IN THE SUPREME COURT OF IOWA

STATE OF IOWA Plaintiff-Appellee, v. ANTHONY FRANK ERNST, Defendant-Appellant.	)	Supreme Court No. 18-1623

APPEAL FROM THE IOWA DISTRICT COURT
FOR DUBUQUE COUNTY
HONORABLE MICHAEL J. SHUBATT, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 19th day of June, 2019, the undersigned certifies that a true copy of the forgoing instrument was served upon the Defendant-Appellant by placing on copy thereof in the United States mail, proper postage attached, addressed to Anthony Ernst, No. 6716421, Fort Dodge Correctional Facility, 1550 "L" Street, Fort Dodge, Iowa 50501.

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because issues raised involves a substantial issue of first impression in Iowa and furthermore this case presents substantial questions of enunciating or changing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c). The issue contained herein requires the Court to determine whether an expert witness is needed to inform a jury about a defendant's historical cell site data. As such, the issue is important questions of law that should be settled by the Supreme Court. This case presents a fundamental issue of broad public importance that is requiring ultimate determination by the Supreme Court. Iowa R. App. R. 6.903(2)(d), 6.1101(2)(d).

STATEMENT OF THE CASE

Nature of Case. Defendant-Appellant Anthony Frank Ernst appeals from the judgment, conviction, and sentence for Attempted Burglary in the Third Degree in violation of Iowa Code section 713.6B (2017) following a jury trial and a verdict of guilty in the Dubuque County District Court. The

Honorable Michael J. Shubatt presided over all relevant proceedings.

Course of Proceedings. On April 10, 2018, Ernst was charged by Trial Information with the offense of Burglary in the Third Degree, a class D felony, in violation of Iowa Code section 713.6A(1) (2017). (Trial Information) (App. pp. 5-6). The State also alleged that Ernst was a habitual offender pursuant to Iowa Code section 902.8 (2017) for having been convicted twice of a felony. (Trial Information) (App. pp. 5-6). Ernst pled not guilty to the charge and demanded a speedy trial. (Written Arraignment; Arraignment Order) (App. pp. 7-10).

On May 14, 2018, Ernst filed a Motion to Dismiss which alleged that there is no allegations in the Minutes of Testimony or discovery materials that alleges he entered an unoccupied or occupied structure as required for the burglary charge. (Motion to Dismiss) (App. pp. 11-12). On June 13, 2018, Ernst filed a Motion for Bill of Particulars which requested that the State file a more specific Trial Information with more specific information regarding Ernst's alleged entry which

would support the burglary charge. (Motion for Bill of Particulars) (App. pp. 13-14). The State resisted the Motion for Bill of Particulars. (Resistance to Motion for Bill of Particulars) (App. pp. 15-17).

A hearing on the Bill of Particulars was held on June 15, 2018. (6/15/18 Hrg. Tr. p. 1; 6/15/18 Order) (App. pp. 18-19). Prior to the start of the hearing, the State filed additional minutes of testimony. (6/15/18 Hrg. Tr. p. 7, Line 12 – p. 10, Line 12; 6/15/18 Order) (App. pp. 18-19). After reviewing the additional minutes of testimony, the court found that the minutes of testimony contain circumstantial evidence to support the charge and adequately put Ernst on notice of the evidence against him. (6/15/18 Order) (App. pp. 18-19). As such, the court denied Ernst's motion. (6/15/18 Order) (App. pp. 18-19).

On June 29, 2018, Ernst filed a Motion in Limine which sought to exclude the following evidence from the jury trial: (1) any reference to Ernst's prior bad acts; (2) any reference to Ernst's prior arrests, convictions, or any allegations involving prior criminal activity; and (3) any reference to Jason

Wulfekuhle, Emily Wulfekuhle, or any person or entity as "victim". (Motion in Limine) (App. pp. 20-21).

Jury trial commenced on July 10, 2018. (Vol. I Tr. p. 1; Entry of Jury Verdict) (App. pp. 24-25). Prior to jury selection, the district court entertained Ernst's Motion in Limine. (Vol. I Tr. p. 4, Line 23 – p. 14, Line 8; Order re: Motion in Limine) (App. pp. 22-23). Following arguments from the parties, the court granted Ernst's motion except that court will allow the State to present evidence that Emily Wulfekuhle was Ernst's parole officer at the time of the alleged offense and general information about what that relationship involved. (Vol. I Tr. p. 4, Line 23 – p. 14, Line 8; Order re: Motion in Limine) (App. pp. 22-23). The case proceeded to trial and the jury returned a verdict on the lesser included offense of Attempted Burglary in the Third Degree. (Vol. IV Tr. p. 50, Line 1 – p. 54, Line 8; Entry of Jury Verdict) (App. pp. 24-25).

On August 17, 2018, Ernst filed post-trial motions. (Post-trial Motions) (App. pp. 28-29). Ernst first filed a Motion for New Trial which requested that the district court order a new trial since the verdict of guilty rendered by the jury was

contrary to the evidence. (Post-trial Motions) (App. pp. 28-29). Ernst also filed a Motion in Arrest of Judgment which alleged that the verdict was not supported by the evidence and as a matter of law no legal judgment can be pronounced against Ernst. (Post-trial Motions) (App. pp. 28-29). The State resisted the motions. (Resistance to Post-trial Motions) (App. pp. 30-34). A hearing on the Ernst's post-trial motions was held on August 27, 2018. (8/27/18 Hrg. Tr. p. 1; 8/27/18 Order) (App. pp. 35-36). Following arguments from the parties, the court denied Ernst's post-trial motions. (8/27/18 Hrg. Tr. p. 2, Line 1 – p. 8, Line 2; 8/27/18 Order) (App. pp. 35-36).

A sentencing hearing commenced on September 10, 2018. (Sent. Tr. p. 1; Judgment) (App. pp. 37-39). On the charge of Attempted Burglary in the Third Degree, the court ordered Ernst to serve an indeterminate term of imprisonment not to exceed two years and pay a fine of $625 along with statutory surcharges, court costs and restitution. (Sent. Tr. p. 13, Line 25 – p. 18, Line 13; Judgment) (App. pp. 37-39). The court ordered the sentence to be served consecutive to any

sentence imposed in Ernst's pending parole matters. (Sent. Tr. p. 13, Line 25 – p. 18, Line 13; Judgment) (App. pp. 37-39). The court also ordered Ernst to have no contact with the victim for a period of five years. (Sent. Tr. p. 13, Line 25 – p. 18, Line 13; Judgment) (App. pp. 37-39).

Ernst filed a Notice of Appeal on September 18, 2018. (Notice of Appeal) (App. p. 40).

Background Facts. Emily Wulfekuhle testified that she lives with her husband, Jason Wulfekuhle, and two young daughters at a rural residence in Cascade, Iowa. (Vol. I Tr. p. 144, Line 5 – p. 156, Line 4). She stated that she lives on a dead end road with only a few houses along with one business and a farm on the road. (Vol. I Tr. p. 144, Line 5 – p. 156, Line 4). She stated that there is little vehicle traffic on her road. (Vol. I Tr. p. 144, Line 5 – p. 156, Line 4). Emily Wulfekuhle testified that she works for the Department of Corrections as a probation and parole officer. (Vol. I Tr. p. 156, Line 5 – p. 163, Line 24).

Emily Wulfekuhle testified that on August 21, 2017, she left for work between 6:30 a.m. and 6:45 a.m., and she arrived

home around 6:30 p.m. (Vol. I Tr. p. 156, Line 5 – p. 163, Line 24). She stated that when she arrived home, her husband stated that their residence was broken into. (Vol. I Tr. p. 144, Line 5 – p. 156, Line 4). She stated that when she left for work, the doors and windows to the garage were locked and she did not believe the door had any damage. (Vol. I Tr. p. 144, Line 5 – p. 156, Line 4). Emily Wulfekuhle testified that she observed the entry door to the garage and she noticed the weather stripping near the doorknob and the bottom of the door was damaged. (Vol. I Tr. p. 144, Line 5 – p. 156, Line 4). She also stated that no one had permission to be in the garage on August 21, 2017. (Vol. I Tr. p. 144, Line 5 – p. 156, Line 4). She admitted that she did not call the police at that time and it was not until a few hours later that she called the Iowa State Patrol to report the incident. (Vol. I Tr. p. 144, Line 5 – p. 156, Line 4). Emily Wulfekuhle testified that she was currently supervising Ernst on his parole since October 2016. (Vol. I Tr. p. 156, Line 5 – p. 163, Line 24). She stated that she last met with Ernst two weeks prior to August 21, 2017. (Vol. I Tr. p. 156, Line 5 – p. 163, Line 24).

Emily Wulfekuhle testified that Ernst was currently working in August 2017 with Decker Concrete in Dyersville, Iowa. (Vol. I Tr. p. 156, Line 5 – p. 163, Line 24). She stated that Ernst was not working on August 21, 2017 given that he had a child support hearing that he had to attend on that day. (Vol. I Tr. p. 156, Line 5 – p. 163, Line 24). Furthermore, Mike Decker is the owner of Decker Concrete in Dyersville, Iowa. (Vol. I Tr. p. 177, Line 6 – p. 180, Line 8). He stated that Ernst was an employee of his company in August 2017. (Vol. I Tr. p. 177, Line 6 – p. 180, Line 8). He stated that on August 21, 2017, he was contacted by Ernst via a text message at 8:17 a.m. which informed him that Ernst was not able to work that day because he had a court hearing. (Vol. I Tr. p. 177, Line 6 – p. 180, Line 8). Decker also testified that Jason Wulfekuhle works for a company that he does see from time to time at his various work sites. (Vol. I Tr. p. 177, Line 6 – p. 180, Line 8).

