court." *Id.* "The underlying requirement of error preservation is to give opposing counsel notice of the argument and opportunity to be heard on the issue." *Id.* Defendant cannot agree to a procedure at the district court—thereby depriving both the State and district court the

[16] At the hearing, Trial Counsel stated they were aware of *Escobedo* and *Miller*. 1-22-2018 Tr. 14:1–8.

opportunity to argue and consider the issue—then cry error on appeal after an unfavorable verdict.[17]

Defendant relies on *State v. Wisniewski* to assert that he was not required to raise this issue to the district court. 171 N.W.2d 882 (Iowa 1969). In *Wisniewski*, the Iowa Supreme Court found that the defendant was not required to object to an issue raised for the first time on appeal because a long-standing rule had been overturned after the defendant's trial, but before his appeal. *Id.* at 886. A such, the Supreme Court found that the "defendant should have the benefit of the" change in the law. *Id.* at 887. These are not the circumstances here, so *Wisniewski* is inapposite.

For as long as there have been jury trials, district courts have been required to manage a variety of juror issues. This is reflected in the Iowa Code and the Rules of Criminal Procedure, which provides district courts with wide discretion of jury management. For thirty-

[17] In his brief, Defendant asserts that "the trial judge failed to confirm that any waiver was knowing, voluntary, and intelligent." App. Br. at 49. This statement is a nonsequitur, and even if true, would not preserve his claim for appeal. Even assuming a district court is required to take certain steps before Defendant could agree to replace a juror after deliberations began, failure to take those steps would not automatically preserve the claim for appeal. Instead, Defendant would still be required to object at the time of the allegedly deficient waiver.

five years, section 607A.6 has allowed a district court to "dismiss a juror at any time in the interest of justice." Iowa Code § 607A.6. While it may be unusual, it is not a novel circumstance to be faced with the possibility of replacing a deliberating juror with an alternate because that juror fell ill, experienced an emergency, or faced allegations of bias or misconduct. Although our Rules of Criminal Procedure do not precisely outline how a district court should remove a juror once deliberations have begun, this does not alleviate Defendant of his responsibility to object if he suspects that the district court is acting in error, especially when, as here, Defendant was well-aware of the case law surrounding the issue, and the district court suggested a variety of options, including the option to do nothing at all. The district court did not require Defendant to choose between unsound choices, nor did Defendant "merely acquiesce" to the district court's suggestion—although this is all that would have been required under *Escobedo*. Defendant affirmatively chose to replace the non-deliberating juror with the first alternative, and in doing so, he has waived any objection to that juror's replacement.

III. The District Court Did Not Force Defendant to Choose Between His Right to a Speedy Trial and His Right to a Jury Venire with a Fair Cross-Section of the Community.

Preservation of Error

Next, Defendant argues that the district court "demanded" that he choose between his right to a speedy trial and his rights under *State v. Plain*, 898 N.W.2d 801 (Iowa 2017), to a jury venire with an adequate cross-section of the community. Defendant did not preserve this issue for appeal. At the district court, Defendant neither raised any objection to the way the district court handled this matter, nor did he argue that the district court was impermissibly making him choose between his rights under *Plain* and his right to a speedy trial.

It is axiomatic that an issue must be both raised to and decided by the district court before it may raised by a party on appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (internal citations omitted); *see also Taft v. Iowa Dist. Court ex rel Linn Cty.*, 828 N.W.2d 309, 322 (Iowa 2013) (citing *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002) ("Even issues implicating constitutional rights must be presented to and ruled upon by the district court in order to preserve error for appeal."). This is because "it is not a sensible exercise of appellate review to analyze facts of an issue 'without the

benefit of a full record or lower court determination[].'" *Id.* (quoting *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992)). Because Defendant failed to raise these arguments below, and the district court never ruled on them, they are not preserved for appeal, and the Court should decline to address this argument on the merits.

Standard of Review

"[T]he court's application of procedural rules governing speedy trial" is reviewed for correction of errors at law. *State v. Miller*, 637 N.W.2d 201, 204 (Iowa 2001).

Merits

If this Court determines that this claim is preserved, it still fails on the merits. Defendant paints a stark picture of a district court that strong-armed him into choosing between his right to a speedy trial and his rights under *Plain*. But when the record is read in its entirety, it is apparent the district court did nothing improper.

On January 5, 2018—three days before trial—the district court held a hearing to discuss the parties' motions in limine. 01-05-2018 Motion in Limine Tr. During this hearing, the parties discussed Defendant's "request as of late in the afternoon yesterday concerning *State v. Plain*." *Id.* at 20:13–15.

Defendant then made an argument under *Plain* and alleged that the jury venire assembled for his upcoming trial did not contain a fair cross-section of the community. *Id.* at 22:7–24:10. At the conclusion of this argument, the district court asked, "Are you taking the position that you do not want to go forward with this trial based on the zero percent proportionate members of African Americans in this community?" *Id.* at 24:11–14. Defendant responded, "No, Your Honor. I and my client would like his right to speedy trial to be afforded and go forward with trial." *Id.* at 24:15–17.

In its response to Defendant's argument, the State asserted it "is unclear as to the wishes of the Defendant:"

> Is the defense proposing that the Court proceed with a possible jury that the Defendant will now claim be possibly deficient, and that is now…exclusive systematically of members of other races? I don't understand what the Defendant is proposing to do here. The Defendant is proposing superficially now that this is an improper panel to be hearing this matter, yet at the same time, Defendant is not waiving his right to speedy trial. Which is it? Is the defense and State risking that there will be future ineffective assistance of counsel in allowing this Court or encouraging this Court to proceed with a jury panel that the Defendant will turn around and say this panel was deficient under *State v. Plain*? I'd like clarity from the defense as to what exactly the defense is seeking in this matter.

