SUMMARIES OF DECISIONS, IOWA COURT OF APPEALS
March 21, 2018

Pursuant to Iowa Rule of Appellate Procedure 6.904(2)(6), an unpublished opinion of the Iowa Court of Appeals may be cited in a brief; however, unpublished opinions shall not constitute controlling legal authority.

No. 15-0368

AFFIRMED.

ATZEN v. ATZEN

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom, Judge. Heard by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Tabor, J. (34 pages)

Defendant, Angelia Atzen, appeals a civil jury verdict finding she abused the legal process, intentionally inflicted severe emotional distress upon Kari Atzen, and defamed Kari Atzen. She also challenges the award of punitive damages. She also challenges the damages awarded for each category and objects to certain jury instructions. **OPINION HOLDS:** Angelia abused the legal process because she leveraged criminal charges and a criminal no-contact order against Kari to impact Kari's ongoing child custody proceedings. Angelia inflicted severe emotional distress by attempting to prevent Kari from participating in her children's lives and ostracizing Kari from the community. Angelia defamed Kari by fabricating a story about Kari chasing and threatening Angelia and Angelia's young child. The record supported the award of punitive damages and its amount. The record also supported the remaining damages award. The challenged jury instructions do not require a new trial because they were either properly given or resulted in no prejudice.

No. 16-0836

AFFIRMED.

STATE v. JOHNSON

Appeal from the Iowa District Court for Polk County, Odell G. McGhee, District Associate Judge. Considered by Tabor, P.J., McDonald, J., and Carr, S.J. Opinion by Tabor, P.J. (6 pages)

David Johnson appeals his conviction for driving while barred following his written guilty plea. On appeal he claims he received constitutionally deficient legal representation because counsel did not challenge the factual basis for his guilty plea. **OPINION HOLDS:** Because the minutes of evidence and Johnson's written plea established his license was barred and he operated a motor vehicle during that time period, a factual basis existed for his plea. Counsel was not ineffective for failing to challenge Johnson's habitual-offender status by inquiring into the underlying administrative proceedings.

No. 16-1044

REVERSED AND REMANDED.

STATE v. MURILLO

Appeal from the Iowa District Court for Muscatine County, Stuart P. Werling, Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Danilson, C.J. (5 pages)

Roberto Murillo Jr. was convicted following a jury trial for failure to appear for his pretrial conference, in violation of Iowa Code section 811.2(8) (2015). On appeal, Murillo contends the trial court erred by denying his motion for judgment of acquittal based on the State's failure to present sufficient evidence that he "willfully" failed to appear. **OPINION HOLDS:** To establish willfulness, there has to be evidence that Murillo was sent a copy of the order requiring his appearance or was otherwise informed or had knowledge of the order's contents. Because we conclude that the evidence presented is not sufficient to prove beyond a reasonable doubt that Murillo willfully failed to appear at the pretrial conference, we reverse and remand for an order of dismissal.

No. 16-1694 **STATE v. ROBBINS**

AFFIRMED.

Appeal from the Iowa District Court for Marshall County, John J. Haney and James C. Ellefson, Judges. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Vogel, P.J. (14 pages)

David Robbins appeals from his convictions of several drug-related offenses asserting his motion to suppress should have been granted because the application for the search warrant lacked corroboration, he was entitled to a *Franks* hearing, and the district court abused its discretion in declining to reopen the suppression record. Robbins also asserts his motions for judgment of acquittal and new trial should have been granted. **OPINION HOLDS:** Because there is sufficient independent evidence to corroborate information on the search-warrant application, we affirm the district court's denial of Robbins's motion to suppress and motion for a *Franks* hearing. We also find no abuse of discretion in the court's denial of Robbins's request to reopen the first suppression hearing record. As to the post-trial motions, we conclude there is sufficient evidence of Robbins's identity as the person charged with the crimes and the court did not abuse its discretion in allowing the jury to hear the recording on a different playback device, in permitting the State to question a witness on redirect to prove the drug stamp violations, or in finding Robbins competent to stand trial, such that Robbins's motion in arrest of judgment or motion for new trial should have been granted.

No. 16-1785 **STATE v. PACE**

AFFIRMED.

Appeal from the Iowa District Court for Floyd County, Peter B. Newell, District Associate Judge. Heard by Danilson, C.J., and Vaitheswaran, Doyle, Tabor and McDonald, JJ. Opinion by Doyle, J. (8 pages)

Anthony Pace appeals from the judgment and sentence entered following his conviction for domestic abuse assault while displaying a dangerous weapon. **OPINION HOLDS: I.** Statements made by a four-year-old child when law enforcement responded to a call were nontestimonial and were properly allowed into evidence even though the child did not testify at trial. **II.** Because the district court abused its discretion in determining that Pace was able to pay jail fees without knowing the amount of the fees, we vacate that portion of the sentence and remand for a determination of Pace's ability to pay. **III.** Pace is unable to show the district court abused its discretion in overruling his motion for new trial based on newly discovered evidence.

No. 16-2070 **STATE v. SMITH**

AFFIRMED.

