

**IN THE COURT OF APPEALS OF IOWA**

No. 1-518 / 09-1708  
Filed July 27, 2011

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**RICHARD EUGENE MILLER JR.,**  
Defendant-Appellant.

---

Appeal from the Iowa District Court for Polk County, Douglas Staskal (motion for substitute counsel), Joel D. Novak (first trial), and Scott Rosenberg (retrial, habitual offender trial, and sentencing), Judges.

Richard Miller appeals his conviction and sentence for burglary in the first degree and assault causing serious injury as an habitual offender. **AFFIRMED IN PART AND VACATED IN PART.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant State Appellate Defender, for appellant.

Richard E. Miller, Jr., Clarinda, pro se.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, John P. Sarcone, County Attorney, and Jeff Noble, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

**SACKETT, C.J.**

Richard Eugene Miller Jr. appeals his conviction and sentence for burglary in the first degree, in violation of Iowa Code sections 713.1 and 713.3 (2009), and assault causing serious injury as a habitual offender, in violation of sections 708.1, 708.2(4), and 902.8. Miller asserts the district court erred by 1) denying his motion to dismiss on double jeopardy grounds, 2) denying his request for substitute counsel, 3) denying his motion for judgment of acquittal as the evidence was insufficient as a matter of law to convict him of burglary in the first degree and assault causing serious injury, 4) admitting into evidence the recorded telephone conversations Miller made while in jail, and 5) imposing and then suspending a fine on his habitual offender sentence. In addition, Miller, in his pro se brief, alleges the trial court erred in 1) admitting testimony from Officer Garcia, 2) failing to require the State to call as a witness Officer Dautovic; 3) granting the State's Iowa Rule of Evidence 5.104(a) motion to admit the recorded phone conversations as the motion was untimely, and 4) permitting a retrial more than ninety days after indictment. Miller also filed a motion when this case was transferred to this court to stop and restore the restitution payments during the pendency of this appeal. We affirm.

**I. BACKGROUND AND PROCEEDINGS.** From the testimony developed at trial, the following facts can be deduced. In the evening of January 8, 2009, Nikki Welding was home with her three children and her boyfriend, Elmer Zelaya. There was a knock on her door. Nikki opened it and discovered it was her father, Richard Miller. Nikki thought Miller was intoxicated and refused

to allow him to come into her home. Miller then pushed his way into the home and an argument ensued. Nikki asked Miller several times to leave with no success. When Miller started yelling at Zelaya, Nikki went into her kitchen and retrieved a butcher knife approximately twelve to fourteen inches long with a blade at least five inches. She once again told Miller to leave. Miller pushed Nikki against the wall, twisted her hand and took the knife away from her. Nikki told Zelaya to pick up her four-month-old daughter and run to Nikki's mother's house. As Zelaya attempted to leave with the child, Nikki saw Miller swing the handle of the knife at the back of Zelaya. At that moment Nikki blinked her eyes and her daughter started crying. From what she saw, Nikki concluded Miller hit the back of her daughter's head with the handle of the knife.

Zelaya was running behind the house when he heard the little girl moan. He realized something was not right with the child. He hurried to Nikki's mother's house and saw the child's head was swollen. The police and ambulance were called and the child was taken to the hospital where it was later determined she had a skull fracture and a subdural hematoma. She recovered without surgery. At trial Zelaya denied dropping the child as he ran from Nikki's house and both Nikki and her mother testified they did not see anything on the child or her clothing to indicate she had been dropped.

On February 18, 2009, a trial information was filed against Miller charging him with burglary in the first degree and willful injury causing serious injury. On May 1, 2009, a conference was held before the May 18 trial date. Its purpose was to make a record of Miller's rejection of a plea offer. During that conference

Miller stated he and his attorney had a “pretty good relationship” but he expressed concern there may be a “breakdown of our relationship” as he wanted his attorney to believe he was not guilty of the offenses charged. The court inquired whether he was requesting new counsel to which Miller responded, “At this time, no.”

A second conference was held on May 8, 2009, when discovery depositions were terminated at Miller’s request to discuss his objections with the judge. During this conference Miller stated he had an “attorney-client breakdown” because his attorney would not object to the questions the county attorney was posing to his witnesses during the deposition. The court explained to Miller the purpose of discovery depositions and that all objections are reserved. Miller did not request new counsel at this conference.

