STATE JUDICIAL NOMINATION COMMISSION
AND OFFICE OF THE GOVERNOR
JOINT JUDICIAL APPLICATION

Please complete this application by placing your responses in normal type, immediately beneath each request for information. Requested documents should be attached at the end of the application or in separate PDF files, clearly identifying the numbered request to which each document is responsive. Completed applications are public records. If you cannot fully respond to a question without disclosing information that is confidential under state or federal law, please submit that portion of your answer separately, along with your legal basis for considering the information confidential. Do not submit opinions or other writing samples containing confidential information unless you are able to appropriately redact the document to avoid disclosing the identity of the parties or other confidential information.

PERSONAL INFORMATION

1. **State your full name.**

   Joel William Barrows

2. **State your current occupation or title. (Lawyers: identify name of firm, organization, or government agency; judicial officers: identify title and judicial election district.)**

   Iowa District Court Judge, Seventh Judicial District

3. **State your date of birth (to determine statutory eligibility).**

   11/7/1960

4. **State your current city and county of residence.**

   Bettendorf, Scott County

PROFESSIONAL AND EDUCATIONAL HISTORY

5. **List in reverse chronological order each college and law school you attended including the dates of attendance, the degree awarded, and your reason for leaving each school if no degree from that institution was awarded.**

College(s) and Law School(s) – and reason for leaving, if applicable	**Dates Attended (Mo/Yr to Mo/Yr)**	**Degree(s)**	**Month/Yr Received**
Georgetown University Law Center, Washington, D.C.	January, 1992, through May, 1993	LL.M. in International and Comparative Law *with distinction*	May, 1993
Drake University Law School, Des Moines, IA	August, 1986, through May, 1989	Doctor of Jurisprudence	May, 1989
Southern Illinois University at Carbondale, Carbondale, IL	January, 1984, through May, 1986	Master of Arts, History	May, 1986
Coe College, Cedar Rapids, IA	September, 1979, through August, 1983	Bachelor of Arts	August, 1983

6. **Describe in reverse chronological order all of your work experience since graduating from college, including:**
   a. **Your position, dates (beginning and end) of your employment, addresses of law firms or offices, companies, or governmental agencies with which you have been connected, and the name of your supervisor or a knowledgeable colleague if possible.**

District Court Judge

Iowa Judicial Branch, Seventh Judicial District

Scott County Courthouse, 400 W. 4th Street, Davenport, Iowa

August, 2012 – Present

Chief Judge Marlita Greve

Assistant United States Attorney

United States Department of Justice,

United States Attorney's Office, Southern District of Iowa,

United States Courthouse,

Suite 310, 131 East 4th Street, Davenport, IA 52801

December, 2000 – August, 2012

(Most of my time as an AUSA was spent in the Davenport/Rock Island branch office, but I also worked at the main office in Des Moines.)

Donald Allegro, Former Branch Chief

Special Assistant United States Attorney, Assistant Iowa Attorney General,

United States Department of Justice, United States Attorney's Office, Southern District of Iowa, Iowa Department of Justice

Suite 286, 110 East Court Avenue, Des Moines, IA 50309

October, 1999 - December, 2000

Stephen Patrick O'Meara, Former Criminal Chief

Adjunct Professor of Law

Drake University Law School

Cartwright Hall,

2507 University Avenue, Des Moines, Iowa, 50311

January 1998 - December 1999

Dean Jerry Anderson or Professor James Albert

Assistant Polk County Attorney

Polk County Attorney's Office, Des Moines, Iowa

206 Sixth Avenue, Midland Building, Des Moines, IA 50309

October 1995 - October, 1999

John Sarcone, Polk County Attorney

Assistant County Attorney

Child Support Recovery Unit, Clinton, Iowa

121 6th Ave., South, P.O. Box 1175, Clinton, IA 52733-1175

September 1994 - October 1995

I had no particular supervisor

Law Clerk

James L. Sayre, P.C.