Appeal from the Iowa District Court for Story County, James B. Malloy, District Associate Judge. Considered by Potterfield, P.J., Mullins, J., and Blane, S.J. Opinion by Potterfield, P.J. (5 pages)

Shane Smith pled guilty to failure to register as a sex offender in violation of Iowa Code section 692A.111 (2016). Smith argues his waiver of counsel prior to his plea and sentencing was not knowing, voluntary, and intelligent. Smith also argues the State failed to comply with the plea agreement and his plea lacked a factual basis. **OPINION HOLDS:** Because we find Smith's waiver of counsel was knowing, intelligent, and voluntary, and we do not reach Smith's claims regarding the plea agreement and a factual basis, we affirm.

No. 16-2084 **STATE v. ANDERSON**

AFFIRMED.

Appeal from the Iowa District Court for Black Hawk County, Kellyann M. Lekar, Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Danilson, C.J. (11 pages)

Jeremy Anderson appeals his conviction for second-degree sexual abuse, in violation of Iowa Code section 709.3 (2014). He contends the district court erred in allowing two hearsay statements, and there is insufficient evidence to sustain the conviction. **OPINION HOLDS:** The court did not err in concluding the statements fell within hearsay exceptions, and there is substantial evidence supporting the conviction.

No. 16-2175 **WARE v. STATE**

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by McDonald, J. (8 pages)

Darin Ware appeals from the denial of his application for postconviction relief. He argues his plea counsel provided ineffective assistance by failing to investigate a motion to suppress evidence, failing to investigate other matters, and in coercing Ware to plead guilty or in failing to challenge Ware's guilty plea as involuntary. **OPINION HOLDS:** We find Ware's first two claims underdeveloped and unpersuasive. In light of the strong evidence of the his guilt, the significant charging and sentencing concessions obtained by Ware, and his repeated affirmations of the voluntary nature of his plea at the time of plea and sentencing, we cannot conclude Ware proved his plea was not voluntary.

No. 17-0118 **STATE v. HARRIS**

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Paul D. Scott, Judge. Considered by Doyle, P.J., McDonald, J., and Carr, S.J. Opinion by McDonald, J. (5 pages)

Anthony Harris challenges his convictions for possession of methamphetamine with intent to deliver and delivery of a controlled substance. He contends the district court erred in receiving implied hearsay or indirect hearsay testimony, and that the evidence was insufficient to establish he possessed methamphetamine. **OPINION HOLDS:** Harris has not preserved his challenge to the hearsay evidence for appellate review. The evidence, in the light most favorable to the verdict, established Harris had direct physical control over methamphetamine.

No. 17-0130 **STATE v. HICKS**

AFFIRMED.

Appeal from the Iowa District Court for Dubuque County, Thomas A. Bitter, Judge. Heard by Danilson, C.J., and Vaitheswaran, Doyle, Tabor, and McDonald, JJ. Opinion by Tabor, J. Special Concurrence by Danilson, C.J. (26 pages)

Eddie Hicks appeals his conviction for murder in the first degree following a bench trial. Through counsel, Hicks claims statements made to officers should have been suppressed either as *Miranda* violations or because they were not voluntarily made. He also challenges the sufficiency and weight of the evidence satisfying the specific intent element and defeating his self-defense claim. Finally he claims the district court abused its discretion by denying his motion for substitute counsel. Through pro se claims, Hicks alleges the State committed a *Brady* violation, argues a surgical complication was an intervening cause of the victim's death, claims the presiding judge should have recused himself because he presided over the pre-trial matters, and claims his trial counsel provided ineffective assistance. **OPINION HOLDS:** Because Hicks was in custody when questioned by officers, he was entitled to a *Miranda* warning. But statements admitted without a *Miranda* warning and waiver were harmless error. Later

statements made after a *Miranda* warning and waiver were admissible because the waiver was knowingly, intelligently, and voluntarily made. The statements were also voluntarily made. There was sufficient evidence showing Hicks could form specific intent and rejecting his self-defense claim. Additionally, the weight of the evidence supported the district court's determination Hicks could form specific intent and defeated his self-defense claim. The district court also did not abuse its discretion by denying the motion to substitute counsel. There was no evidence of a *Brady* violation. The surgical complication was not an intervening cause of death. The judge had no duty to recuse himself. The ineffective-assistance-of-counsel claims should be preserved for postconviction relief so that a record may be developed. **SPECIAL CONCURRENCE ASSERTS:** I agree with the majority opinion but write separately to address the issues of premeditation and specific intent.

No. 17-0133 **STATE v. POGWIZD**

AFFIRMED.

Appeal from the Iowa District Court for Boone County, Paul G. Crawford, District Associate Judge. Considered by Potterfield, P.J., Mullins, J., and Blane, S.J. Opinion by Potterfield, P.J. (13 pages)

Dominic Pogwizd II appeals from his conviction for assault, a simple misdemeanor. Pogwizd maintains the district court erred by admitting into evidence statements of the alleged victim through the testimony of third-party witnesses in violation of the Confrontation Clause and rules prohibiting the admission of hearsay. **OPINION HOLDS:** Because each of the claims Pogwizd complains of were properly admitted pursuant to an exception to the hearsay rule and his claim regarding the Confrontation Clause was not preserved for our review, we affirm.