Five days later on May 13 a third pretrial conference was held. At this time Miller requested new counsel based on an attorney-client breakdown and what he termed a “conflict of interest” with the adult and juvenile public defender’s office.<sup>1</sup> He asserted he could not trust his attorney. Noting the trial was scheduled on the eighty-ninth day following arraignment, the court first discussed with Miller his need to waive speedy trial should the court agree to appointment him new counsel. Miller agreed to such as waiver. The court then questioned both Miller’s counsel, Jason Dunn, and Miller to determine whether new counsel was needed. Dunn informed the court he had done extensive

---

<sup>1</sup> Miller described this conflict of interest as the public defenders having over-packed caseloads, not being prepared for trial, and advising him to plead guilty to crimes he did not commit.

discovery and investigation and he had expressed his concern to Miller that he could be unsuccessful at trial. He also described a disagreement with Miller regarding the calling of certain medical witnesses. The court denied Miller's request for new counsel stating,

[y]ou haven't given me a reason, and I'm not going to just appoint another attorney in the public defender's office for you to come in later and say the same things that you're saying about this public defender. It's not enough that you and he disagree about trial strategy. He is a qualified, experienced attorney, you are not entitled to choose your attorney because your attorney is appointed and paid for by the State. You're entitled to competent representation, and you have that right now. Nothing you've told me here on the record gives me any concern about his ability to represent you as well as anyone else could.

The case remained set for trial as scheduled.

Defense counsel filed a motion in limine on May 14 seeking to exclude evidence of the arresting officer's prior interactions with Miller and evidence of Miller's prior criminal history or incarceration. This motion was sustained the morning of trial.

The trial commenced on May 18. Nikki, the first witness, was asked by the prosecutor to explain why she would get a knife to confront her own father. She responded, "Because he had a bad history of hitting my mom." Defense counsel objected that the comment violated the court's ruling on his motion in limine and he requested a mistrial. Nikki stated she was sorry and that she was nervous and forgot she was not supposed to say things like that. The prosecutor indicated Nikki was emotional and he did not believe she intentionally violated the court's order or the prosecutor's instructions. The court denied the mistrial request and admonished Nikki that if there were any other comments like that he

would declare a mistrial. In addition the court admonished the jury to disregard Nikki's statement as it had no relevance to the case.

The second day of trial Officer Weispfenning was testifying regarding his investigation the day of the incident. The prosecutor asked Weispfenning if Miller said anything to him when he was trying to identify Miller. The officer replied, "We asked him if he was Richard Miller; he said no he wasn't. And one of the other officers recognized him from—." Defense counsel objected at this point and, after excusing the jury, made another motion for a mistrial asserting the officer's testimony was the second violation of the court's order. The prosecutor responded he had instructed the witness he was not to refer to the fact he recognized Miller from prior occasions, but "may have not been entirely clear with him with regard to the fact that he wasn't to say other officers didn't recognize him from prior interactions. So I admit I bear some responsibility for this." He went on to say that he did not believe Miller suffered any prejudice as the witness did not say how the officers recognized him.

The court granted the motion for a mistrial based on the cumulative effect of both violations. The court explained, "I don't find necessarily fault with anybody, but I am not going to take the chance that this defendant is not going to get a fair trial." The prosecutor asked the court to clarify whether by granting the motion for a mistrial, it was finding good cause to go beyond the speedy trial deadline. Defense counsel responded his understanding was, "when you grant a mistrial, that 90 tolls again, so no argument here. . . . I think the State has another 90 days to bring it to trial based on the mistrial." The prosecutor also

asked the court to clarify it was not finding an intentional violation of the court's order by the State that would cause double jeopardy to attach. The court stated,

It is not intentional. I said that. That's my finding. I don't think the officer intentionally violated my orders. Sometimes these things just happen. No matter how cautious you try to be. The point is, whether intentional or not, I have to—I have to balance the prejudice to the defendant, taking both of these things that happened, even though it wasn't intentional on the part of the State. It wasn't intentional on the part of the officer to violate this Court's motion in limine ruling. These things did come in. And I think I've said enough. The motion will be granted for the reasons I have set forth on the record.

The court filed a written order which stated,

On May 19, 2009, defense counsel's motion for mistrial came before the court, joined by defendant individually and personally. The motion was sustained for the reasons stated on the record.

Based on the court's personal observations and the circumstances of the violations, the court finds that the violations of the order in limine were unintentional and inadvertent. The court finds good cause and necessity to re-schedule trial beyond the speed trial deadlines.