Jason Wulfekuhle testified that on August 21, 2017, he left for work at 5:30 a.m. and returned home after picking up their two daughters at 4:30 p.m. (Vol. I Tr. p. 169, Line 8 – p. 173, Line 25). He stated that when he arrived home, he

noticed the entry door was slightly ajar by a half inch to one inch. (Vol. I Tr. p. 169, Line 8 – p. 173, Line 25). He stated that it appeared the door was pried open with a pry bar and the doorknob was still locked. (Vol. I Tr. p. 169, Line 8 – p. 173, Line 25). Jason Wulfekuhle testified that he went into the house to make sure no one was inside the residence and nobody was located. (Vol. I Tr. p. 169, Line 8 – p. 173, Line 25). He stated that there was nothing out of place in the residence. (Vol. I Tr. p. 169, Line 8 – p. 173, Line 25). He further stated that he gave no-one permission to be in the garage. (Vol. I Tr. p. 169, Line 8 – p. 173, Line 25).

William Grant, an investigator with Dubuque County Sherriff's office, testified that he was contacted by Emily Wulfekuhle on August 22, 2017 to the discussed the incident from the day before. (Vol. II Tr. p. 4, Line 7 – p. 16, Line 4). He stated that after talking with her, he went to the residence. (Vol. II Tr. p. 4, Line 7 – p. 16, Line 4). He stated that he observed damage to the entry door to the garage which appeared to be little pry marks near the doorknob and the bottom of the door. (Vol. II Tr. p. 4, Line 7 – p. 16, Line 4).

Grant also stated that he observed damage to the weather stripping on the door. (Vol. II Tr. p. 4, Line 7 – p. 16, Line 4). He stated that after photographing the entry door, he went to a nearby business to inquire if they had a surveillance video of the road. (Vol. II Tr. p. 4, Line 7 – p. 16, Line 4).

Grant testified that when he went to Wulfekuhle's residence, he did not go inside the residence. (Vol. III Tr. p. 31, Line 10 – p. 40, Line 16). He stated that he did not find any finger prints or footprints in the garage. (Vol. III Tr. p. 31, Line 10 – p. 40, Line 16). He also testified that he did not find anything out of place in the garage nor did he find any evidence of anybody going into the garage. (Vol. III Tr. p. 31, Line 10 – p. 40, Line 16).

Grant stated that he was provided the video from the nearby business and reviewed it to determine if there was any unusual traffic on the road. (Vol. II Tr. p. 4, Line 7 – p. 16, Line 4). He stated that the video showed very little traffic on the road that Wulfekuhle's residence is located on on August 21, 2017. (Vol. II Tr. p. 4, Line 7 – p. 16, Line 4). Grant testified that he observed a few tractors and trucks driving the

road on August 21, 2017 but those were accounted for as either traffic to the nearby business or the farm. (Vol. II Tr. p. 16, Line 5 – p. 30, Line 3). He stated that he did observe a white Crown Victoria vehicle which appeared to be a police model from the years 2006 to 2012 that was missing paint on the driver's side rear door and roof area. (Vol. II Tr. p. 16, Line 5 – p. 30, Line 3). Emily Wulfekuhle testified that Ernst was driving a white Crown Victoria vehicle in August 2017 that he purchased from a local police department. (Vol. I Tr. p. 156, Line 5 – p. 163, Line 24).

Grant stated that the surveillance video first showed the vehicle driving south on the road toward Wulfekuhle's residence at 10:31 a.m. and the vehicle returned driving north away from the residence at 10:43 a.m. (Vol. II Tr. p. 16, Line 5 – p. 30, Line 3). He stated that it appeared the vehicle was traveling very slowly. (Vol. II Tr. p. 16, Line 5 – p. 30, Line 3). He further testified that it appeared that the vehicle only had one person who appeared to be wearing a bright-colored shirt. (Vol. II Tr. p. 16, Line 5 – p. 30, Line 3; State's Exhibit #22) (Ex. App. p. 17). He stated that Ernst was wearing a bright

colored shirt on August 21, 2017. (Vol. II Tr. p. 16, Line 5 – p. 30, Line 3).

Grant testified that he did search the records for Crown Victoria vehicles within 60 miles radius of the Wulfekuhle's residence and found there were approximately thirty-two vehicles that matched a white Crown Victoria from years 2006 and 2011. (Vol. II Tr. p. 30, Line 4 – p. 36, Line 24). He stated that Ernst did operate a white Crown Victoria in August 2017. (Vol. II Tr. p. 30, Line 4 – p. 36, Line 24; State's Exhibit #14, #15) (Ex. App. pp. 10-11). He further testified that he also reviewed Dubuque City traffic cameras and was able to determine that Ernst, on August 21, 2017, left his residence in Dubuque at 8:45 a.m. and left the city of Dubuque at approximately 8:55 a.m. (Vol. III Tr. p. 3, Line 12 – p. 15, Line 9). Grant testified that Ernst returned to the city at approximately 12:20 p.m. and went to his residence at 12:28 p.m. (Vol. III Tr. p. 3, Line 12 – p. 15, Line 9). He stated that Ernst left his residence for the courthouse at 1:15 p.m. (Vol. III Tr. p. 3, Line 12 – p. 15, Line 9).

Grant testified that he interviewed Ernst and Ernst was adamant that he had nothing to do with the alleged break in at the Wulfekuhle's residence. (Vol. III Tr. p. 15, Line 10 – p. 31, Line 9; State's Exhibit #39). He also testified that he received Ernst cell phone records from August 21, 2017 and it shows that Ernst called his mother at 11:45 a.m. and 11:48 a.m. on August 21, 2017. (Vol. III Tr. p. 15, Line 10 – p. 31, Line 9). Grant testified that those calls were made in the area of Cascade, Iowa. (Vol. III Tr. p. 15, Line 10 – p. 31, Line 9). He stated that Ernst's sister who lives in nearby Bernard, Iowa told him that Ernst was not with her on August 21, 2017. (Vol. III Tr. p. 15, Line 10 – p. 31, Line 9). He further testified that there is no indication that he was near his sister house in Bernard, Iowa or his mother's house in Epworth, Iowa on August 21, 2017. (Vol. III Tr. p. 15, Line 10 – p. 31, Line 9).

Kimberly Kuntz testified that she is the sister of Ernst and she lives in Bernard, Iowa. (Vol. III Tr. p. 69, Line 6 – p. 73, Line 13). She stated that she was pregnant in August 2017. (Vol. III Tr. p. 69, Line 6 – p. 73, Line 13). She stated that on August 21, 2017 she was sick due to her pregnancy

and Ernst brought items to her to help her with her sickness. (Vol. III Tr. p. 69, Line 6 – p. 73, Line 13). She stated that he arrived sometime between 9:30 a.m. and 9:45 a.m. and he stayed for about an hour. (Vol. III Tr. p. 69, Line 6 – p. 73, Line 13). Kimberly Kuntz testified when Ernst left, he was heading to their mother's residence in Epworth to drop off cigarettes to her which was about twenty to twenty-five minutes away from her residence. (Vol. III Tr. p. 69, Line 6 – p. 73, Line 13). She also stated that she remembered that she talked with Grant and admitted she was not forthcoming about Ernst's whereabouts on August 21, 2017. (Vol. III Tr. p. 69, Line 6 – p. 73, Line 13). Specifically, she stated that she did not tell Grant in the brief telephone call that Ernst was with her for a period of time in the morning of August 21, 2017. (Vol. III Tr. p. 69, Line 6 – p. 73, Line 13).

Pamela Kuntz testified that Ernst arrived at her residence on August 21, 2017 sometime after 11:00 a.m. and he brought her some cigarettes and pop. (Vol. III Tr. p. 57, Line 6 – p. 60, Line 13). She stated that Ernst stayed for a little while at her residence and they left for Dubuque around 12:00 p.m. (Vol.

III Tr. p. 57, Line 6 – p. 60, Line 13). She stated that they went to a pharmacy in Dubuque and then to Ernst's ex-girlfriend's residence in Dubuque before he left to go to the court hearing that afternoon. (Vol. III Tr. p. 57, Line 6 – p. 60, Line 13).

Any additional pertinent facts will be discussed below.

ARGUMENT

I. The jury found Ernst guilty of the lesser included offense of Attempted Burglary. During the trial, Ernst moved for a judgment of acquittal alleging there was insufficient evidence to support the charge. Following the trial, Ernst filed a motion for new trial which alleged that the verdict was contrary to weight of the evidence or law. Did the court err in denying Ernst's motion for judgment of acquittal and overruling Ernst's motion for new trial?