No. 17-0178 **GREEN v. STATE**

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Jeanie K. Vaudt, Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Vogel, P.J. (3 pages)

Shalonda Green appeals the district court's summary dismissal of her third application for postconviction relief based on the applicable statute of limitations. **OPINION HOLDS:** Because Green's claim is not a new ground of fact or law that could not have been raised within the applicable time period, we affirm the dismissal.

No. 17-0272 **BENFORD v. IOWA DISTRICT COURT FOR JASPER COUNTY**

WRIT ANNULLED.

Certiorari from the Iowa District Court for Jasper County, Terry R. Rickers, Judge. Considered by Vaitheswaran, P.J., Potterfield, J., and Carr, S.J. Opinion by Vaitheswaran, P.J. (4 pages)

Andreas Benford appeals the denial of his motion to correct an illegal sentence. He contends his Iowa Code section 903B.1 (2009) special sentence constitutes cruel and unusual punishment as applied. **OPINION HOLDS:** Based on *State v. Tripp*, 776 N.W.2d 855 (Iowa 2010), we conclude Benford's constitutional challenge to the section 903B.1 special sentence is not ripe for adjudication. We annul the writ of certiorari.

No. 17-0300 **STATE v. CHANEY**

AFFIRMED.

Appeal from the Iowa District Court for Scott County, Cheryl E. Traum, District Associate Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Vaitheswaran, J. (7 pages)

Steven Chaney appeals his convictions for driving while barred as a habitual offender, assault on persons engaged in certain occupations, driving under suspension, and interference with official acts. He contends he was denied a fair trial based on "[t]he State's repeated and surreptitious references to alcohol and intoxication over the duration of the trial." **OPINION HOLDS:** The district court abused its discretion in summarily denying Chaney's motion in limine, which resulted in the admission of irrelevant alcohol-related evidence. But because the error was harmless, we affirm Chaney's convictions for all the crimes.

No. 17-0336 **FRANZEN v. MYERS**

AFFIRMED.

Appeal from the Iowa District Court for Fayette County, Richard D. Stochl, Judge. Considered by Vogel, P.J., Mullins, J., and Mahan, S.J. Opinion by Mahan, S.J. (7 pages)

In this interlocutory appeal, James Franzen challenges the district court's orders relating to a motion to quash a subpoena, claiming the court "impos[ed] improper and unreasonable conditions on discovery." **OPINION HOLDS:** We find no abuse of the court's discretion in its ruling. We therefore affirm the district court's February 1, 2017 orders.

No. 17-0359 **STATE v. FRAKES**

AFFIRMED.

Appeal from the Iowa District Court for Lee (South) County, John G. Linn, John M. Wright, Michael J. Schilling, and Mary Ann Brown, Judges. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Tabor, J. (16 pages)

Chris Frakes appeals his convictions for possession of methamphetamine, possession of marijuana with intent to deliver, and keeping a drug house. On appeal, he challenges the validity of a search warrant by claiming the warrant lacked probable cause and the affiant-officer was intentionally misleading in the warrant application. He also challenges the sufficiency of the evidence for his convictions for possession of marijuana with intent to deliver, and keeping a drug house. Finally, he challenges the admission of evidence related to a defunct business venture run out of his home. **OPINION HOLDS:** The warrant was supported by probable cause the affiant-officer was not misleading in the application. There was also sufficient evidence supporting both challenged convictions. And the challenged evidence was relevant because it supported the State's theory of the case and the district court limited certain evidence that could be considered too prejudicial.

No. 17-0361 **STATE v. MUNOZ GONZALEZ**

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Vaitheswaran, J. (4 pages)

Christian Munoz Gonzalez appeals his sentences for first-degree murder and first-degree robbery, contending the district court abused its discretion in imposing consecutive sentences. **OPINION HOLDS:** The district court did not abuse its discretion in articulating its reasons for imposing consecutive sentences. We affirm.

No. 17-0422 **NOBLE v. IOWA DISTRICT COURT FOR MUSCATINE COUNTY**

WRIT SUSTAINED AND REMANDED.

Appeal from the Iowa District Court for Muscatine County, Mark J. Smith and Mark D. Cleve, Judges. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by McDonald, J. (14 pages)

Brett Noble challenges his convictions and sentences for attempted murder and voluntary manslaughter. He argues his conviction for attempted murder is void and his sentence illegal because a person cannot be convicted of both killing someone and attempting to kill someone. He relies on the recent decision *State v. Ceretti*, 871 N.W.2d 88 (Iowa 2015). **OPINION HOLDS:** Noble is correct. Each conviction is predicated on the same act against the same victim. Noble's convictions and sentences are in violation of *Ceretti* and were not waived or otherwise barred. At the State's election, the district court shall either: (1) vacate the defendant's conviction and sentence for attempted murder and impose the remainder of the sentence; or (2) vacate the plea bargain and the resulting convictions.

No. 17-0488 **BARKER v. IOWA DEPARTMENT OF PUBLIC SAFETY**

AFFIRMED.