Following the mistrial, Miller filed a pro se motion for a dismissal of the charges based on double jeopardy. In addition, Miller's counsel filed a motion to dismiss asserting double jeopardy barred the retrial because the State's violations of the court's order were neither innocent nor outside the control of the State. The State also filed a motion pursuant to Iowa Rule of Evidence 5.104(a) on July 17, 2009, seeking the court's permission prior to trial to admit into evidence excerpts from recorded phone calls Miller made while in jail. Miller resisted the motion asserting the statements made in the excerpts were not admissions and the court needed to take into account *State v. Cromer*, 765 N.W.2d 1 (Iowa 2009) for admission of phone recordings.

On August 11, 2009, the court denied Miller's motions to dismiss asserting the issue of double jeopardy had already been decided when the court found the reasons for the mistrial were unintentional and inadvertent. The court also ruled that if proper foundation was established at trial for the recorded phone conversations, the statements would be admissible as admissions. According to the court, Miller's reliance on *Cromer* was misplaced as the phone calls in *Cromer* were initiated by law enforcement coaching a witness and contained statements, legal opinions, and conclusions which were highly prejudicial. As the statements here were relevant and probative, the State's motion was granted provided that proper foundation would be laid.

The second trial began on August 12, 2009. The same order on Miller's motion in limine applied. This time neither Nikki nor Officer Weispfenning violated the order. The State called Dr. Flores, who testified that based on the child's CT scan, the child had a skull fracture; however, the doctor was not able to medically determine based on the CT whether the fracture was the result of the child being hit in the head with a handle of a knife or the result of someone falling with her. The State also called Sergeant Hoffman to testify regarding the technology that intercepts phone calls on telephones in the jail. He testified outside the presence of the jury he reviewed the excerpts of the phone calls the State wished to introduce and the excerpts matched the audio from the jail's computer systems 100%. In addition, Hoffman also testified based on his prior interaction with Miller in jail in the past, he recognized Miller's voice on the recordings. Hoffman did admit inmates use other inmate's pin numbers to make



phone calls, but if such misuse is suspected, he will analyze the phone calls made and the numbers called to confirm who was making the calls. There was no indication such misuse occurred in Miller's case. The court admitted the evidence over Miller's objection.

At the close of the State's case, Miller moved for a judgment of acquittal stating,

Your honor, I would like to make a motion for a directed verdict at this time based on the evidence presented to the Court through the witnesses and through law enforcement and asking the Court to direct verdict in favor of not guilty for my client based on the lack of relevant evidence that has been admitted into this court with regards to both charges of burglary in the first degree and willful injury causing serious injury. Thank you.

The State resisted the motion asserting the evidence when viewed in the light most favorable to the State generated a jury question on both crimes charged. The court denied the motion and submitted the case to the jury. On August 14, 2009, the jury found Miller guilty of burglary in the first degree and the lesser offense of assault causing serious injury, and on September 15, 2009, a jury found Miller was the same person previously convicted of two felonies.

On November 3, 2009, Miller was sentenced to a period of incarceration not to exceed twenty-five years on the burglary conviction and a period of incarceration not to exceed fifteen years on the assault conviction. The sentences were ordered to run consecutively for a period not to exceed forty years. Miller was also assessed a fine of \$750 on the assault conviction but the fine was suspended.

Miller appeals both through counsel and pro se claiming a number of errors. We address each claim below.

**II. RETRIAL—DOUBLE JEOPARDY.** Miller's first claim is the district court erred in denying his motion to dismiss on double jeopardy grounds. Miller asserts the district court's finding the violations of the court's order were unintentional and inadvertent was incorrect. He asserts the prosecutor, as a person trained in the law, attempted to elicit testimony from Officer Weispfenning that violated the order knowing the court would sustain a motion for a mistrial because of Nikki's violation the day before. He also asserts the State benefited from the retrial as the prosecutor stated at the start of the second trial that he was "taking a different approach this time."