Id. at 26:2–21. Defendant then again asserted he was raising an argument under *Plain* but did not want to delay trial in order to remedy the deficient venire. *Id.* at 26:23–27:20. The district court expressed confusion over Defendant's argument and asked "whether or not you are waiving the fact that this Court cannot bring in a better cross-section or whether or not we don't go forward, because the Court can't bring in that cross-section." *Id.* at 27:21–28:3. The discussion continued:

> The State: The Defendant is suggesting that we proceed with a deficient jury panel. Now we either waive it and bring in, either more representatives, which I'm amenable to, or we have a change of venue, and we have a jury which is more of the Defendant's situation, which again, I'm amenable to, but to say that we're going to proceed with a deficient panel, how is that justice? How is that even good for the Defendant?
>
> The Court: How is it good for the system? That's my question. So I need the answer. You've got to answer.
>
> Trial Counsel: Your Honor, I would like to take a break to discuss with my client, before I make that representation on that. If you want to go off the record right now and take a quick recess, we can confer with our client, or we can leave this issue for the record open.

> The Court: I think we need to know that now, because if I'm calling the jury panel, I need to know so that I can let the Clerk know to let the jury know that it needs to be here on Monday, if he is going to waive the deficiency. *If he will not waive the deficiency, then I will not call the jury panel, and then you will have to discuss with him waiver of his right to speedy trial.* I will not go forward in violation of that, since the speedy trial deadline has been established as January 9th. So fifteen minutes.
>
> (Whereupon, a recess was taken at 2:15 p.m., and the proceedings were resumed at 2:35 p.m.)
>
> The Court: Thank you. Have a seat. [Trial Counsel], has the Defendant reached a conclusion as to the disparity issue under *Plain*?
>
> Trial Counsel: Yes, Your Honor. He's waiving his right to make an objection to *Plain* at this time.
>
> The Court: So we will go forward, then, next week as scheduled. Correct?
>
> Trial Counsel: Correct.

Id. at 28:4–29:16 (emphasis added).

This exchange makes clear that the district court did not require Defendant to either waive his rights under *Plain* or to waive his right to a speedy trial. First, the district court stated to trial counsel that they should discuss with Defendant whether he would waive the jury

deficiency, and if not, whether he would waive the speedy trial deadline. The district court wanted answers to these two questions but did not require Defendant to choose between the two.

Second, the record shows that Defendant wanted to proceed to trial as scheduled, but also wanted to raise the issue under *Plain* to preserve it for appeal. When the district court and the State expressed their willingness to remedy the deficiency under *Plain*, Defendant denied these offers. During the hearing, both the district court and the State acknowledged the reality that if Defendant wanted to remedy the venire deficiency, it would require a delay of trial because it would not be possible to bring in a new jury venire before trial was scheduled to begin. Because of this tension, there was nothing improper about asking Defendant to clarify his position because if he wanted a new or different jury venire, trial must be delayed. But if he wanted trial to proceed as scheduled, it would not be possible to bring in a new jury venire. Defendant raised an objection under *Plain*, but he did not want the district court to meaningfully address the deficiency. Both the district court and the State were understandably skeptical that Defendant raised this objection but did not want the district court to provide a remedy.

Defendant's argument on appeal would perhaps have more merit if he had insisted on both a remedy to the deficient jury venire and to his right to a speedy trial. He did not do so. Instead, he attempted to create a situation in which he could have his cake and eat it too. That is, he wanted to raise an objection under *Plain*, but did not want to give the district court the opportunity to remedy the jury deficiency. Then, if convicted, he could argue that the verdict was incompetent because the jury was not comprised of a fair cross-section of the community. This is precisely what he attempts to do now, and the district court rightfully did not allow him to do so. The district court and the State made it clear they were willing and able to remedy the jury venire deficiency. Defendant did not want to do so. Instead, he decided to waive his argument under *Plain* and proceed to trial as scheduled. The district court acted appropriately in handling this matter.[18]

[18] Had Defendant continued to assert his rights under *Plain*, as well as his right to a speedy trial, his motion under *Plain* would have created good cause to delay trial. "Generally, a defendant must accept the passage of time that is reasonably necessary for a court to hear and rule on dispositive pretrial motions." *State v. Winters*, 690 N.W.2d 903, 908 (Iowa 2005); *accord State v. Donnell*, 239 N.W.2d 575, 579 (Iowa 1976).

IV. Defendant's Argument that the Iowa Supreme Court Erred by Striking His Proof Brief is A Non-Cognizable Claim.

Merits

In Defendant's original proof brief, he quoted extensively from Link's confidential medical records. The Iowa Supreme Court struck his proof brief and ordered him to remove the quoted material. Dkt. 18-0733, 11-29-2018 Order, 01-10-2019 Order. Defendant addresses this issue again in his amended proof brief but does not raise a cognizable claim that is appropriate for appellate review, nor does he ask for any remedy or relief. The Iowa Supreme Court has already ruled that Link's medical records could not be quoted from in the proof briefs, and the proof briefs have already been submitted in this case. Any further discussion of the issue is moot.

CONCLUSION

For all the reasons stated above, the State respectfully requests that this Court affirm Defendant's conviction and sentence and deny all claims on the merits.

REQUEST FOR NONORAL SUBMISSION

The State requests that this case be submitted without oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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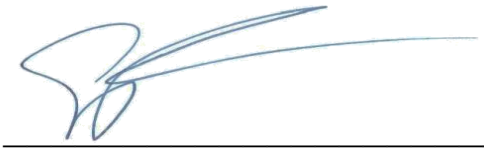
Dated: May 20, 2019



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