13375 University, Suite 101, Clive, IA 50325

November 1993 - May 1994

James Sayre

Associate Attorney

Evans and Dixon, Attorneys at Law

1200 Saint Louis Place, 200 North Broadway, St. Louis, MO 63102-2749

January, 1991 - November, 1991

Robert Bidstrup (My managing partner, who is now retired.)

Compliment Division of NEOAX (formerly Barrows Enterprises)

Camanche, Iowa

Mid-70's – 1986

(I held numerous positions at this company, which was a family business. While there, I worked in the accounting and purchasing departments. I did various types of sales and production analysis. I was also a plant foreman, quality control inspector and warranty officer. The company is no longer in existence.)

I have omitted several summer jobs held during my college years and limited this to more substantive positions. I worked for Clinton Fence and Pool briefly after college, but this company is no longer in existence.

b. Your periods of military service, if any, including active duty, reserves or other status. Give the date, branch of service, your rank or rating, and present status or discharge status.

Not applicable

7. List the dates you were admitted to the bar of any state and any lapses or terminations of membership. Please explain the reason for any lapse or termination of membership.

Iowa (licensed by examination)	June, 1994
Missouri	October, 1989
United States District Court for the Southern District of Iowa	August, 1999
United States Court of Appeals for the Eighth Circuit	April, 2000

8. Describe the general character of your legal experience, dividing it into periods with dates if its character has changed over the years, including:

a. A description of your typical clients and the areas of the law in which you have focused, including the approximate percentage of time spent in each area of practice.

Dates (From -- To)	Description of law practice
January, 1991 - November, 1991	Evans and Dixon, Attorneys at Law St. Louis, MO At the time, approximately 100 attorneys Associate attorney Workers' compensation defense Numerous large self-insured employers and insurance companies
November 1993 - May 1994	James L. Sayre, P.C. Clive, IA Two attorneys Law clerk Employment law I was employed to assist with one case involving the Iowa Department of Corrections. Mr. Sayre offered to employ me temporarily while I prepared for the Iowa bar exam.

September 1994 - October 1995	Child Support Recovery Unit Clinton, Iowa One attorney in the Clinton office, dozens statewide Handled paternity actions and legal matters concerning the establishment, modification and enforcement of child support orders including garnishments and involvement in divorce and custody actions. Handled the child support case load for Clinton, Jackson and Cedar Counties. Responsibilities also included supervising the legal work of 8-10 county and state workers. My client would have been the State of Iowa
October 1995 - October, 1999	Polk County Attorney's Office Des Moines, Iowa Approximately 40 attorneys Assistant County Attorney * OWI Attorney, September 1998 - October, 1999 Was responsible for all aspects of one third of the felony and misdemeanor OWI docket as well as the driving while barred docket, including, but not limited to, depositions, pre-trial conferences, suppression hearings and bench and jury trials. * Indictable Misdemeanor Attorney, June 1998 - September 1998 Was responsible for all aspects of one half of the general indictable misdemeanor docket, including, but not limited to, depositions, pre-trial conferences, suppression hearings and bench and jury trials. * Intake Attorney, September 1997 - June 1998; October 1995 - October 1996 Provided legal advice to various law enforcement agencies concerning ongoing investigations, reviewed incoming cases for sufficiency and approved or declined charges or requested follow-up in felony and misdemeanor cases. Prepared search warrants, county attorney subpoenas, trial informations and extradition requests. Handled civilian inquiries. Supervised the unemployment benefits, fraudulent practices program. Handled case referral and case review for the mediation and civilian intake aspects of our Restorative Justice Center. Lectured at the Des Moines Police Academy and the Iowa Law Enforcement Academy on various subjects. Promoted to Attorney II June 1997 and returned to the intake attorney position, September 1997, where duties continued to include all of the above and trial work. Presented lectures on a variety of subjects at a number of seminars.