Because this claim involves the constitutional provision of double jeopardy, our view is de novo. *State v. Kramer*, 760 N.W.2d 190, 194 (Iowa 2009). The Double Jeopardy Clause, applicable to the states through the Fourteenth Amendment, protects individuals against: "(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *Id.* The clause is implicated only when a defendant is placed in jeopardy, which attaches when a jury is empaneled and sworn or when a judge begins to receive evidence in a bench trial. *Id.* When a mistrial is declared at the request of a defendant, double jeopardy does not bar retrial unless "the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." *Oregon v. Kennedy*, 456 U.S. 667, 679, 102 S. Ct. 2083,

2091, 72 L. Ed. 2d 416, 427 (1982). The finding of the subjective intent of the prosecutor “must be made in the first instance by the trial court.” *State v. Rademacher*, 433 N.W.2d 754, 757 (Iowa 1988). While we make our own evaluation of the totality of the circumstances when considering constitutional issues, “the dispositive factual determination required to be made . . . is one which the district court [is] in a far better position to resolve.” *Id.* at 759.

Upon our review of the record, we do not find the prosecution goaded the defendant to move for a mistrial. There is no evidence Nikki’s remark was intentional. While the prosecutor did acknowledge he may not have been entirely clear with Officer Weispenning in explaining the motion in limine, there was no evidence the State was purposefully trying to elicit testimony that violated the court’s order. We find no reason to disagree with the district court’s finding the errors were unintentional and inadvertent; and therefore, deny Miller’s claim.

**III. SUBSTITUTE COUNSEL.** Next Miller claims the district court erred by denying his request for new counsel before the first trial. Miller asserts the district court incorrectly focused on the competence of his attorney rather than focusing on the substance of his complaints. Miller contends he told the district court on a number of occasions he did not trust his attorney, his attorney failed to subpoena witnesses for trial, failed to secure an expert for trial, failed to challenge the admissibility of evidence, and there was a conflict of interest between them.

Our review of the district court’s denial of Miller’s request for substitute counsel is for abuse of discretion. *State v. Lopez*, 633 N.W.2d 774, 778 (Iowa

2001). The Sixth Amendment does not guarantee a meaningful relationship between an accused and his court-appointed counsel. *Id.* When a defendant requests new counsel, he must show sufficient cause to justify the substitution, such as a conflict of interest, irreconcilable conflict, or a complete breakdown in communication. *State v. Tejeda*, 677 N.W.2d 744, 749–50 (Iowa 2004). Where a defendant alleges a breakdown in communication, the court does have a duty to inquire of the defendant the grounds for such allegation. *Id.* at 750. In addition, a defendant is required to show prejudice from the court's denial of substitute counsel, unless the defendant has been denied counsel entirely or counsel had a conflict of interest. *Lopez*, 633 N.W.2d at 779.

In this case we find the court made an adequate inquiry as to the grounds for Miller's request for a new attorney, and the court did not abuse its discretion in denying the request. When asked why he wanted a new attorney, Miller made general assertions there were witnesses who needed to be called and his attorney was either dragging his feet or had a case load that was over packed. He made a general statement he had a conflict of interest with both the adult and juvenile public defender's offices, but failed to articulate what that conflict was, simply saying attorneys from those offices had advised him in the past to plead guilty to crimes he believes he did not commit. He asserted four or five doctors from the medical records of the child needed to be called to testify as to what

actually “happened,” and he asserted there was a doctor’s report that said the child did not actually have a skull fracture.<sup>2</sup>

Miller’s counsel responded he had spent considerable time on Miller’s case. That he took about fifteen depositions and had seen Miller close to twenty times after being assigned the case. He acknowledged Miller may not have liked his assessment of the evidence or his trial strategy not to call all medical providers to come and repeat the fact the child had a skull fracture. However, counsel said he was ready to try the case.

The district court did not abuse its discretion in refusing the request for new counsel.

**IV. SUFFICIENCY OF THE EVIDENCE.** Miller next asserts there was insufficient evidence to convict him of either burglary in the first degree or assault causing serious injury. Specifically, under burglary in the first degree, he asserts there was no evidence he possessed a dangerous weapon or that intentionally or recklessly caused bodily injury to another. As to the assault causing serious injury conviction, he believes there was insufficient evidence to prove his actions caused serious injury to the child.