Preservation of Error. "To preserve error on a claim of insufficient evidence for appellate review in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal." *State v. Truesdell,* 679 N.W.2d 611, 615 (Iowa 2004). In this case, at the end of the State's case, Ernst made a motion for judgment of acquittal which alleged the specific grounds that are alleged on appeal and specified which elements of the

crime that were insufficiently supported by the evidence. (Vol. III Tr. p. 42, Line 23 – p. 54, Line 18). Specifically, Ernst argued that there is no evidence that he was at Wulfekuhle's residence and there is no evidence that Ernst entered the garage as alleged by the State. (Vol. III Tr. p. 42, Line 23 – p. 54, Line 18). The court overruled Ernst's motion on these grounds but did grant the motion on the specific intent alternative regarding assault. (Vol. III Tr. p. 42, Line 23 – p. 54, Line 18). The court found that there is circumstantial evidence to support the specific intent to commit a theft element of the charge but the court concluded that there is no evidence to support the alternative allegation that there was specific to commit an assault toward Wulfekuhle. (Vol. III Tr. p. 42, Line 23 – p. 54, Line 18). Therefore, Ernst preserved error on his challenge to the sufficiency of the evidence.

"It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut,* 641 N.W.2d 532, 537 (Iowa 2002). Ernst filed a Motion for New Trial which requested the district court to

grant a new trial given that verdict was contrary to the evidence presented at trial, which the district court denied following a hearing on the motion. (8/27/18 Hrg. Tr. p. 2, Line 1 – p. 8, Line 2; 8/27/18 Order) (App. pp. 35-36). Error was preserved on this issue by the district court's ruling on Ernst's post-trial motions. *Lamasters v. State,* 821 N.W.2d 856, 864 (Iowa 2012).

Should this Court determine that error was not preserved on this issue for any reason, Ernst alternatively claims trial counsel was ineffective for failing to preserve error on this claim. Appellate review is not precluded if failure to preserve error results from a denial of effective assistance of counsel. *State v. Fountain,* 786 N.W.2d 260, 262–63 (Iowa 2010).

Standard of Review and General Principles for Sufficiency of the Evidence. The Court reviews challenges to the sufficiency of the evidence for errors at law. *State v. Bash,* 670 N.W.2d 135, 137 (Iowa 2003). The Court will uphold a jury verdict if substantial evidence supports it. *Id.* Evidence is considered substantial if it would convince a rational fact finder the defendant is guilty beyond a reasonable

doubt. *Id.* The Court reviews the evidence, including legitimate inferences and presumptions that may fairly be deduced from the evidence, in the light most favorable to the State. *Id.* The State has the burden to prove every fact necessary to constitute the crimes with which the defendant is charged. *Id.* The evidence presented must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture. *Id.*

Standard of Review and General Principles for Weight of the Evidence. A district court has broad discretion to rule on motions for a new trial alleging the verdict is contrary to the weight of the evidence. *State v. Nichter,* 720 N.W.2d 547, 559 (Iowa 2006). This Court will reverse only when the district court abuses its discretion. *Id.* However, because Reed is alleging that his trial counsel was ineffective for failing to file a Motion for New Trial, this Court will review de novo this claim of ineffective-assistance-of-counsel. *Ennenga v. State,* 812 N.W.2d 696, 701 (Iowa 2012).

A district court may grant a new trial when "the verdict is contrary to law or evidence." Iowa R. Crim. P. 2.24(2)(*b*)(6).

The language "contrary to ... evidence" means "contrary to the weight of the evidence," rather than unsupported by sufficient evidence. *State v. Ellis,* 578 N.W.2d 655, 659 (Iowa 1998). Under this standard, the district court "may weigh the evidence and consider the credibility of witnesses." *Id.* at 658. Weight of the evidence refers to a determination by the trier of fact "that a greater amount of credible evidence supports one side of an issue or cause than the other." *Id.* In contrast, under a sufficiency-of-the-evidence standard, the court is required to view the evidence in a light most favorable to the State. *Id.*

The Evidence was Insufficient and Contrary to the Weight of the Evidence to Support the Jury's Verdict. Ernst claims that that the district court erred in denying his motion for judgment of acquittal given the evidence submitted does not allow a reasonable fact finder to conclude there is sufficient evidence to prove he committed the attempted burglary charge. Ernst also claims that the district court erred in overruling his motion for new trial since the greater weight of the evidence submitted does not support a finding

beyond a reasonable doubt that he committed the attempted burglary charge.

The burden is on the State to prove every fact necessary to constitute the offense with which a defendant has been charged. *State v. Gibbs*, 239 N.W.2d 866, 867 (Iowa 1976) (citing *In Re Winship*, 397 U.S. 358 (1970)). The crime of attempted burglary is defined as follows:

> Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license, or privilege to do so, attempts to enter an occupied structure, the occupied structure not being open to the public, or who attempts to remain therein after it is closed to the public or after the person's right, license, or privilege to be there has expired, or any person having such intent who attempts to break an occupied structure, commits attempted burglary.

Iowa Code § 713.2. "All attempted burglary which is not attempted burglary in the first degree or attempted burglary in the second degree is attempted burglary in the third degree." Iowa Code § 713.6B(1).

The Iowa Code does not define "attempt." Pursuant to common law, when our criminal law penalizes an "attempt,"

without a statutory definition, the Iowa Supreme Court has previously required:

> (1) an intent to do an act or bring about certain consequences which would in law amount to a crime; and
>
> (2) an act in furtherance of that intent which ... goes beyond mere preparation.

State v. Spies, 672 N.W.2d 792, 797 (Iowa 2003)(internal quotation marks and citations omitted)(applying this definition to the question whether the defendant committed an "attempted transfer" of a controlled substance). In another formulation, the Iowa Supreme Court reiterated that the "common law principles of attempt require the State to prove (1) intent to commit the crime and (2) slight acts in furtherance of the crime that render voluntary termination improbable." *Fryer v. State*, 325 N.W.2d 400, 406 (Iowa 1982) (applying this standard to the question whether the defendant had committed "attempted robbery").

The Iowa Supreme Court has further defined the act for "attempt" in *State v. Roby*, which stated:

> In the instant case, defendant made preparation by enticing prosecutrix by signals to go to a secluded

> place where the act could be committed. They were on the ground in position to have intercourse. Her clothing was more or less disarranged.... These acts proximately led up to the consummation of the intended crime, and were overt acts.
>
> The [overt] act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. While it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made.

State v. Roby, 194 Iowa 1032, 1043, 188 N.W. 709, 714 (1922) (internal quotation marks and citations omitted).

These three formulations are not exactly the same, but these cases have been relied upon by the Iowa Supreme Court in *State v. Erving*, 346 N.W.2d 833 (Iowa 1984) which applied both the *Fryer* and the *Roby* standards to the question whether the defendant had committed attempted burglary as defined in Iowa Code section 713.2. *See State v. Erving*, 346 N.W.2d 833, 835–36 (Iowa 1984). In *Erving*, the Iowa Supreme Court observed it was not necessary, for defendant to actually enter the occupied structure in order to commit attempted

burglary since attempted burglary is distinguished from the completed crime only by defendant's failure to effect an entry. *Id.* Furthermore, the Court observed that the failure to effect a completed breaking and entry will not negate the jury's ability to find an unlawful intent. *Id.*

In order find Ernst's guilty, the jury was instructed that State had to prove all of the following elements of attempted burglary:

> 1. On or about the 21st day of August, 2017, the defendant attempted to enter a garage located [ ] in Cascade, Iowa.
>
> 2. The garage was an occupied structure as defined in Instruction No. 18.
>
> 3. The defendant did not have permission or authority to enter the garage.
>
> 4. The defendant did so with the specific intent to commit theft.

(Jury Instr. No. 20) (App. p. 26). Applying the aforementioned framework to this case, Ernst argues that the evidence does not show he was at the Wulfekuhle's residence nor did he attempt to enter the garage under both the *Fryer* and the *Roby* standards. A review of the record presented at trial shows the

State has failed to prove beyond a reasonable doubt this crucial element of the attempted burglary charge.

The evidence was far from overwhelming against Ernst. The State attempted to establish that the Wulfekuhle's garage was broken into through the testimony of Emily and Jason Wulfekuhle. Emily Wulfekuhle testified that she lives with her husband, Jason Wulfekuhle, and two young daughters at a rural residence in Cascade, Iowa. (Vol. I Tr. p. 144, Line 5 – p. 156, Line 4). She stated that she lives on a dead end road with only a few houses along with one business and a farm on the road. (Vol. I Tr. p. 144, Line 5 – p. 156, Line 4). She stated that there is little vehicle traffic on her road. (Vol. I Tr. p. 144, Line 5 – p. 156, Line 4). Emily Wulfekuhle testified that she works for the Department of Corrections as a probation and parole officer. (Vol. I Tr. p. 156, Line 5 – p. 163, Line 24).

Emily Wulfekuhle testified that on August 21, 2017, she left for work between 6:30 a.m. and 6:45 a.m., and she arrived home around 6:30 p.m. (Vol. I Tr. p. 156, Line 5 – p. 163, Line 24). She stated that when she arrived home, her husband

stated that their residence was broken into. (Vol. I Tr. p. 144, Line 5 – p. 156, Line 4). She stated that the when left for work, the doors and windows to the garage were locked and she did not believe the door had any damage. (Vol. I Tr. p. 144, Line 5 – p. 156, Line 4). Emily Wulfekuhle testified that she observed the entry door to the garage and she noticed the weather stripping near the doorknob and the bottom of the door was damaged. (Vol. I Tr. p. 144, Line 5 – p. 156, Line 4). She also stated that no one had permission to be in the garage on August 21, 2017. (Vol. I Tr. p. 144, Line 5 – p. 156, Line 4). She admitted that she did not call the police at that time and it was not until a few hours later that she called the Iowa State Patrol to report the incident. (Vol. I Tr. p. 144, Line 5 – p. 156, Line 4).