	* Drug and Gang Unit, October 1996 - September 1997 Was responsible for all aspects of the misdemeanor drug possession docket including, but not limited to, depositions, pre-trial conferences, suppression hearings and bench and jury trials. Provided legal advice to the police and prepared search warrants for misdemeanor and felony drug cases. Supervised law student interns. Occasionally handled sentencings, guilty pleas and probation revocations in felony cases and reviewed potential felony drug charges to determine if there was sufficient evidence to file charges. Handled property forfeiture hearings that arose from drug cases. My client was the State of Iowa
October, 1999 - December, 2000	United States Attorney's Office, Southern District of Iowa, Iowa Department of Justice Des Moines, Iowa Approximately 30 attorneys Special Assistant United States Attorney, Assistant Iowa Attorney General Was responsible for the prosecution of methamphetamine related and ancillary federal offenses under the High Intensity Drug Trafficking Area (HIDTA) Program. Also handled Organized Crime Drug Enforcement Task Force (OCDETF) cases. Conducted jury trials and argued at the United States Court of Appeals for the Eighth Circuit while in this position. My client was the United States of America
December, 2000 – August, 2012	United States Attorney's Office, Southern District of Iowa Des Moines, Iowa/Rock Island, Illinois/Davenport, Iowa Approximately 30 attorneys Assistant United States Attorney As the Affirmative Civil Enforcement (ACE) AUSA from December, 2000 through January, 2002 responsibilities included enforcement of federal criminal statutes in the areas of health care fraud and the environment, civil False Claims Act and controlled substances actions, common law unjust enrichment actions, etc.. Reassigned to the Criminal Division as of February, 2002 where responsibilities included handling a general criminal caseload. Transferred to the Quad Cities branch office in December, 2002 (at my request) where duties continued to include a general criminal caseload in areas as diverse as white collar crime, health care fraud, child exploitation, drug trafficking, failure to pay child support, interstate theft, computer crime, firearms offenses, bank robbery, postal theft, benefit fraud, immigration charges and CVB hearings, as well as supervision of law student externs from the University of Iowa, College of Law. Frequently handled preliminary and detention hearings, contested sentencings, jury trials and appeals in this position. Functioned as the district's point of contact and

	coordinator for computer crimes and child exploitation crimes (CHIP and Project Safe Childhood Coordinator). Occasionally handled matters as a Special Assistant United States Attorney for the Central District of Illinois.

b. The approximate percentage of your practice that has been in areas other than appearance before courts or other tribunals and a description of the nature of that practice.

Not applicable

c. The approximate percentage of your practice that involved litigation in court or other tribunals.

Approximately 90%, with an additional 10% as appellate practice.

d. The approximate percentage of your litigation that was: Administrative, Civil, and Criminal.

Types of cases	% of your time
(1) Administrative	5%
(2) Civil	25%
(3) Criminal	70%

e. The approximate number of cases or contested matters you tried (rather than settled) in the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel, and whether the matter was tried to a jury or directly to the court or other tribunal. If desired, you may also provide separate data for experience beyond the last 10 years.

I have been a judge for over eight years. In the three years preceding that, I would estimate that I tried 6-8 trials before a jury, all as sole counsel. Over the course of my legal career, I have probably tried close to 50 cases before a jury, almost all as sole counsel. If the number were also to include contested hearings such as preliminary hearings, detention hearings, suppression hearings and sentencings (which in federal court can be small trials) they would number in the hundreds.

f. The approximate number of appeals in which you participated within the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel. If desired, you may also provide separate data for experience beyond the last 10 years.

g.

(My answer covers the period back to 1999.)

Generally, when one leaves employment with the United States Department of Justice they are not allowed to take their work product with them absent a specific request and justification. Therefore, I do not have direct access to the majority of the materials I produced while employed with the United States Attorney's Office. I do have considerable appellate experience at the United States Court of Appeals for the Eighth Circuit. As an Assistant United States Attorney, I handled most of my own appellate work. A name search on the Eighth Circuit website shows me to be associated with 85 cases there. A paralegal at the U.S. Attorney's Office checked their records and reports that I wrote 40 appellate briefs and was named in 53 appeals. I do know that a number of these cases would be 2255 (post-conviction relief) actions that were handled by another attorney in the office. I also would have been co-author on some of the briefs. Therefore, precise numbers are difficult to provide. I argued at the Eighth Circuit on approximately a dozen occasions.