Appeal from the Iowa District Court for Scott County, Mark D. Cleve, Judge. Considered by Doyle, P.J., McDonald, J., and Mahan, S.J. Opinion by McDonald, J. (6 pages)

Ross Barker filed an administrative appeal challenging the department of public safety's determination regarding the length of time he must register with the sex offender registry. He claims that because two courts told him the registration period was ten years, the department is barred from enforcing the appropriate lifetime registry requirement. **OPINION HOLDS:** Because registry determinations are the responsibility of the department, not the courts, Barker's claims are unavailing.

No. 17-0509 **STATE v. STICKROD**

AFFIRMED.

Appeal from the Iowa District Court for Monroe County, Lucy J. Gamon, Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Danilson, C.J. (9 pages)

Justin Stickrod appeals from his convictions of first-degree sexual abuse, in violation of Iowa Code sections 709.1 and .2 (2016), and child endangerment, in violation of section 726.6(1)(a), (3), and (5). He contends his trial attorneys were ineffective in several respects. **OPINION HOLDS:** Upon our de novo review, we conclude Stickrod's ineffectiveness claims fail. The record reflects substantial evidence the infant suffered a serious injury and counsel, thus, had no duty to challenge the sufficiency of the evidence by a motion for judgment of acquittal. Stickrod cannot prove prejudice resulted from a failure to object on foundation grounds to the admissibility of DNA evidence or to the jury instructions on the elements of child endangerment.

No. 17-0524 **HENNINGS v. STATE**

AFFIRMED.

Appeal from the Iowa District Court for Webster County, Kurt L. Wilke, Judge. Considered by Vogel, P.J., Mullins, J., and Blane, S.J. Opinion by Mullins, J. (3 pages)

Mark Hennings appeals the district court's summary dismissal of his third postconviction-relief (PCR) application. He complains the district court inappropriately dismissed his application without affording him an opportunity to present evidence at a hearing. **OPINION HOLDS:** We affirm the district court's summary dismissal of Hennings's PCR application without further opinion pursuant to Iowa Court Rule 21.26(1)(a), (c), (d), and (e).

No. 17-0561 **STATE v. FRY**

JUDGMENT AFFIRMED,

Appeal from the Iowa District Court for Des Moines County, John G. Linn, Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion

SENTENCE AFFIRMED IN PART AND VACATED IN PART, AND REMANDED. by Vaitheswaran, J. (8 pages)

Tobias Issac Fry appeals his conviction and sentence for assault with intent to commit sexual abuse causing bodily injury. Fry (1) challenges the sufficiency of the evidence supporting the district court's finding of guilt and (2) argues the district court erred in ordering him to make restitution of $25 for court-appointed attorney fees and requiring him to pay court costs. **OPINION HOLDS:** We affirm Fry's conviction for assault with intent to commit sexual abuse. We also affirm the district court's determination that Fry was able to pay $25 in restitution toward his court-appointed attorney fees. We vacate that portion of the district court's judgment entry imposing a restitution obligation for court costs and remand for a determination of his reasonable ability to pay those costs.

No. 17-0597 **STATE v. LONG**

AFFIRMED. Appeal from the Iowa District Court for Scott County, Paul L. Macek, Judge. Considered by Vaitheswaran, P.J., Bower, J., and Scott, S.J. Opinion by Scott, S.J. (10 pages)

Following a jury trial, Loren Long was convicted of ten counts of sexual exploitation of a minor for possessing child pornography. On appeal he asserts his counsel was ineffective for failing to object to the marshalling jury instruction he asserts violates the unanimity rule. He also claims the court abused its discretion in admitting an excessive amount of photographs of child pornography and child erotica. In addition, Long filed a pro se brief appearing to challenge the sufficiency of the evidence he possessed the child pornography. **OPINION HOLDS:** We conclude Long failed to prove counsel was ineffective in failing to object to the undifferentiated jury instruction because he cannot prove the result of the trial would have been different had counsel made such an objection. In addition, the court did not abuse its discretion in admitting the fifty images of child pornography in light of the nature of the case. Finally, we conclude the evidence was sufficient to prove Long possessed the child pornography. Long's convictions are affirmed.

No. 17-0665 **DRIESEN v. IOWA DEP'T OF HUMAN SERVS.**

AFFIRMED. Appeal from the Iowa District Court for Lyon County, Jeffrey A. Neary, Judge. Considered by Vaitheswaran, P.J., and Potterfield and McDonald, JJ. Opinion by Vaitheswaran, P.J. (7 pages)

Two men appeal the dismissal of their elderly-abuse petition. They contend the district court could not "refuse to hear the[ir] known material claims." **OPINION HOLDS:** We affirm the dismissal of the elderly-abuse petition on issue preclusion grounds.