Jason Wulfekuhle testified that on August 21, 2017, he left for work at 5:30 a.m. and returned home after picking up their two daughters at 4:30 p.m. (Vol. I Tr. p. 169, Line 8 – p. 173, Line 25). He stated that when he arrived home, he noticed the entry door was slightly ajar by a half inch to one inch. (Vol. I Tr. p. 169, Line 8 – p. 173, Line 25). He stated

that it appeared the door was pried open with a pry bar and the doorknob was still locked. (Vol. I Tr. p. 169, Line 8 – p. 173, Line 25). Jason Wulfekuhle testified that he went into the house to make sure no one was inside the residence and nobody was located. (Vol. I Tr. p. 169, Line 8 – p. 173, Line 25). He stated that there was nothing out of place in the residence. (Vol. I Tr. p. 169, Line 8 – p. 173, Line 25). He further stated that he gave no-one permission to be in the garage. (Vol. I Tr. p. 169, Line 8 – p. 173, Line 25).

William Grant, an investigator with Dubuque County Sherriff's office, testified that he was contacted by Emily Wulfekuhle on August 22, 2017 to the discussed the incident from the day before. (Vol. II Tr. p. 4, Line 7 – p. 16, Line 4). He stated that after talking with her, he went to the residence. (Vol. II Tr. p. 4, Line 7 – p. 16, Line 4). He stated that he observed damage to the entry door to the garage which appeared to be little pry marks near the doorknob and the bottom of the door. (Vol. II Tr. p. 4, Line 7 – p. 16, Line 4). Grant also stated that he observed damage to the weather stripping on the door. (Vol. II Tr. p. 4, Line 7 – p. 16, Line 4).

He stated that after photographing the entry door, he went to a nearby business to inquire if they had a surveillance video of the road. (Vol. II Tr. p. 4, Line 7 – p. 16, Line 4).

However, it is unclear by whom or what may have opened the garage entry door on August 21, 2017. The most troubling for the State is that there is no eyewitness that saw any suspicious person on the Wulfekuhle's property on August 21, 2017. Furthermore, the circumstantial evidence does not support a finding that the entry door to the garage was pried open. Jason Wulfekuhle admitted that there was no pry marks on the entry door from the garage to the house. (Vol. I Tr. p. 174, Line 176, Line 25). He also admitted that he did not find any pry bar left at the residence. (Vol. I Tr. p. 174, Line 176, Line 25). He also testified that there was nothing taken from the garage and nothing out of place in the garage. (Vol. I Tr. p. 174, Line 176, Line 25). Jason Wulfekuhle further testified that his 2015 Chevy truck was parked inside the garage and he observed no marks or prints on truck. (Vol. I Tr. p. 174, Line 176, Line 25). In addition, he testified that nothing was moved nor missing from the shelves located

inside the garage. (Vol. I Tr. p. 174, Line 176, Line 25). He testified that he shut the entry door to the garage after he arrived and it had to be reopened to take pictures of how he believed the door was when he arrived home. (Vol. I Tr. p. 169, Line 8 – p. 173, Line 25).

Emily Wulfekuhle acknowledged that there is no alarm or surveillance equipment at her residence. (Vol. I Tr. p. 164, Line 168, Line 25). She further acknowledged that nothing was missing from the house and the garage. (Vol. I Tr. p. 164, Line 168, Line 25). Specifically, she testified that nothing was out of place in the garage or house. (Vol. I Tr. p. 164, Line 168, Line 25).

Grant testified that when he went to Wulfekuhle's residence, he did not go inside the residence. (Vol. III Tr. p. 31, Line 10 – p. 40, Line 16). He stated that he did not find any finger prints or footprints in the garage. (Vol. III Tr. p. 31, Line 10 – p. 40, Line 16). He also testified that he did not find any out of place in the garage nor did he find any evidence of anybody going into the garage. (Vol. III Tr. p. 31, Line 10 – p. 40, Line 16). Furthermore, the pictures of the door taken by

the Wulfekuhles and the police shows the entry door to be an older door and it does appear to have wear and tear on the weather stripping outside of the alleged damage they said occurred on August 21, 2017. (State's Exhibits #3, 4, 10, 11, 12) (Ex. App. pp. 4-6).

Taking the evidence in the light most favorable to the State and drawing all fair and reasonable inferences that may be deduced from the evidence, there was insufficient evidence from which a reasonable jury could find that someone intentionally opened that the Wulfekuhle's garage entry door on August 21, 2017. The inference is insufficient to support Ernst's conviction:

> Inferences drawn from the evidence must raise a fair inference of guilt on each essential element, including the element of intent. Inferences that do no more than create speculation, suspicion, or conjecture do not create a fair inference of guilt. Under these standards, when two reasonable inferences can be drawn from a piece of evidence, ... such evidence only gives rise to a suspicion, and, without additional evidence, is insufficient to support guilt. In such a situation, a jury would necessarily be required to rely upon conjecture to reach a verdict of guilt. Some other evidence of guilt is required to support a conviction.

State v. Truesdell, 679 N.W.2d 611, 618–19 (Iowa 2004) (citations and internal quotation marks removed).

In this case, more than one reasonable inference can be drawn from this evidence. A fact finder could go on to infer other inferences on how the door was opened, including wind, an animal hitting into the door, or the Wulfekuhles, contrary to what they remember, they forget to properly close the door when they left in the morning. The State presented no evidence to show that someone saw a suspicious person on the Wulfekuhle's property on August 21, 2017. As such, there is no evidence to which to base an inference that someone attempted to enter the Wulfekuhle's garage as alleged by the State.

Even if the record somehow supports that someone attempted to enter the Wulfekuhle's garage on August 21, 2017, the evidence was insufficient to support a finding that it was Ernst who committed the act. A conviction may not rest on speculative evidence — evidence that will support two or more reasonable inferences — that forms the fulcrum over which guilt or innocence balances. *Truesdell*, 679 N.W.2d at

618–19; *see also State v. Reed*, 875 N.W.2d 693, 711–13 (Iowa 2016) (Hecht, J., concurring specially) (cautioning against recognizing a "stack of speculative inferences piled one on top of another as substantial evidence"). The State's theory is a stack of speculative inferences that it was Ernst who attempted to enter the Wulfekuhle's garage on August 21, 2017.

The "fulcrum" is the speculation that is the basis for the State's theory – that because Ernst was a parolee of Emily Wulfekuhle and his vehicle may have been in the area of the Wulfekuhle's residence on August 21, 2017, it was Ernst that committed this attempted burglary. In order to draw that inference and to build upon it, the State attempted to link Ernst to this alleged crime through his relationship with Emily Wulfekuhle, who was currently supervising Ernst on his parole since October 2016. (Vol. I Tr. p. 156, Line 5 – p. 163, Line 24). She stated that she last met with Ernst two weeks prior to August 21, 2017. (Vol. I Tr. p. 156, Line 5 – p. 163, Line 24).

The fact that Ernst was a parolee being supervised by Emily Wulfekuhle does not support a finding that it must have been him who attempted to enter the garage. Emily Wulfekuhle testified that Ernst had no violations on parole and had a cordial working relationship with him. (Vol. I Tr. p. 164, Line 168, Line 25). She further admitted that she and Ernst had no major fights or disagreements, and Ernst had made no threats to her. (Vol. I Tr. p. 164, Line 168, Line 25). She also admitted that Ernst was following through with his parole requirements which included maintaining employment, checking in with her and staying out of trouble. (Vol. I Tr. p. 164, Line 168, Line 25). Emily Wulfekuhle stated that Ernst was not her only parolee since she was currently supervising about fifty-five people at that time. (Vol. I Tr. p. 164, Line 168, Line 25). She stated that she had some issues with some of the people she supervised over the years, including having arguments with family and friends of the parolees. (Vol. I Tr. p. 164, Line 168, Line 25).

The State attempted to build upon this inference by showing that Ernst had the opportunity to commit the crime.

Emily Wulfekuhle testified that Ernst was currently working in August 2017 with Decker Concrete in Dyersville, Iowa. (Vol. I Tr. p. 156, Line 5 – p. 163, Line 24). She stated that Ernst was not working on August 21, 2017 given that he had a child support hearing that he had to attend on that day. (Vol. I Tr. p. 156, Line 5 – p. 163, Line 24). Furthermore, Mike Decker is the owner of Decker Concrete in Dyersville, Iowa. (Vol. I Tr. p. 177, Line 6 – p. 180, Line 8). He stated that Ernst was an employee of his company in August 2017. (Vol. I Tr. p. 177, Line 6 – p. 180, Line 8). He stated that on August 21, 2017, he was contacted by Ernst via a text message at 8:17 a.m. which informed him that Ernst was not able to work that day because he had a court hearing. (Vol. I Tr. p. 177, Line 6 – p. 180, Line 8). Decker also testified that Jason Wulfekuhle works for a company that he does see from time to time at his various work sites. (Vol. I Tr. p. 177, Line 6 – p. 180, Line 8).