9. Describe your pro bono work over at least the past 10 years, including:

a. Approximate number of pro bono cases you've handled.

b. Average number of hours of pro bono service per year.

c. Types of pro bono cases.

I have been a District Court Judge or Assistant United States Attorney for the last ten years. As actual pro bono work was not an option, I have made contributions to support those efforts.

10. If you have ever held judicial office or served in a quasi-judicial position:

a. Describe the details, including the title of the position, the courts or other tribunals involved, the method of selection, the periods of service, and a description of the jurisdiction of each of court or tribunal.

Dates (From -- To)	Judicial title	County or District	Types of cases within your jurisdiction
August, 2012 – present	District Court Judge	7th Judicial District	General jurisdiction

b. List any cases in which your decision was reversed by a court or other reviewing entity. For each case, include a citation for your reversed opinion and the reviewing entity's or court's opinion and attach a copy of each opinion.

To date, there have been no decisions by a reviewing court that criticized my rulings. I have listed every case I was involved in that was reversed, including those in which the reversal was not related to my ruling.

The following are all Iowa Court of Appeals decisions, with the exception of the *Hardin* case:

State v. Williams, No. 3-683/12-2178, Filed July 24, 2013

State v. Burton, No. 3-835/12-2223, Filed October 23, 2013 (The reversal related primarily to a trial issue. I was not the trial judge.)

State v. Burton, No. 3-843/13-0398, Filed October 2, 2013

State v. Pike, No. 3-903/13-0051, Filed November 6, 2013

State v. Bunce, No. 14-0645, Filed February 25, 2015 (The reversal related to a sentencing issue. I was not the sentencing judge.)

State v. Howell, No. 14-1411, Filed July 22, 2015 (The reversal related to a sentencing issue. I was not the sentencing judge.)

State v. Perkins, No.15-0196, Filed December 9, 2015 (The reversal related to an issue during the plea. I was only the sentencing judge.)

State v. Howard, No. 16-0137, Filed January 11, 2017

State v Hardin, 885 N.W.2d 428 (Iowa 2016)(Unpublished Disposition). (As noted above, this was a reversal due to a change in the law regarding the imposition of life without parole sentences for juvenile offenders.)

State v. Richards, No. 18-0522, Filed March 6. 2019 (*reversed in part*)

State v. Wooten, No. 18-0023, Filed December 19, 2018 (*sentence affirmed in part, vacated in part, and remanded*)

State v. Talley, No. 18-2003, Filed May 13, 2020

They are all also cited in the North Western Reporter, but only as "Decisions Without Published Opinions" table citations. They are available online:

http://www.iowacourts.gov/About_the_Courts/Court_of_Appeals/Court_of_Appeals_Opinions/index.asp

Hardin can be found at the following link by searching the term "Romeo Hardin"

http://www.iowacourts.gov/About_the_Courts/Supreme_Court/Supreme_Court_Opinions/Opinions_Archive/

Copies will be provided.

c. List any case in which you wrote a significant opinion on federal or state constitutional issues. For each case, include a citation for your opinion and any reviewing entity's or court's opinion and attach a copy of each opinion.

I would not say that any of my rulings have involved what I would call a significant opinion on a federal or state constitutional issue. Obviously, many district court decisions touch on constitutional issues, e.g., search and seizure. One of my writing samples is a ruling on a motion to suppress.

11. If you have been subject to the reporting requirements of Court Rule 22.10:

a. State the number of times you have failed to file timely rule 22.10 reports.

None

b. State the number of matters, along with an explanation of the delay, that you have taken under advisement for longer than:

i. 120 days.

None

ii. 180 days.

None

iii. 240 days.

None

iv. One year.