No. 17-0670 **STATE v. DUNCAN**

AFFIRMED. Appeal from the Iowa District Court for Scott County, Paul L. Macek and Stuart P. Werling, Judges. Considered by Danilson, C.J., Bower, J., and Goodhue, S.J. Opinion by Bower, J. (9 pages)

Ryan Duncan appeals his conviction for delivery of a controlled substance (methamphetamine). **OPINION HOLDS:** We determine there is sufficient evidence in the record to support Duncan's conviction. We find the district court did not abuse its discretion in its response to the jury's questions. We find the district court did not err in determining Iowa Code section 124.411 (2015) could be applied to enhance Duncan's sentence. We conclude all of Duncan's claims of ineffective assistance by defense counsel should be preserved for possible postconviction proceedings. We affirm Duncan's conviction and sentence.

No. 17-0672

AFFIRMED.

STATE v. GINES

Appeal from the Iowa District Court for Polk County, Thomas W. Mott, Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Potterfield, J. (4 pages)

Denise Gines appeals her sentence following a guilty plea to third-degree theft. On appeal, Gines argues the court abused its discretion in failing to consider mitigating factors. **OPINION HOLDS:** We find the district court did not abuse its discretion and affirm the sentence imposed.

No. 17-0712

AFFIRMED.

STATE v. HODGES

Appeal from the Iowa District Court for Woodbury County, Duane E. Hoffmeyer and Jeffrey A. Neary, Judges. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Doyle, P.J. (9 pages)

Nicholas Hodges appeals his convictions for possession with intent to deliver and failure to affix a drug tax stamp. **OPINION HOLDS:** The district court properly overruled Hodges's motion to suppress because the deputy's extraterritorial stop of the vehicle in which Hodges was a passenger and subsequent arrest of Hodges was lawful.

No. 17-0719

AFFIRMED.

STATE v. MCPHERSON

Appeal from the Iowa District Court for Woodbury County, John D. Ackerman, Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Doyle, P.J. (7 pages)

John McPherson appeals his conviction for assault on a police officer. **OPINION HOLDS:** Viewing the evidence in the light most favorable to the State, we find ample evidence to affirm the verdict. In addition, we see no abuse of discretion in the district court's determination the greater weight of credible evidence supported the verdict. We affirm the judgment and sentence of the district court.

No. 17-0732

AFFIRMED IN PART AND AFFIRMED AS MODIFIED IN PART ON APPEAL; AFFIRMED IN PART, AFFIRMED AS MODIFIED IN PART, AND REVERSED IN PART ON CROSS-APPEAL.

IN RE MARRIAGE OF LOCKARD

Appeal from the Iowa District Court for Dallas County, Paul R. Huscher, Judge. Considered by Danilson, C.J., and Doyle and Mullins, JJ. Opinion by Mullins, J. (15 pages)

John Lockard appeals and Laura Lockard cross-appeals a district court ruling concerning the modification of their dissolution decree. Both parties forward a number of substantive arguments and also contend the district court abused its discretion in declining to award them attorney fees in the modification proceeding. Laura requests an award of appellate attorney fees. **OPINION HOLDS:** We affirm as modified the provisions of the district court's decree of modification relating to spousal and child support. We reverse the district court's modification of the decree that removed the requirements that John be current on his spousal-support obligation in order to claim any of the children on his taxes and that he secure his spousal-support obligation with life insurance. We affirm the district court's denial of each party's request for attorney fees in the modification proceeding. We decline to award appellate attorney fees to Laura.

No. 17-0745

AFFIRMED.

MERRICK v. CRESTRIDGE, INC.

Appeal from the Iowa District Court for Scott County, Henry W. Latham II, Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by McDonald, J. (7 pages)

Claimant Velene Merrick seeks judicial review of the workers' compensation commissioner's decision denying her claim for industrial disability benefits. She contends the agency's decision is not supported by substantial evidence and the agency misapplied the law to the facts. **OPINION HOLDS:** We conclude the workers' compensation commissioner's findings are supported by substantial evidence and its application of the law to facts was not irrational, illogical, or wholly unjustifiable. The district court did not err in affirming the agency's action.

No. 17-0761 **STATE v. LINDSEY**

AFFIRMED.

Appeal from the Iowa District Court for Black Hawk County, Bradley J. Harris, Judge. Considered by Potterfield, P.J., Mullins, J., and Blane, S.J. Opinion by Blane, S.J. (12 pages)

Mar'yo Lindsey Jr. appeals from his convictions of intimidation with a dangerous weapon, willful injury causing bodily harm, possession of a firearm by a felon, going armed with intent, and carrying weapons. Lindsey maintains there is insufficient evidence to support his convictions, arguing that the State failed to prove he was the person who possessed or used a firearm—necessary elements in each of the five crimes. Lindsey also maintains his trial counsel provided ineffective assistance by failing to create a contemporaneous record of a sleeping juror that would have supported his motion for new trial based on juror misconduct. **OPINION HOLDS:** Because substantial evidence supports each of Lindsey's convictions, we affirm. We preserve his claim of ineffective assistance for further development of the record in possible later proceedings.

No. 17-0813 **STATE v. HARPER**

SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING.