To try further build on this inference that it must have been Ernst who attempted to enter the Wulfekuhle's garage, the State tried to show that Ernst was in the area on August 21, 2017. Grant stated that he was provided the video from

the nearby business and reviewed it to determine if there was any unusual traffic on the road. (Vol. II Tr. p. 4, Line 7 – p. 16, Line 4). He stated that the video showed very little traffic on the road that Wulfekuhle's residence is located on August 21, 2017. (Vol. II Tr. p. 4, Line 7 – p. 16, Line 4). Grant testified that he observed a few tractors and trucks driving the road on August 21, 2017 but those were accounted for as either traffic to the nearby business or the farm. (Vol. II Tr. p. 16, Line 5 – p. 30, Line 3). He stated that he did observe a white Crown Victoria vehicle which appeared to be a police model from the years 2006 to 2012 that was missing paint on the driver's side rear door and roof area. (Vol. II Tr. p. 16, Line 5 – p. 30, Line 3). Emily Wulfekuhle testified that Ernst was driving a white Crown Victoria vehicle in August 2017 that he purchased from a local police department. (Vol. I Tr. p. 156, Line 5 – p. 163, Line 24).

Grant stated that the surveillance video first showed the vehicle driving south on the road toward Wulfekuhle's residence at 10:31 a.m. and the vehicle returned driving north away from the residence at 10:43 a.m. (Vol. II Tr. p. 16, Line 5

– p. 30, Line 3). He stated that it appeared the vehicle was traveling very slowly. (Vol. II Tr. p. 16, Line 5 – p. 30, Line 3). He further testified that it appeared that the vehicle only had one person who appeared to be wearing a bright-colored shirt. (Vol. II Tr. p. 16, Line 5 – p. 30, Line 3; State's Exhibit #22) (Ex. App. p. 17). He stated that Ernst was wearing a bright colored shirt on August 21, 2017. (Vol. II Tr. p. 16, Line 5 – p. 30, Line 3).

Grant testified that he did search the records for Crown Victoria vehicles within 60 miles radius of the Wulfekuhle's residence and found there were approximately thirty-two vehicles that matched a white Crown Victoria from years 2006 and 2011. (Vol. II Tr. p. 30, Line 4 – p. 36, Line 24). He stated that Ernst did operate a white Crown Victoria in August 2017. (Vol. II Tr. p. 30, Line 4 – p. 36, Line 24; State's Exhibit #14, #15) (Ex. App. pp. 10-11). He further testified that he also reviewed Dubuque City traffic cameras and was able to determine that Ernst, on August 21, 2017, left his residence in Dubuque at 8:45 a.m. and left the city of Dubuque at approximately 8:55 a.m. (Vol. III Tr. p. 3, Line 12 – p. 15, Line

9). Grant testified that Ernst returned to the city at approximately 12:20 p.m. and went to his residence at 12:28 p.m. (Vol. III Tr. p. 3, Line 12 – p. 15, Line 9). He stated that Ernst left his residence for the courthouse at 1:15 p.m. (Vol. III Tr. p. 3, Line 12 – p. 15, Line 9).

Grant testified that he interviewed Ernst and Ernst was adamant that he had nothing to do with the alleged break in at the Wulfekuhle's residence. (Vol. III Tr. p. 15, Line 10 – p. 31, Line 9; State's Exhibit #39). He also testified that he received Ernst cell phone records from August 21, 2017 and it shows that Ernst called his mother at 11:45 a.m. and 11:48 a.m. on August 21, 2017. (Vol. III Tr. p. 15, Line 10 – p. 31, Line 9). Grant testified that those calls were made in the area of Cascade, Iowa. (Vol. III Tr. p. 15, Line 10 – p. 31, Line 9). He stated that Ernst's sister who lives in nearby Bernard, Iowa told him that Ernst was not with her on August 21, 2017. (Vol. III Tr. p. 15, Line 10 – p. 31, Line 9). He further testified that there is no indication that he was near his sister house in Bernard, Iowa or his mother's house in Epworth, Iowa on August 21, 2017. (Vol. III Tr. p. 15, Line 10 – p. 31, Line 9).

However, other actual evidence contradicts these inferences that it was Ernst who committed this attempted burglary. Grant admitted that Ernst's sister does live near the Wulfekuhle's residence in nearby Bernard, Iowa. (Vol. III Tr. p. 31, Line 10 – p. 40, Line 16). He also admitted that he is not an expert on cell phone towers or cell phones and acknowledged that cell phones can use different towers which might not be the closet tower to the cell phone.[1] (Vol. III Tr. p. 31, Line 10 – p. 40, Line 16). Grant also acknowledged that the surveillance video shows the white Crown Victoria vehicle near the Wulfekuhle's residence in Cascade, Iowa from approximately 10:30 a.m. to 10:45 a.m. on August 21, 2017 but the cell phone records show Ernst's phone used a tower near Cascade, Iowa approximately one hour later at 11:44 a.m. and 11:48 a.m. (Vol. III Tr. p. 31, Line 10 – p. 40, Line 16). Grant admitted that the white Crown Victoria was driving away from the direction of the Wulfekuhle's residence at 10:43 a.m. (Vol. III Tr. p. 31, Line 10 – p. 40, Line 16). The State

[1] Division II details the technology behind cell phones and cell phone towers which is incorporated in this Division by reference.

offered no evidence to explain this discrepancy between the cell phone records and the surveillance video.

The record does show that Ernst was in the area on August 21, 2017 because he was visiting his sister. Kimberly Kuntz testified that she is the sister of Ernst and she lives in Bernard, Iowa. (Vol. III Tr. p. 69, Line 6 – p. 73, Line 13). She stated that she was pregnant in August 2017. (Vol. III Tr. p. 69, Line 6 – p. 73, Line 13). She stated that on August 21, 2017 she was sick due to her pregnancy and Ernst brought items to her to help her with her sickness. (Vol. III Tr. p. 69, Line 6 – p. 73, Line 13). She stated that he arrived sometime between 9:30 a.m. and 9:45 a.m. and he stayed for about an hour. (Vol. III Tr. p. 69, Line 6 – p. 73, Line 13). Kimberly Kuntz testified when Ernst left, he was heading to their mother's residence in Epworth to drop off cigarettes to her which was about twenty to twenty-five minutes away from her residence. (Vol. III Tr. p. 69, Line 6 – p. 73, Line 13). She also stated that she remembered that she talked with Grant and admitted she was not forthcoming about Ernst's whereabouts on August 21, 2017. (Vol. III Tr. p. 69, Line 6 – p. 73, Line

13). Specifically, she stated that she did not tell Grant in the brief telephone call that Ernst was with her for a period of time in the morning of August 21, 2017. (Vol. III Tr. p. 69, Line 6 – p. 73, Line 13).

Pamela Kuntz testified that Ernst arrived at her residence on August 21, 2017 sometime after 11:00 a.m. and he brought her some cigarettes and pop. (Vol. III Tr. p. 57, Line 6 – p. 60, Line 13). She stated that Ernst stayed for a little while at her residence and they left for Dubuque around 12:00 p.m. (Vol. III Tr. p. 57, Line 6 – p. 60, Line 13). She stated that they went to a pharmacy in Dubuque and then to Ernst's ex-girlfriend's residence in Dubuque before he left to go to the court hearing that afternoon. (Vol. III Tr. p. 57, Line 6 – p. 60, Line 13).

Furthermore, the theory that because a white Crown Victoria was seen near the Wulfekuhle's residence it must have been the same white Crown Victoria that was driven by Ernst is not support by the record. Grant admitted that he did not search the records for any white Crown Victoria from years 2005 and 2012, and also did not search for vehicles

outside of the 60 miles radius. (Vol. III Tr. p. 31, Line 10 – p. 40, Line 16). Grant also acknowledged that it is normal for the white Crown Victoria vehicle to have a paint peel which was due to a primer issue. (Vol. III Tr. p. 31, Line 10 – p. 40, Line 16). There was no license plate observed to link the vehicle seen on the surveillance video to Ernst. Moreover, the testimony that the driver of this vehicle on the surveillance video appears to be wearing a bright colored shirt, which is necessary to infer that it must have been Ernst driving the vehicle, is also not supported by the record. A careful review of the photographs from the surveillance video which were submitted by the State shows that it is impossible to conclude or determine the color of the shirt for the driver of that vehicle. (State's Exhibits #20-28) (Ex. App. pp. 15-23).

Even if this Court takes the aforementioned inferences that Ernst had opportunity and was driving the white Crown Victoria on August 21, 2017 in the light most favorable to the State, the fact Ernst may have been near the residence is insufficient to support a finding of his guilt on this charge. The Iowa Supreme Court has repeatedly held that the

opportunity to commit a crime or mere presence at the scene ordinarily is not a sufficient corroborative circumstance from which to infer guilt and to prove defendant committed the offense. *See State v. DeRaad,* 164 N.W.2d 108, 109 (Iowa 1969); *State v. Jellema,* 206 N.W.2d 679 (Iowa 1973); *State v. Sellers,* 215 N.W.2d 231, 232 (Iowa 1974); *State v. Schrier,* 300 N.W.2d 305, 309 (Iowa 1981). The record is lacking of any other evidence linking Ernst to this alleged attempted burglary.