None

12. **Describe at least three of the most significant legal matters in which you have participated as an attorney or presided over as a judge or other impartial decision maker. If they were litigated matters, give the citation if available. For each matter please state the following:**
    a. **Title of the case and venue,**
    b. **A brief summary of the substance of each matter,**
    c. **A succinct statement of what you believe to be the significance of it,**
    d. **The name of the party you represented, if applicable,**
    e. **The nature of your participation in the case,**
    f. **Dates of your involvement,**
    g. **The outcome of the case,**
    h. **Name(s) and address(es) [city, state] of co-counsel (if any),**
    i. **Name(s) of counsel for opposing parties in the case, and**
    j. **Name of the judge before whom you tried the case, if applicable.**

Significant legal matter #1:

United States v. James William Young, 613 F.3d 735, (8th Cir. 2010). Young was a Clinton High School band teacher charged with attempting to entice a minor to engage in sexual activity. The primary lasting significance of *Young* was that, in a case of first impression, the Eighth Circuit held that abandonment was not available as a defense in an attempt crime once the defendant has taken a substantial step toward completion of the offense. I represented the United States at trial and on appeal. This case played out from November, 2008, through the Eighth Circuit decision on July 19, 2010. Young's counsel was

Alfred E. Willett, Elderkin & Pirnie, PLC, 316 2nd St. SE, Suite 124, Cedar Rapids, IA 52401, 319-362-2137. The case was tried before The Honorable John A. Jarvey in the United States District Court for the Southern District of Iowa.

Significant legal matter #2:

United States v. Jayson Harris, Criminal No. 3:05-cr-563. Harris was a Davenport resident who created a bogus MSN website, then sent e-mails to MSN customers requesting that they visit the website and update their accounts by providing credit card numbers and other personal information. He obtained numerous credit card numbers through this scheme. The particular significance of the case was that this was one of the first computer phishing cases prosecuted in the United States. Microsoft had filed civil actions against a number of "John Doe" phishers in an attempt to secure their identity through the discovery process. Harris happened to be "John Doe #1" and live in Davenport. The case received considerable national and international press attention. I represented the United States throughout the investigation and prosecution of the case. As a result of handling this prosecution, I was invited to New Orleans to address Digital Phishnet, a national computer security conference sponsored by Microsoft. Harris's activity began in January, 2003. The case came to a conclusion with his sentencing in May, 2006. Harris was represented by Kevin Cmelik, then an Assistant Federal Defender. Kevin is now with the Iowa Attorney General's Office, 1305 E. Walnut St., Des Moines, IA, 50319, 515-281-5164. Harris was sentenced by The Honorable Harold D. Vietor in the United States District Court for the Southern District of Iowa.

Significant legal matter #3:

United States v. Otho Leonard Rater, No. 03-1449 (8th Cir. April 30, 2004) (unpublished). At the time, the Rater case was easily the most notorious child support case in Iowa history. At a bench trial I was able to convict Rater, a former mathematics professor, of 5 counts of willfully failing to pay child support. The case has received untold media attention over the years, and was possibly the most challenging of my career. I represented the United States throughout most of the investigation, at trial and on appeal. The case played out over many years, but the trial occurred in 2002 and the appeal culminated with the above decision. Rater was represented by Gerald "Jake" Feuerhelm, 2155 NE 51st Place, Suite B, Des Moines, IA 50313, 515-266-5552. The case was tried before The Honorable James E. Gritzner in the United States District Court for the Southern District of Iowa.

13. Describe how your non-litigation legal experience, if any, would enhance your ability to serve as a judge.

If appellate practice is to be considered non-litigation legal experience, as noted in 8(f) above, I have considerable appellate experience. Obviously, this is important for an appellate court position in terms of understanding the process, including the roles of advocate and judge.

14. If you have ever held public office or have you ever been a candidate for public office, describe the public office held or sought, the location of the public office, and the dates of service.

(The locations are noted in 6(a) above.)