The State asserts Miller failed to preserve error on these claims and we agree. Miller’s motion for judgment of acquittal made at the close of the State’s evidence failed to adequately articulate any specific elements of either offense he thought were not supported by the record. See *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005) (finding the failure to “make reference to specific elements of

---

<sup>2</sup> Neither defense counsel nor the prosecutor was aware of any such medical record. No such record was introduced at trial or provided in the appeal record.

the crime on which the evidence was claimed to be insufficient, did not preserve the sufficiency of the evidence issue for review”). However, Miller asks, in the event we find the issue not preserved as a result of counsel’s failure to make a specific motion, that we consider this claim under the guise of ineffective assistance of counsel. Finding adequate record upon which to evaluate such a claim, we accept Miller’s invitation and proceed. See *State v. Soboroff*, 798 N.W.2d 1, 8 (Iowa 2011) (stating ineffective-assistance-of-counsel claims are generally preserved for postconviction relief proceedings unless we find there is an adequate record to resolve the issue on direct appeal).

Ineffective-assistance-of-counsel claims are reviewed de novo. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010). Miller must prove counsel 1) failed to perform an essential duty, and 2) this failure resulted in prejudice. *State v. Vance*, 790 N.W.2d 775, 785 (Iowa 2010). If either element is lacking, the claim will fail. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008).

The verdict is supported by substantial evidence. Evidence is substantial if, when viewed in the light most favorable to the State, it would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008). We consider all evidence, not just inculpatory evidence, and if the evidence only raises suspicion, speculation, or conjecture, it is not substantial. *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000).

**A. Burglary in the First Degree.** First, Miller claims there was insufficient evidence to prove he possessed a dangerous weapon. The jury

instruction given defined dangerous weapon in part as a “knife having a blade exceeding five inches in length.”<sup>3</sup> There was sufficient evidence to support this element. Both Nikki and Zelaya testified the knife was twelve to fourteen inches long, both indicating an estimate of the length by using their hands. Nikki stated she was certain the blade of the knife exceeded five inches. Miller asserts because the knife was not produced at trial—having disappeared after the incident—and because Nikki said she never measured the knife, the evidence of the length of the knife was insufficient. We disagree. Just because the knife was lost and Nikki did not measure the knife with the ruler, does not make her testimony regarding her estimation of the length of the blade speculation or conjecture.

Miller also asserts there was insufficient evidence to prove he caused the injury to the child. Nikki testified she did not actually see the impact between the handle of the knife and her daughter’s head, but concluded it happened because she saw Miller swing the handle of the knife at Zelaya and her daughter and her daughter began screaming immediately following the swing. Miller may believe Zelaya dropped the child while he was fleeing the scene, and Dr. Flores could not medically rule out that possibility, but no evidence was offered at trial to indicate Zelaya may have dropped the child. The fact Nikki did not see the knife’s handle hit her child’s head does not make the evidence insubstantial.

---

<sup>3</sup> Miller does not contend the jury instructions incorrectly stated the law, so we will examine his sufficiency claims in light of the instructions given to the jury. *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006).

**B. Assault Causing Serious Injury.** Miller also argues there was insufficient evidence to prove he caused serious injury to the child. There was sufficient evidence to prove Miller possessed a dangerous weapon and that his action caused a serious injury to the child. Counsel was not ineffective in failing to make a more detailed motion for judgment of acquittal.

**V. RECORDED PHONE CONVERSATIONS.** Miller claims the trial court erred in admitting into evidence the excerpts from the recorded phone conversations Miller had while he was in jail. Specifically, he challenges the exhibit offered into evidence was not trustworthy.

Evidentiary issues are reviewed for an abuse of discretion. *State v. Weatherly*, 519 N.W.2d 824, 825 (Iowa Ct. App. 1994). In Iowa, the test for the admission of recorded conversations is whether evidence establishes the recordings are accurate and trustworthy. *Id.* at 826. Miller asserts Sergeant Hoffman's testimony established any inmate walking around the jail could intercept another inmate's pin number and the jail was having problems with improper pin usage, which resulted in a change the procedure of assigning pin numbers after Miller's calls were recorded. Because of the problems with the integrity of the phone system, Miller asserts the recordings are not trustworthy. We disagree.

While Hoffman did testify that the jail did have problems with inmates using other inmates' pin numbers, there was no indication someone other than Miller used his pin number on the recordings admitted into evidence. Hoffman stated he was familiar with Miller's voice and was confident it was Miller on the



phone calls. In addition, he said he was 100% sure the audio in the exhibit matched the audio in the jail computer system. We find the district court did not abuse its discretion in admitting the excerpts of the recorded phone conversations.