Ernst was not found at the residence, no one saw Ernst at the residence nor was there any evidence that he even attempted to enter the garage. The evidence does not support a finding that Ernst was at the Wulfekuhle's residence nor did he attempt to enter the garage under both the *Fryer* and the *Roby* standards. There is simply not evidence to establish a substantial step toward the commission of the burglary, which is required for the attempted burglary conviction.

The inferences upon which support for this attempted burglary conviction relies are stacked on top of each other without the evidence. They require manipulation of the

evidence that does not exist and rank speculation about what may have occurred and what the jury may have imagined could have happened. As previously mentioned, "when two reasonable inferences can be drawn from a piece of evidence, ... such evidence only gives rise to a suspicion, and, without additional evidence, is insufficient to support guilt." *Truesdell*, 679 N.W.2d at 618-19. Because other equally plausible explanations of the sequence of events are abound, the State's evidence was not "wholly inconsistent with any rational" explanation of Ernst's innocence. *State v. Schurman*, 205 N.W.2d 732, 734 (Iowa 1973) ("[T]he circumstances must be entirely consistent with defendant's guilt, [and] wholly inconsistent with any rational hypothesis of his innocence....").

These limiting principles inform this Court's role as "careful gatekeepers" whose responsibility it is to assure convictions are based on substantial evidence of proof beyond a reasonable doubt rather than suspicion. *See Reed,* 875 N.W.2d at 711 (Hecht, J., concurring specially). The evidence presented in this case does nothing more than serve to generate mere suspicion, speculation or conjecture, and there

does arise a reasonable doubt as a matter of law. *See Jellema*, 206 N.W.2d at 682. Therefore, the evidence here is insufficient to support the verdict. Accordingly, this Court should reverse the judgment and sentence on the attempted burglary charge, and remand for dismissal of the charge.

In the alternative, if this Court determines there is sufficient evidence to support the charge, Ernst further contends that the weight of the credible evidence does not support the jury's verdict on the charge. After weighing the evidence and considering the credibility of the witnesses, the greater weight of the evidence supported a finding that Ernst did not commit the attempted burglary on August 21, 2017. Ernst contends this is a case where the evidence supporting the verdict on charge was so scanty and the evidence opposing it was so compelling that the verdict must be considered contrary to the weight of the evidence. *See State v. Adney*, 639 N.W.2d 246, 253 (Iowa Ct. App. 2001). As such, the weight of the evidence does not support a finding beyond a reasonable doubt that Ernst committed this offense. Consequently, the district court abused its discretion in denying Ernst's motion.

Therefore, the Court should vacate Ernst's conviction, and remand for a new trial.

Ineffective Assistance of Counsel. In the event this Court finds error was not preserved on the sufficiency of the evidence and the weight of the evidence issues, Ernst claims trial counsel ineffective under both the United States and Iowa Constitutions for failing to preserve error. U.S. Const. amends. VI, XIV; Iowa Const. art. I § 10. If trial counsel did not preserve error on these issues, Ernst was prejudiced by trial counsel's breach of duty. Ernst's trial counsel breached an essential duty by failing to properly raise the sufficiency of evidence or the weight of evidence issues as discussed in the Subsection above. Ernst was clearly prejudiced by this breach of essential duty. Therefore, the Court should reverse Ernst's conviction and remand this case for a new trial. Ernst is entitled to have this conviction vacated.

II. The right to assistance of counsel under the Sixth Amendment to the United States Constitution and article I, section 10 of the Iowa Constitution is the right to "effective" assistance of counsel. Ernst alleges that trial counsel was ineffective for failing to object to the testimony regarding Ernst's cell phone location and records from August 21, 2017. Was trial counsel ineffective?

Preservation of Error. Ernst alleges that trial counsel was ineffective for failing to object to William Grant's testimony regarding Ernst's cell phone location on August 21, 2017 and for failing to object to the submission of the call log for Ernst's cell phone from August 21, 2017. Because Ernst is claiming trial counsel was ineffective, this provides an exception to normal error preservation requirements. *State v. Rodriguez,* 804 N.W.2d 844, 848 (Iowa 2011). Therefore, the issue is proper before this Court.

Standard of Review. Ineffective assistance of counsel claims are grounded in the Sixth Amendment. *State v. Clay,* 824 N.W.2d 488, 494 (Iowa 2012). This Court reviews ineffective assistance of counsel claims de novo. *Id.*

Applicable Law on Ineffective Assistance of Counsel. "The right to assistance of counsel under the Sixth

Amendment to the United States Constitution and article I, section 10 of the Iowa Constitution is the right to 'effective' assistance of counsel." *State v. Fountain*, 786 N.W.2d. 260, 265 (Iowa 2010). To establish an ineffective-assistance-of-counsel claim, a defendant must show that "(1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice." *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). This Court can resolve ineffective-assistance-of-counsel claims under either prong of the analysis. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003).

The first prong requires the defendant to show a deficiency in counsel's performance. *State v. Ross*, 845 N.W.2d 292, 698 (Iowa 2014). Under this prong, the presumption is the attorney competently performed his or her duties. *Id.* The defendant "rebuts this presumption by showing a preponderance of the evidence demonstrates counsel failed to perform an essential duty." *Id.* (quoting *Clay*, 824 N.W.2d at 495). Counsel breaches an essential duty when counsel makes such serious errors that counsel is not functioning as the advocate the Sixth Amendment guarantees.

Id. "[W]e require more than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently." *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). Trial counsel has no duty to raise an issue that lacks merit. *See State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011).

To establish prejudice in the context of an ineffective-assistance-of-counsel claim, a defendant must show a reasonable probability that the result of the trial would have been different. *King v. State*, 797 N.W.2d 565, 574 (Iowa 2011). The likelihood of a different result must be substantial, not just conceivable. *Id.* at 572. A defendant must show the probability of a different result is sufficient to undermine confidence in the outcome. *Clay*, 824 N.W.2d at 496. This standard requires this Court to consider the totality of the evidence, identify what factual findings would have been affected, and determine if the error was pervasive or isolated and trivial. *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010).

Although ordinarily preserved for postconviction relief, this Court will consider the merits of such a claim on direct

appeal if the record is adequate. *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). Preserving ineffective assistance of counsel claims that can be resolved on direct appeal wastes time and resources. *Id.* If the record on appeal establishes both elements of an ineffective assistance claim and an evidentiary hearing would not alter this conclusion, the Court will reverse the defendant's conviction and remand for a new trial. *State v. Allison*, 576 N.W.2d 371, 374 (Iowa 1998). This Court should conclude that the record is adequate to address the issues.

Trial Counsel was Ineffective for Failing to Object to William Grant's Testimony Regarding Ernst's Cell Phone Location. Iowa is generally "committed to a liberal view on the admissibility of expert testimony." *Ranes v. Adams Labs., Inc.*, 778 N.W.2d 677, 685 (Iowa 2010). Our broad test for admissibility of expert testimony has two preliminary areas of judicial inquiry that must be considered before admitting expert testimony. *See* Iowa R. Evid. 5.702. The court must first determine if the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.*

This preliminary determination not only requires the court to consider the existence of a reliable body of "scientific, technical, or other specialized knowledge," but it also requires the court to ensure the evidence is relevant in assisting the trier of fact. *See Johnson v. Knoxville Cmty. Sch. Dist.*, 570 N.W.2d 633, 637 (Iowa 1997) (stating that, to be relevant, the evidence must be reliable, and reliability is an implicit requirement of admissibility under Iowa Rule of Evidence 5.702 because "unreliable testimony cannot assist the trier of fact").

Second, the court must determine if the witness is qualified to testify "as an expert by knowledge, skill, experience, training, or education." Iowa R. Evid. 5.702. In all circumstances involving expert testimony, the proponent of the evidence has the burden of demonstrating to the court as a preliminary question of law the witness's qualifications and the reliability of the witness's opinion. Iowa R. Evid. 5.104(*a*); *Ranes,* 778 N.W.2d at 686. All expert witnesses must be qualified in the area of their testimony based on knowledge, skill, experience, training or education but a particular degree

or type of education is not needed. *See Ranes,* 778 N.W.2d at 687. Moreover, an expert does not need to be a specialist in the area of the testimony as long as the testimony is within the general area of expertise of the witness. *See id.*

Ernst contends trial counsel was ineffective for failing to object to Investigator William Grant's testimony regarding Ernst's cell phone location on August 21, 2017. This issue requires the Court to determine whether an expert witness is needed to inform a jury about a defendant's historical cell site data. This is an issue of first impression for the Iowa Supreme Court. Ernst acknowledges that the Iowa Court of Appeals have decided several unpublished cases which concluded that officer's training and experience qualified the officer to testify to historical cell site data. *See, e.g., State v. Garcia,* No. 17-0111, 2018 WL 3913668 (Iowa Ct. App. Aug. 15, 2018); *State v. Benson,* No. 15-1895, 2016 WL 7393891 (Iowa Ct. App. Dec. 21, 2016); *State v. Rendon,* No. 15-1832, 2016 WL 6270092 (Iowa Ct. App. Oct. 26, 2016).

The courts that have addressed whether testimony which purports to locate people based on cellular data is lay or

expert testimony are divided. *See* Alexandra Wells, Comment, *Ping! The Admissibility of Cellular Records to Track Criminal Defendants*, 33 St. Louis U. Pub. L. Rev. 487 (2014); James Beck, Christopher Magana & Edward J. Imwinkelried, *The Use of Global Positioning (GPS) and Cell Tower Evidence to Establish a Person's Location—Part II*, 49 No. 3 Crim. Law Bulletin ART 8 (Summer 2013); Aaron Blank, Article, *The Limitations and Admissibility of Using Historical Cellular Site Data to Track the Location of a Cellular Phone*, 18 Rich. J.L. & Tech. 3 (Fall 2011).