Dates (From -- To)	Public office(s): Indicate "Held" or "Sought" and Location
September, 1994-October, 1995	Assistant County Attorney for Child Support Recovery (Clinton, Jackson and Cedar Counties
October, 1995-October, 1999	Assistant Polk County Attorney
October, 1999-December, 2000	Special Assistant United States Attorney/Assistant Iowa Attorney General
December, 2000-August, 2012	Assistant United States Attorney
August, 2012-present	District Court Judge

15. **If you are currently an officer, director, partner, sole proprietor, or otherwise engaged in the management of any business enterprise or nonprofit organization other than a law practice, provide the following information about your position(s) and title(s):**
    a. **Name of business / organization.**
    b. **Your title.**
    c. **Your duties.**
    d. **Dates of involvement.**

Dates (From -- To)	Organization Name	Nature of your involvement
2011-2012 2016-present	James Arthur Albert Foundation	Member of Board of Directors
1995-present	The Nature Conservancy	Member

16. **List all bar associations and legal- or judicial-related committees or groups of which you are or have been a member and give the titles and dates of any offices that you held in those groups.**

Professional associations to which you have belonged	Committees / Offices	Dates (From -- To)
Iowa State Bar Association		1994-present
The Missouri Bar		1989-present
Scott County Bar Association		2012-present
American Bar Association		1989-2000(?) 2015-2018
Dillon Inn of Court		2014(?)-present
Iowa Judges Association		2012-present
National Association of Assistant United States Attorneys	For several years functioned as the organization's delegate in the United States Attorney's Office for the Southern District of Iowa	2000-2012
Clinton County Bar Association		1994-1995
Polk County Bar Association		1995-1999

American Society of International Law		Early '90s
Bar Association of Metropolitan St. Louis		1991

Dates (From -- To)	Government commissions, task forces, etc. on which you served
2016 - 2018	Statewide Public Safety Assessment (PSA) Implementation Team
? – present	Seventh Judicial District Lunch & Learn Committee
? – present	Seventh Judicial District Family Law Informal Trial Pilot Program Task Force
?	Seventh Judicial District Supervised Visitation Committee (Chair)
?	Seventh Judicial District Post-conviction Relief Committee
?	Seventh Judicial District Law Clerk Work Distribution Committee
?	Regional Time Survey Review Focus Group
	Please note, many of the above committees had no formal start date or termination date.

17. **List all other professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed above, to which you have participated, since graduation from law school. Provide dates of membership or participation and indicate any office you held. "Participation" means consistent or repeated involvement in a given organization, membership, or regular attendance at events or meetings.**

    To the best of my recollection the answers to questions 15 and 16 cover all such organizations.

18. **If you have held judicial office, list at least three opinions that best reflect your approach to writing and deciding cases. For each case, include a brief explanation as to why you selected the opinion and a citation for your opinion and any reviewing entity's or court's opinion. If either opinion is not publicly available (i.e., available on Westlaw or a public website other than the court's electronic filing system), please attach a copy of the opinion.**

    State of Iowa v. Larry Dean Bell/Kendrick E. Sampson, Ruling on Defendants' Motion to Suppress (A ruling on a constitutional search and seizure issue.)

    Curry's Transportation Services, Inc. v. Mike Dotson, Eric Ryner, Justin Craig Shafer, and Ryner Transportation, Inc., Ruling on Plaintiff's Petition at Law (A bench trial ruling that involved complex business law issues.) *Curry's Transp. Servs., Inc. v. Dotson*, No. 13-1555, 2014 WL 7343243 (Iowa Ct. App. Dec. 24, 2014).

Matthew D. Hargrave v. Grain Processing Corporation and Kent Corporation, Ruling on Defendant's Motion for Summary Judgment (A summary judgement ruling on an employment law/contractual issue.) *Hargrave v. Grain Processing Corp.*, No. 14-1197, 2015 WL 1331706 (Iowa Ct. App. Mar. 25, 2015).

19. If you have not held judicial office or served in a quasi-judicial position, provide at least three writing samples (brief, article, book, etc.) that reflect your work.

In addition to the materials provided in response to question 18, I have attached additional writing samples from my time as an Assistant United States Attorney.

United States of America v. Greg Allen Johnson, Brief of Appellee

United States of America v. James Griffin, Brief of Appellee

United States of America v. Paul Warren Wells, Government's Resistance to Defendant's Motion to Suppress and Brief in Support of Government's Resistance to Defendant's Motion to Suppress.

OTHER INFORMATION

20. If any member of the State Judicial Nominating Commission is your spouse, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, father, mother, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister, state the Commissioner's name and his or her familial relationship with you.