Appeal from the Iowa District Court for Black Hawk County, Joseph Moothart, Brook K. Jacobsen, and Nathan A. Callahan, District Associate Judges. Considered by Doyle, P.J., Tabor, J., and Goodhue, S.J. Opinion by Goodhue, S.J. (4 pages)

Breeanna Harper appeals her conviction and sentence for possession of a controlled substance (marijuana). **OPINION HOLDS:** We have concluded that the reasons stated and the record made are not adequate to meet the requirements of Iowa Rule of Criminal Procedure 2.23(3)(d). We have concluded, based on the scant reasons stated, the court abused its discretion in ordering the sentence imposed.

No. 17-0822 **STATE v. HOCKEMEIER**

AFFIRMED.

Appeal from the Iowa District Court for Boone County, Steven J. Oeth, Judge. Considered by Vogel, P.J., Potterfield, J., and Carr, S.J. Opinion by Carr, S.J. (4 pages)

Myrna Hockemeier appeals the sentence imposed after she pled guilty to one count of first-degree theft. **OPINION HOLDS:** Because the record does not support Hockemeier's claims that the sentencing court improperly considered an unproven offense or the impact her sentence would have on the community, we affirm.

No. 17-0927 **HAMBLETON v. MCWHORTOR**

AFFIRMED.

Appeal from the Iowa District Court for Lee (South) County, Mary Ann Brown, Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Tabor, J. (8 pages)

A father appeals the denial of his request to modify a custody order. The father argues the district court applied the incorrect burden of proof—holding him to the standard for changing custody rather than visitation. And alternatively, the father contends he met the higher burden, and the court should have granted his modification. **OPINION HOLDS:** The father was seeking a modification to the physical-care arrangement, not just the visitation schedule. Therefore, the district court correctly applied the more stringent burden of proof. On our review of the evidence, the father did not meet this burden. On the mother's request, we order the father to pay $4000 toward appellate attorney fees.

No. 17-0953 **STATE v. EDWARDS**

AFFIRMED.

Appeal from the Iowa District Court for Polk County, David N. May, Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by McDonald, J. (6 pages)

Shane Edwards appeals following conviction for possession of a controlled substance, methamphetamine, third offense. He contends the prosecutor breached the plea agreement by not recommending a suspended sentence and that plea counsel provided constitutionally deficient representation in failing to object to the alleged breach. **OPINION HOLDS:** The prosecutor's reference to the defendant's criminal history and substance-abuse history provided context to the sentencing recommendation and was not improper. Plea counsel had no duty to object to counsel's statement because no breach of the plea agreement occurred.

No. 17-1056 **STATE v. BUENNEKE**

REVERSED AND REMANDED.

Appeal from the Iowa District Court for Black Hawk County, Bradley J. Harris, Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Vaitheswaran, J. (7 pages)

Daniel Buenneke appeals following his guilty plea from convictions for second-degree robbery and first-degree theft, contending his plea lacked a factual basis and his attorney was ineffective in failing to challenge it on this ground. **OPINION HOLDS:** Because the record lacked a factual basis for second-degree robbery and first-degree theft arising from the liquor store events, Buenneke's attorney breached an essential duty in failing to challenge the plea via a motion in arrest of judgment. Prejudice is presumed. We vacate Buenneke's sentence and reverse and remand the case to allow the State to establish a factual basis for the crimes.

No. 17-1136 **STATE v. VONHOFSTEDER**

AFFIRMED.

Appeal from the Iowa District Court for Plymouth County, Edward A. Jacobson, Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Mullins, J. (7 pages)

Wilhelm VonHofsteder appeals his guilty pleas to three counts of sexual exploitation of a minor and the sentences imposed. He contends, because his guilty pleas lacked a factual basis, his attorney rendered ineffective assistance by failing to file a motion in arrest of judgment to challenge the pleas. **OPINION HOLDS:** Based upon VonHofsteder's admissions to the court and minutes of evidence, we conclude a factual basis existed for each of the three charges. Because the pleas were supported by factual bases, counsel did not render ineffective assistance by failing to challenge them by way of a motion in arrest of judgment. We affirm VonHofsteder's convictions and the sentences imposed.

No. 17-1200 **IN RE MARRIAGE OF FLEMING**

REVERSED AND REMANDED.

Appeal from the Iowa District Court for Hardin County, Timothy J. Finn, Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Tabor, J. (7 pages)

On interlocutory appeal, Teresa Fleming requests the district court's grant of transfer of venue be reversed. She argues venue may not be transferred because she brought her modification action in a statutorily permitted county. She also argues even if forum non conveniens applies, her former husband failed to show he would suffer any hardship by defending the case in Teresa's county of residence. **OPINION HOLDS:** We reverse and remand. Because the action was brought in a proper county the district court erred in transferring venue under Iowa Rule of Civil Procedure 1.808. And, assuming forum non conveniens applies, the court failed to apply the proper standard.

No. 17-1267

STATE v. DIGHT

AFFIRMED.

Appeal from the Iowa District Court for Floyd County, Peter B. Newell, District Associate Judge. Considered by Vogel, P.J, and Potterfield and Mullins, JJ. Opinion by Mullins, J. (4 pages)

Samuel Dight appeals his guilty plea to possession of a controlled substance with intent to deliver. He contends his plea was not voluntarily and intelligently made because the district court failed to advise him at the plea proceeding of the statutory surcharge contained in Iowa Code section 911.1 (2017) and that his plea could affect his federal immigration status. **OPINION HOLDS:** We affirm Dight's conviction but preserve his claims of ineffective assistance of counsel for postconviction relief.