At the jury trial, William Grant, an investigator with Dubuque County Sherriff's office, testified that he received Ernst cell phone records from August 21, 2017 and it shows that Ernst called his mother at 11:45 a.m. and 11:48 a.m. on August 21, 2017. (Vol. III Tr. p. 15, Line 10 – p. 31, Line 9; State's Exhibit #36) (Conf. App. pp. 4-5). Relying on the data provided by Ernst's service provider, Grant testified that those calls were made in the area of Cascade, Iowa. (Vol. III Tr. p. 15, Line 10 – p. 31, Line 9). Furthermore, Grant used this data to plot those on the map to show the tower locations that

these two calls used on August 21, 2017. (Vol. III Tr. p. 15, Line 10 – p. 31, Line 9; State's Exhibit #38) (Ex. App. p. 30). Moreover, Ernst's trial counsel did not object to this testimony.

Yet, highly problematic, is the Grant never testified as to the coverage area of each cell tower or antenna or general technology of cell site location. (Vol. III Tr. p. 15, Line 10 – p. 31, Line 9). Nor did Grant testify as to the knowledge, skill, experience, training or education that he had for him to testify to this information. The only information in the record regarding Grant's background is his testimony that he has been in law enforcement for twenty-five years, he attended the Law Enforcement Academy and has worked the County Sheriff's Office in the Civil Department, the Jail Department, and the Road Department on several occasions. (Vol. II Tr. p. 4, Line 7 – p. 5, Line 8). Grant also testified that he has ongoing training through the sheriff's office and is retired veteran of the military. (Vol. II Tr. p. 4, Line 7 – p. 5, Line 8). No other information was elicited as to the basis for his testimony regarding Ernst's cell phone location. In fact, Grant

admitted that he is not an expert on cell phone towers and cell phones, and he has only a basic understanding. (Vol. III Tr. p. 15, Line 18 – p. 16, Line 3; p. 32, Lines 12-20).

A discussion on the technology of cell site location is helpful to illustrate why Grant's testimony is so problematic. A cell phone transmits and receives signals throughout a cellular network like a two-way radio. *See United States v. Hill,* 818 F.3d 289, 295 (7th Cir. 2016) ("A cell phone is essentially a two-way radio that uses a cellular network to communicate."). Cell phone networks are divided into geographic coverage areas that are called "cell sites or towers," and each cell site contains an antenna that receives and transmits signals to cell phones. *See In re Application of U.S. for an Order for Prospective Cell Site Location Info. on a Certain Cellular Tel.,* 460 F.Supp.2d 448, 450 (S.D.N.Y. 2006). "To connect with the local telephone network, the Internet, or other wireless networks, cell-phone providers maintain an extensive network of cell sites, or radio base stations, in the geographic areas they serve." *State v. Earls,* 70 A.3d 630, 637 (N.J. 2013).

Cell sites "are similar to traditional radio towers; however, they emit frequencies with much lower power, which allows many people in a small area to communicate over the same frequencies without interference." Adam Koppel, *Warranting A Warrant: Fourth Amendment Concerns Raised by Law Enforcement's Warrantless Use of GPS and Cellular Phone Tracking*, 64 U. Miami L. Rev. 1061, 1066 (2010). The size of the area served by a cell site will depend "upon a number of factors, including but not limited to, the height of the antennas, topography of the land, vegetative cover and physical obstructions." *Nextel Commc'ns of the Mid-Atl., Inc. v. Town of Brookline, Mass.*, 520 F.Supp.2d 238, 242 (D. Mass. 2007). When a call is placed on a cell phone, the phone will connect to the cell site with the strongest signal. *See Ameritech Mobile Commc'ns, Inc. v. Dep't of Revenue,* 571 N.W.2d 924 (Wisc. Ct. App. 1997) ("When a mobile unit owner wishes to place a call, the mobile unit scans the signals sent out by the various cell sites and selects the strongest signal.").

"As a cell phone user moves from place to place, the cell phone automatically switches to the tower that provides the

best reception." *In re Application of U.S. for an Order for Disclosure of Telecomms. Records & Authorizing the Use of a Pen Register & Trap & Trace,* 405 F.Supp.2d 435, 436-37 (S.D.N.Y. 2005); *see also Nextel Commc'ns of Mid-Atl., Inc. v. Town of Wayland Mass.*, 231 F.Supp.2d 396, 399 (D. Mass. 2002) ("As customers move throughout the service area, the transmission from the portable unit is automatically transferred to the closest Nextel facility without interruption in service, provided that there is overlapping coverage from the cells.").

A cell phone can be tracked when it is "used to make a call, send a text message, or connect to the Internet — or when they take no action at all, so long as the phone is not turned off." *Earls,* 214 N.J. at 577, 70 A.3d at 637. There are three basic methods used to track cell phone signals: (1) Global Positioning System (GPS) technology; (2) real-time cell site data; and (3) historical cell site data. Aaron Blank, *The Limitations and Admissibility of Using Historical Cellular Site Data to Track the Location of a Cellular Phone,* 18 Rich. J.L. & Tech. 3, 9 (2011). GPS is a satellite-based navigation system

used to determine location, velocity, and time. Koppel, *Warranting A Warrant,* 64 U. Miami L. Rev. at 1063-64; *see also* Wells, *Ping!,* 33 St. Louis U. Pub. L. Rev. 487, 489-90 (2014) ("[A] receiver on the satellite picks up a signal delivered from a GPS chip in the cellular phone. The delivery speed is then converted into distance giving a very accurate reading of the cell phone's location.").

The distinction between real-time cell site data and historical cell site data has been described as follows:

> [B]oth real-time cell site data and historical cell site data use cellular technology to locate the cell user. While they are extremely similar, they differ in the time the signal, or "ping," received and recorded by a tower is observed. Real-time cell site data is obtained through viewing the cell phone's activity and signals in real time, meaning at that instant. Thus, this largely happens when police officers survey a particular cell phone's activity. On the other hand, historical cell site data ... is information obtained after the cell phone's activity is recorded using the cell companies' records of that activity.

Wells, Ping!, 33 St. Louis U. Pub. L. Rev. at 490; *see also United States v. Myles,* No. 5:15-CR-172-F-2, 2016 WL 1695076, at *6 (E.D.N.C. Apr. 26, 2016) ("Historical cell site data refers to the acquisition of cell site data for a period

retrospective to the date of the order.... Real-time data, on the other hand, ... shows where the phone is presently located through the use of GPS or precision location data."); *United States v. Jones,* 908 F.Supp.2d 203, 207 (D.D.C. 2012) ("The information is identical regardless of whether it is obtained historically or prospectively." (internal quotations omitted)).

In this case, this Court is concerned only with Ernst's historical cell site data. As noted above, cell phone service providers create and maintain records of cell phone interaction with cell phone towers. *See United States v. Johnson,* No. 14-CR-00412-TEH, 2015 WL 5012949, at *6 (N.D. Cal. Aug. 24, 2015) ("Carriers keep records of these connections **563 *586 for each customer.... This is referred to as 'historical cell site' data, and can be used to identify a customer's general location at a given time."). It has been observed that a "cell service provider collects and stores historical cell site data for its own business purposes, perhaps to monitor or optimize service on its network or to accurately bill its customers for the segments of its network that they use." *In re U.S. for Historical Cell Site Data,* 724 F.3d 600, 611-12 (5th Cir. 2013). "That same

information makes it possible to identify at least the general location of a cell phone at the time the phone connects to a tower." *State v. Simmons*, 143 A.3d 819, 825 (Me. 2016).

It has been recognized that "courts that have been called upon to decide whether to admit historical cell-site analysis have almost universally done so." *Hill,* 818 F.3d at 297. However, "courts that have addressed whether testimony which purports to locate people based on cellular data is lay or expert testimony are divided." *Collins v. State,* 172 So.3d 724, 739 (Miss. 2015). In a majority of reported cases, experts were used to provide testimony of historical cell site data; while in a minority of reported cases, lay testimony was allowed in some circumstances. *See State v. Johnson,* 797 S.E.2d 557, 563 (W. Va. 2017) (cites various cases from around the country that has addressed the issue of whether lay testimony or expert testimony is needed to provide evidence regarding historical cell site data).

The Mississippi Supreme Court explained the necessity for requiring experts to inform the jury of historical cell site data:

> [W]hile the technology underlying cell identification is not extremely difficult to understand, utilizing cell identification to locate a person does require specialized knowledge regarding such technology—namely, knowledge regarding the various antennas on cell sites and the cell site coverage range and how those interact to determine the entire area in which a cell phone user might have been located while making a cell phone call. Illustrating that cell identification requires specialized knowledge are the facts that Detective Sims had to take a sixteen-hour course on how to use cellular technology in law enforcement and that he used specialized software acquired at this course to determine the locations of Collins and Jenkins on the night of Jenkins's murder.