Not applicable

21. If any member of the State Judicial Nominating Commission is a current law partner or business partner, state the Commissioner's name and describe his or her professional relationship with you.

Not applicable

22. List the titles, publishers, and dates of books, articles, blog posts, letters to the editor, editorial pieces, or other published material you have written or edited.

On Becoming a Lawyer, 96 Iowa L. Rev. 1511 (2011)
Deep White Cover (Crime Street Press, 2014, republished by Down & Out Books, May 2019)
Deep Green Cover (Down & Out Books, November 2019)

Deep Red Cover (Down & Out Books, September 2020)
Poisoned Waters (CreateSpace Independent Publishing Platform, 2017)
The Drug Lords (CreateSpace Independent Publishing Platform, 2017)

23. List all speeches, talks, or other public presentations that you have delivered for at least the last ten years, including the title of the presentation or a brief summary of the subject matter of the presentation, the group to whom the presentation was delivered, and the date of the presentation.

This is, of course, a difficult list to compile after more than thirty years as an attorney and judge. I have included what I can recall in narrative form as I thought that would be a more complete and useful answer to the question. I would not be able to provide exact dates for most of these presentations or a specific sponsor beyond what is indicated below.

I taught a course on Negotiations at Drake University Law School in the late '90s. I once gave a presentation on truancy law and the truancy program of the Polk County Attorney's Office (PCAO) at a meeting of the School Administrators of Iowa (1995 or 96). I often spoke to youthful offenders as part of the PCAO Youthful Offender Program. I spoke on behalf of the McCain presidential campaign at the 2008 Iowa Caucuses. I have delivered numerous continuing legal education (CLE) presentations, more than I can remember. They have included a presentation on the Federal Sentencing Guidelines at a Scott County Bar Association CLE (approximately 12 years ago?), a presentation to the staff of the United States Attorney's Office for the Southern District of Iowa on obtaining electronic/digital evidence, and a presentation to the Iowa Sex Crimes Investigators Association on the prosecution of Federal child enticement offenses (2012). I spoke at a symposium on the future of legal education entitled *Rethinking Legal Education* hosted by the *Iowa Law Review* on February 25 or 26, 2011. I have moderated a presentation on e-discovery issues at a Scott County Bar Association CLE (2012?). I have spoken at several one-hour Lunch and Learn CLEs sponsored by the judges of Iowa's Seventh Judicial District, and continue to do so, including as part of a recent panel on the subject of jury selection. I have also lectured on Iowa sentencing law at the Dillon Inn of Court (2013 or 2014), and recently delivered an updated version of this address at a CLE entitled *Views from the Bench* that was held in support of the HELP Regional Offices of Iowa Legal Aid. I also delivered a lecture on domestic abuse protective orders several years ago at a CLE that was in support of HELP. I was on a panel that addressed the Dillon Inn of Court on the topic *Managing Difficult Criminal Clients* held in Davenport, Iowa, on 3/16/16. I participated in a judicial panel discussion as part of a CLE sponsored by the National Business Institute (NBI) in December of 2014. I have more recently participated in two other judicial panels at NBI sponsored CLEs. Those are *What Civil Court Judges Want You To Know*, held in Davenport, Iowa, on 11/4/16, and *What Family Court Judges Want You To Know*, also held in

Davenport on 10/23/15. On 12/18/15 I was on a panel that addressed *Staying on the Right Side of the New Rules* at the Scott County Bar Association's 2015 Last Chance Seminar. This was in Davenport, Iowa. I was recently on a large panel that addressed racial disparity in the criminal justice system. This was at St. Ambrose University in Davenport, Iowa, on 4/11/17. I am unsure of the exact sponsor(s) for this event but do recall that the NAACP's state director was the moderator. Over the years I have also lectured to innumerable law enforcement agencies on matters such as search and seizure, criminal investigation and prosecution, etc. Finally, I recently addressed my daughter's fifth grade class on the Bill of Rights (May 15, 2018.)