**VI. SUSPENDED FINE.** Miller asserts the district court erred in imposing and then suspending a \$750 fine on the habitual offender sentence. Based on our ruling in *State v. Halterman*, 630 N.W.2d 611, 613–14 (Iowa Ct. App. 2001)<sup>4</sup>, the State concedes the fine was improperly imposed and asks us to vacate the district court’s sentencing order to the extent it imposes this suspended fine. We agree and accordingly vacate that portion of the district court’s sentencing order.

**VII. PRO SE CLAIMS.** Miller also asserts a number of pro se claims. We will address each below.

**A. Officer Garcia.** First, Miller asserts the district court erred in permitting Officer Garcia to testify as Garcia had not previously been identified in the minutes of testimony. Miller did not object to the officer’s testimony at trial and thus, any alleged error was not preserved. *State v. Shimon*, 182 N.W.2d 113, 115 (Iowa 1970) (“Failure to make a timely objection . . . will ordinarily preclude a party from later claiming error in the admission of testimony.”). Reviewing the court file we find Officer Garcia was identified by the State in a

---

<sup>4</sup> This case holds that because habitual offender sentencing code provision, Iowa Code section 902.9(2), does not identify a fine, no such fine can be imposed unless a separate code provision provides for such a fine. Just as in *Halterman*, the underlying crime Miller was convicted of, assault causing serious injury, does not contain a separate penalty provision, and thus, the district court was without power to impose the fine.

notice of additional witnesses filed on May 8, 2009, well before the August 12 retrial. Thus, we reject this claim of error.

**B. Officer Dautovic.** Next, Miller asserts the district court erred by failing to require the State to call Officer Dautovic, when the State had identified him in the minutes of testimony. Miller did not preserve this claim of error at trial, and thus, the error is not preserved for our review. *Shimon*, 182 N.W.2d at 115. In addition, we know of no such rule which requires the State to call at trial every witness identified in the minutes of testimony. Had Miller wanted Dautovic's testimony at trial, he could have called him. Iowa Rule of Criminal Procedure 2.5(3), which requires a prosecuting attorney to file minutes of testimony, does not require the State to call all of those individuals at trial. It is simply a rule of notice to alert a defendant to the evidence against him. *In re Dugan*, 334 N.W.2d 300, 305 (Iowa 1983).

**C. Iowa Rule of Evidence 5.104(a) Motion's Timeliness.** Miller also claims the court erred in granting the State's Iowa Rule of Evidence 5.104(a) motion for a preliminary determination as to the admissibility of the recorded phone conversations as this motion was filed more than forty days after arraignment. Miller did not raise this claim when the motion was initially made, instead he objected to the admissibility of the recordings on hearsay and authentication grounds. Thus, this error is not preserved for our review. In addition, we find a motion under rule 5.104(a) is not a motion that must be made within the forty days after arraignment. The official comments to Iowa Rule of Evidence 5.104(a) state the rule is intended to greatly facilitate the orderly

admission of evidence by procuring a court ruling in advance of trial. This is not a motion that Iowa Rule of Criminal Procedure 2.11(4) requires to be filed within forty days of arraignment.

**D. Retrial—Speedy Trial.** Miller’s final pro se argument on appeal states the district court erred by holding his retrial more than ninety days after the indictment was filed. Miller’s attorney waived this argument at trial when he made the motion for a mistrial by stating, “And my understanding is, when you grant a mistrial, that 90 tolls again, so no argument here. . . . I think the State has another 90 days to bring it to trial based on a mistrial.” When a mistrial is granted the ninety days runs from the time the mistrial is granted. *State v. Zaehring*, 306 N.W.2d 792, 794–95 (Iowa 1981). The mistrial was granted on May 19, 2009, and the retrial occurred eighty-five days later on August 12, 2009. We reject Miller’s claim.

**E. Reply Brief.** Miller also makes a number of claims in his reply brief which were not made in his original brief. We decline to address a claim raised for the first time in a reply brief. *State v. Olsen*, 794 N.W.2d 285, 287 n.1 (Iowa 2011).

**F. Restitution Payments.** Finally, when this case was transferred to our court Miller made a pro se motion to stop and restore the restitution payments the State was removing from his jail account during the pendency of this appeal. At this time we deny that motion.

**VIII. CONCLUSION.** In conclusion, we affirm Miller’s conviction of burglary in the first degree and assault causing serious injury with the exception

of vacating that portion of the district court's sentencing order imposing and then suspending a \$750 fine under the habitual offender conviction.

**AFFIRMED IN PART AND VACATED IN PART.**