Collins, 172 So.3d at 741. The Missouri Court of Appeals has also addressed the need for expert testimony to inform the jury of historical cell site data as follows:

> A cell phone may be in range of several sites simultaneously, and a multitude of factors influence which site among them will have the strongest signal. The technical features of the cell site, geography, and the workings of the cell phone itself may result in connections from as far away as thirty miles or as close as thirty feet. Thus, knowing the location of the cell site to which a phone connects permits an expansive range of inferences as to where the phone actually is. We think that drawing such an inference without the aid of specialized experience or knowledge in the field of cellular communications comes too close to mere speculation.

> Here, the State introduced evidence of the locations of the cell sites used by Patton's phone in order to place Patton near the crime scene at the time of the shootings.... To narrow down the area in which Patton's phone must have been to have connected to a particular cell site—i.e., to proffer testimony actually probative of whether Patton was in one area rather than the other—required analysis of the many variables that influence cell site signal strength. Such analysis amounts to opinion testimony that is properly the province of an expert. Thus, we hold that the trial court erred by failing to require an expert witness to testify as to the location of Patton's phone in relation to the cell sites to which it connected.

State v. Patton, 419 S.W.3d 125, 131-132 (Mo. Ct. App. 2013).

This Court should reject the minority approach to this issue because lay witness not only reads the records to the jury, but they draw the ultimate conclusion that the records could show the caller was in a specific location. *See* Wells, *Ping!,* 33 St. Louis U. Pub. L. Rev. at 511; *see also State v. Edwards*, 156 A.3d 506, 525-526 (Conn. 2017) (police officer testifying about cell phone data must be qualified as an expert witness, as knowledge of how cell phone communicate through cell towers is not within understanding of average layperson). Therefore, this Court should hold a witness must be qualified

as an expert under Rule 5.702 in order to present evidence of cell phone historical site data.

In this case, the record does not support a conclusion that Grant was qualified to testify about Ernst's, or for anyone else's, location based on the cellphone tower records because the State presented no evidence of Grant's experience or knowledge in the area of cellular phone technology. Ernst's attorney breached a duty by failing to object to Grant's testimony on this issue. Under these circumstances, Ernst's attorney had a duty and an obligation to keep abreast of the need for expert testimony for cell phone site historical date from around the country, and the arguments asserted herein were worth raising. *See State v. Clay*, 824 N.W.2d 488, 496 (Iowa 2012) (stating counsel has a duty to know the law); *State v. Vance*, 790 N.W.2d 775, 789 (Iowa 2010) (discussing information attorney should have discovered if attorney had researched the appropriate law); *State v. Westeen*, 591 N.W.2d 203, 210 (Iowa 1999) (noting counsel must exercise reasonable diligence in deciding whether issue is worth raising).

Ernst asserts that he was prejudiced by his attorney's errors and omissions. As outlined in Division I, the evidence against Ernst cannot be considered overwhelming. The State's case rested solely on the location of Ernst on August 21, 2017 which was based on inferences gleaned from Ernst's cell phone data that was testified to by Grant. (Vol. III Tr. p. 15, Line 10 – p. 31, Line 9). This testimony was necessary for the State to establish that Ernst attempted to enter the Wulfekuhle's garage on August 21, 2017. In fact, the State emphasized this this testimony during its closing and its final rebuttal argument to the jury. (Vol. IV Tr. p. 4, Line 18 – p. 23, Line 19; p. 39, Line 8 – p. 45, Line 21). Ernst did not receive fair trial and the result may have been different if proper objections had been made to exclude Grant's testimony. Ernst was prejudiced by trial counsel's breach of duty for failing to object to the challenged testimony. Accordingly, the Court should vacate Ernst's conviction, and remand for a new trial at which challenged evidence shall not be admitted without the proper qualified expert witness.

Trial Counsel was Ineffective for Failing to Object to the Cell Phone Records Exhibit. During William Grant's testimony, the State introduced Ernst's cell phone records from August 21, 2017. (Vol. III Tr. p. 16, Line 4 – p. 17, Line 2). Grant testified that he got a search warrant to obtain these records from U.S. Cellular. (Vol. III Tr. p. 16, Line 4 – p. 17, Line 2). The two-page exhibit which documents Ernst's cell phone calls from August 21, 2017 was admitted as an exhibit that was not objected to by Ernst's attorney. (Vol. III Tr. p. 16, Line 4 – p. 17, Line 2). Grant testified to the information contained in the exhibit regarding Ernst's cell phone on August 21, 2017. (Vol. III Tr. p. 15, Line 10 – p. 31, Line 9). Ernst argues his trial counsel was ineffective for failing to object since the phone records contained in State Exhibit #36 was hearsay and not admissible under the business record exception contained in Rule 5.803(6).

Hearsay evidence is inadmissible unless permitted by another rule, statute, or constitutional provision. Iowa R. Evid. 5.802; *State v. Newell,* 710 N.W.2d 6, 18 (Iowa 2006). "Hearsay' is a statement, other than one made by the

declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(c). The records contained in Exhibit #36 were "offered to prove the truth of matter asserted." *See State v. Lain,* 246 N.W.2d 238, 242 (Iowa 1976) (finding a telephone bill was hearsay because it was offered to prove the telephone calls were made as the bill purported to show).

If the cell phone records were produced through a fully automated system and generated by a computer, there was no declarant and it is not hearsay. *See State v. Reynolds,* 746 N.W.2d 837, 843–44 (Iowa 2008) (acknowledging the possibility that if a bank's error records and information provided via an automated 1–800 information line are produced reliably and generated by a computer, there is no human declarant and the information is nonhearsay). However, to reach this conclusion, there must be some evidence in the record to establish that the information is computer-generated non-hearsay as opposed to computer-stored hearsay. *See id.* Likewise, a court cannot admit a telephone record under the business record exception, without

evidence and foundation in the record showing that it meets the requirements of the exception. *Lain,* 246 N.W.2d at 242. An adequate foundation requires evidence that the phone records were made in the regular course of the cellular company's business, near the time the actual calls were made, or other evidence showing the sources of information used to generate the record. *Id.*

There is no such evidence in the record in this case. No one from the telephone company was called to testify regarding the phone records. There was no evidence at trial on how the records were generated or how they were compiled. There was no testimony that computers which generated the phone records are programed to automatically log and compile a record of calls made to and from a certain number. Furthermore, Grant's testimony did not lay the foundation for these records to qualify under the business records exception. (Vol. III Tr. p. 15, Line 10 – p. 31, Line 9). Grant did not explain the identification numbering system used by the company to record the origin and destination of the telephone calls and how the company records the calls. (Vol. III Tr. p.

15, Line 10 – p. 31, Line 9). He did not testify that the records (1) were made at or near the time of the act; (2) were made by a person with knowledge; (3) were kept in the course of regularly conduct business activity; and (4) the regular practice of that business activity was to make the record. (Vol. III Tr. p. 15, Line 10 – p. 31, Line 9). Therefore, Grant's testimony did not qualify the phone records as a business record. *See* Iowa R. Evid. 5.803(6); *Reynolds*, 746 N.W.2d at 842-43. Thus, the State failed to lay the proper foundation for the admission of the records. As such, trial counsel was ineffective for failing to object to this hearsay evidence.

Ernst asserts that he was prejudiced by his attorney's errors and omissions. If hearsay evidence is erroneously admitted, this Court will presume prejudice unless the contrary is affirmatively established. *See State v. Plain*, 898 N.W.2d 801, 811 (Iowa 2017). The burden to affirmatively establish lack of prejudice is met "if the record shows the hearsay evidence did not affect the jury's finding of guilt." *Id.* Tainted evidence that is merely cumulative does not affect the jury's finding of guilt. *Id.* at 813.

A reasonable probability existed that but for counsel's unprofessional errors, the result of the proceeding would have been different if Ernst's trial counsel objected to the evidenced as outlined above. As outlined in Division I, the evidence against Ernst cannot be considered overwhelming. The State's case rested solely on the location of Ernst on August 21, 2017 which was based on inferences gleaned from Ernst's cell phone data. (Vol. III Tr. p. 15, Line 10 – p. 31, Line 9). This evidence was necessary for the State to establish that Ernst attempted to enter the Wulfekuhle's garage on August 21, 2017. In fact, the State emphasized this evidence during its closing and its final rebuttal argument to the jury. (Vol. IV Tr. p. 4, Line 18 – p. 23, Line 19; p. 39, Line 8 – p. 45, Line 21). Ernst did not receive fair trial and the result may have been different if proper objections had been made to exclude this hearsay evidence. Ernst was prejudiced by trial counsel's breach of duty for failing to object to the challenged evidence. Accordingly, the Court should vacate Ernst's conviction, and remand for a new trial at which challenged evidence shall not

be admitted without the proper foundation being laid by the State.

Preservation of the Ineffective Assistance Claims. If this Court determines that the record is not adequate to address the aforementioned claims of ineffective assistance of counsel on direct appeal, Ernst requests that the Court preserve these claims for possible post-conviction relief proceedings. Iowa Code § 814.7.

CONCLUSION

For all of the reasons discussed in the Divisions above, Defendant-Appellant Anthony Frank Ernst respectfully requests the Court vacate his conviction and grant him the relief that he has requested in each Division.

REQUEST FOR ORAL ARGUMENT

Counsel for Defendant-Appellant Anthony Frank Ernst request to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true costs of producing the necessary copies of the foregoing Brief and Argument was $6.63, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

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) because:

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