No. 17-1321

STATE v. BAXTER

AFFIRMED.

Appeal from the Iowa District Court for Des Moines County, Mark E. Kruse and William L. Dowell, Judges. Considered by Vaitheswaran, P.J., Bower, J., and Mahan, S.J. Opinion by Vaitheswaran, P.J. (3 pages)

Max Baxter appeals his convictions of delivery of a controlled subtance following a guilty plea. He contends the district court failed to advise him of "any immigration consequences he may face, as required by Iowa [R]ule of Criminal Procedure 2.8(2)(b)(3)." **OPINION HOLDS:** Baxter failed to preserve error, and we decline to consider his challenge to the guilty plea.

No. 17-1337

STATE v. ABBOTT

REVERSED AND REMANDED.

Appeal from the Iowa District Court for Benton County, Paul D. Miller and Sean W. McPartland, Judges. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Vaitheswaran, J. (5 pages)

Darrell Lee Abbott appeals following his guilty pleas to child endangerment, reckless use of fire or explosives, and second-degree criminal mischief. Abbott argues we must "vacate all three guilty pleas and the plea agreement, and remand the case to the district court for further proceedings" because his misdemeanor pleas were "unknowing, involuntary, and in violation of Rule 2.8(2)(b)" because "he was not advised of the minimum fines and surcharges" on his misdemeanor counts and "he was affirmatively misadvised that the fine on [the serious misdemeanor count] could be suspended." **OPINION HOLDS:** Based on *State v. Weitzel*, 905 N.W.2d 397 (Iowa 2017), we conclude the district court's failure to advise Abbott about the minimum surcharges and the court's misadvice about the fine on the serious misdemeanor count requires us to set aside all three pleas and remand to allow Abbott to plead anew. We reverse

and remand.

No. 17-1367 **STATE v. STONEBRAKER**

AFFIRMED.

Appeal from the Iowa District Court for Hardin County, Adria Kester, District Associate Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Vogel, P.J. (3 pages)

Following a guilty plea, Andrew Stonebraker appeals his conviction of third-offense domestic abuse assault. He asserts on appeal his attorney provided ineffective assistance in failing to advise him of the justification defense and not sufficiently investigating the facts of the case. **OPINION HOLDS:** Because we have no evidence of counsel's investigation of the case or counsel's advice to Stonebraker, we are unable on the record currently available to resolve these claims. Therefore, they must be preserved for possible postconviction-relief proceedings. We affirm Stonebraker's conviction and sentence.

No. 17-1496 **STATE v. LEMON**

AFFIRMED.

Appeal from the Iowa District Court for Dubuque County, Thomas A. Bitter, Judge. Considered by Vogel, P.J., Potterfield, J., and Scott, S.J. Opinion by Vogel, P.J. (4 pages)

Dorien Lemon appeals following a remand and resentencing. **OPINION HOLDS:** Because the district court reiterated why it imposed the original sentence and then followed the remand order by explaining why the sentences were to run consecutively, and because Lemon's counsel had no duty to object to stray arguments, we affirm.

No. 17-1848 **IN RE P.C.**

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Rachael E. Frideres Seymour, District Associate Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Vaitheswaran, J. (4 pages)

A father appeals the termination of his parental rights to two children, born in 2005 and 2006. He contends the record lacks clear and convincing evidence to support the termination under Iowa Code section 232.116(1)(f) (2016). **OPINION HOLDS:** We conclude the children could not be returned to the father's custody and termination was warranted under Iowa Code section 232.116(1)(f).

No. 17-1906 **IN RE R.A.**

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Romonda D. Belcher, District Associate Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Potterfield, J. (9 pages)

A father appeals the termination of his parental rights to A.A. and K.A. The father argues there is not clear and convincing evidence to terminate parental rights on any of the three grounds for termination and termination is not in the children's best interests. **OPINION HOLDS:** Having carefully considered the record and each party's position, we reach the same conclusion as the juvenile court—termination of the father's parental rights is in the best interests of the children. We affirm.

No. 17-1907 **IN RE A.F.**

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Joseph W. Seidlin, District Associate Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Vaitheswaran, J. (5 pages)

A mother appeals an order terminating her parental rights to two children, born in 2014 and 2016. She contends (1) the record lacks clear and convincing evidence to support the ground for termination cited by the district court and (2) termination is not in the children's best interests. **OPINION HOLDS:** The State satisfied its burden of proving termination was warranted under Iowa Code section 232.116(1)(h) (2016). Termination was in the children's best interests. We affirm.

No. 17-2098 **IN RE M.P.**

AFFIRMED.

Appeal from the Iowa District Court for Linn County, Susan F. Flaherty, Associate Juvenile Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Mullins, J. (2 pages)

A mother appeals a juvenile court order in a child-in-need-of-assistance proceeding removing her children from her physical custody. **OPINION HOLDS:** We conclude the mother failed to preserve error below and has waived error on appeal. Accordingly, we affirm.

No. 18-0072 **IN RE A.H.**

AFFIRMED.

Appeal from the Iowa District Court for Dickinson County, David C. Larson, District Associate Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Bower, J. (7 pages)

A father appeals the juvenile court order terminating his paternal rights. **OPINION HOLDS:** We find there was sufficient evidence to terminate the father's parental rights, the State made reasonable efforts, no exceptions should be applied to preclude termination, and termination is in the best interests of the child.

No. 18-0073 **IN RE B.R.**

AFFIRMED.

Appeal from the Iowa District Court for Linn County, Susan F. Flaherty, Associate Juvenile Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Doyle, P.J. (5 pages)

A mother appeals the termination of her parental rights to her children. **OPINION HOLDS: I.** Error was not preserved on the mother's claim the State failed to make reasonable efforts to avoid termination. Regardless, the record shows the mother failed to participate in the services offered to her. **II.** Clear and convincing evidence establishes the grounds for terminating the mother's parental rights under Iowa Code section 232.116(1)(f) (2016). **III.** Terminating the mother's parental rights is in the children's best interests.

No. 18-0086 **IN RE D.M.**

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Susan C. Cox, District Associate Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by McDonald, J. (7 pages)

Ariana appeals from the order terminating her parental rights in her child. She argues the evidence is insufficient to support termination of her parental rights and that guardianship is a better alternative to termination of her parental rights. **OPINION HOLDS:** There is clear and convincing evidence authorizing the termination of Ariana's rights pursuant to Iowa Code section 232.116(1)(f) (2017). We also conclude guardianship is not preferable under these circumstances.

No. 18-0092 **IN RE X.S.**

AFFIRMED ON BOTH APPEALS.

Appeal from the Iowa District Court for Jackson County, Phillip J. Tabor, District Associate Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Tabor, J., takes no part. Opinion by Vogel, P.J. (9 pages)

A mother and father separately appeal the termination of their parental rights to their children. **OPINION HOLDS:** Because B.M. was removed for twelve consecutive months, his safety and development is best served by terminating the father's rights, and there are no exceptions to preclude termination, we affirm the district court's termination of the father's rights. Additionally, because the children's safety and development is best served by terminating the mother's rights and there are no barriers to termination, we affirm the district court's termination of the mother's rights.

No. 18-0102 **IN RE M.M.**

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Colin J. Witt, District Associate Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Tabor, J. (8 pages)

A mother appeals the termination of her parental rights to her three children. She argues the statutory grounds for termination were not met because the children could have been returned to her care. Alternatively she seeks additional time to work toward reunification. She also argues termination is not in the children's best interests and her close bond with the children should preclude termination. **OPINION HOLDS:** Due to the mother's ongoing substance-abuse and legal issues the children could not be returned to her care. Because the mother did not request additional time to work toward reunification prior to termination, the issue is not preserved for appeal. It is in the children's best interests to terminate the mother's parental rights, and the parent-child bond is not so strong as to preclude termination.

No. 18-0115 **IN RE M.H.**

AFFIRMED.

Appeal from the Iowa District Court for Dubuque County, Thomas J. Straka, Associate Juvenile Judge. Considered by Danilson, C.J., and Vaitheswaran and Bower, JJ. Opinion by Vaitheswaran, J. (5 pages)

A father appeals the termination of his parental rights to his child, born in 2017. He contends the State failed to make reasonable efforts to reunify him with the child. **OPINION HOLDS:** The department did its best to comply with the reasonable efforts mandate, and the State satisfied its burden of proving termination under Iowa Code section 232.116(1)(h) (2017). We affirm the termination of the father's parental rights to his child.

No. 18-0133 **IN RE A.I.**

AFFIRMED.

Appeal from the Iowa District Court for Polk County, Louise M. Jacobs, District Associate Judge. Considered by Vogel, P.J., and Potterfield and Mullins, JJ. Opinion by Potterfield, J. (6 pages)

The father appeals the termination of his parental rights to his three children, A.I, born in 2003; F.I., born in 2006; and F.I., born in 2012. He maintains the court should not have terminated his parental rights and asks for a six-month extension to achieve reunification. Alternatively, he maintains the court should have placed the children in a guardianship. **OPINION HOLDS:** The statutory grounds for termination have been met, termination is in the children's best interests, and the father has not established that any permissive factor should be applied to save the parent-child relationship. Additionally, nothing in the record indicates that the father would be able to care for the children in six months or that a guardianship is appropriate in this case. We affirm.

No. 18-0151 **IN RE W.D.**

AFFIRMED.

Appeal from the Iowa District Court for Muscatine County, Gary P. Strausser, District Associate Judge. Considered by Doyle, P.J., and Tabor and McDonald, JJ. Opinion by Doyle, P.J. (10 pages)

A father appeals the termination of his parental rights. **OPINION HOLDS:** Clear and convincing evidence establishes the grounds for termination pursuant to Iowa Code section 232.116(1)(h) (2017). The record does not support granting the father additional time for reunification with the child. Termination of the father's parental rights is in the child's best interests. Therefore, we affirm.