I try to honor as many requests to speak as I can. In most instances this is as a member of a panel of judges. I have also given several interviews to the media related to the work of the court or to my work as an author. Those I can recall are listed below:

Stolen guns in Iowa often led to other crimes, The Cedar Rapids Gazette, March 28, 2014, available at the following link: http://thegazette.com/2013/03/17/stolen-guns-in-iowa-often-lead-to-other-crimes/

Interview on KHSU Radio regarding my novel, *Deep White Cover*, on November 20, 2014. This was previously available at the following link, but it appears that the recording is no longer accessible: http://khsu.streamguys.net/TNT_Joel%20Barrows.mp3

Crime thriller is judge's debut as author, Quad City Times, July 19, 2014, available at the following link: http://qctimes.com/entertainment/crime-thriller-is-judge-s-debut-as-author/article_87fbb8a0-f45b-5c55-9cad-6f067527eebb.html

The Dana Pretzer Show, June 24, 2014, to discuss my book, *Deep White Cover*, available at the following link: http://scaredmonkeysradio.com/2014/06/24/the-dana-pretzer-show-tuesday-june-24-2014-with-special-guests-joel-barrows-and-keith-thibodeaux/

(I am not sure if this is still available at the above link.) It is available at:

http://www.joelwbarrows.com/uploads/2/9/4/7/29477279/danapretzer-joelwbarrows-062414.mp3

Georgetown Alumni Online, Alumni Author Spotlight: Summer Thrillers, available at the following link: http://alumni.georgetown.edu/alumni-stories/alumni-authors-summer-thrillers

Interview on WVIL Radio regarding my novels on June 17, 2017, available at the following link: http://wvik.org/post/scribble-joel-barrows#stream/0

Scott County Drug Court Celebrates New Graduates, Quad City Times, May 5, 2017, available at the following link: http://qctimes.com/news/local/scott-county-drug-court-celebrates-new-graduates/article_2a4a5932-9eed-560b-ac0f-1fc8444871ba.html

http://www.thebigthrill.org/2019/12/december-2-8-do-day-jobs-get-in-the-way-of-writing-thrillers/

http://www.thebigthrill.org/2019/12/deep-green-cover-by-joel-w-barrows/

https://www.thebigthrill.org/2020/09/deep-red-cover-by-joel-w-barrows/

I was also interviewed for an article on Drug Court that was published in The Catholic Messenger in June of 2018.

Finally, I recently did three radio interviews related to the release of my novel, *Deep Red Cover*. Those interviews were all in January or April of 2021 on stations WHO, WMT and KSCJ. They can be found on my website: https://www.joelwbarrows.com/

24. List all the social media applications (e.g., Facebook, Twitter, Snapchat, Instagram, LinkedIn) that you have used in the past five years and your account name or other identifying information (excluding passwords) for each account.

Social media application name	Account name or other identifying information
Facebook	jwbarrows@aol.com
LinkedIn	Jwbarrows@aol.com
Twitter	@jwbarrows
Goodreads	Jwbarrows@aol.com
reddit	joelwbarrows
Amazon author page	Joel W. Barrows
Indie Writers Support	Jwbarrows@aol.com
joelwbarrows.com	

25. List any honors, prizes, awards or other forms of recognition which you have received (including any indication of academic distinction in college or law school) other than those mentioned in answers to the foregoing questions.

Name/Title of Honor, Prizes, Awards	Awarded by:	Month/Yr Received
American Jurisprudence Award in Wills and Trusts		1987 or 1988
Dean's List, Drake Law School	Drake Law School	

Graduated with distinction from my LL.M. program at Georgetown (approximately 25% of the LL.M. class graduated with distinction).	Georgetown University Law Center	May, 1993
Two top A's at Georgetown University Law Center, National Security Law and International Organizations.		1992 or 1993
Certificate of Recognition from the Iowa Department of Public Safety for my work with the Internet Crimes Against Children Task Force	Iowa Department of Public Safety	2012
Various leave and bonus awards from the United States Attorney's Office	United States Attorney's Office, Southern District of Iowa	numerous
Finalist for vacancy on the Iowa Supreme Court	State Judicial Nominating Commission	January, 2020

26. Provide the names and telephone numbers of at least five people who would be able to comment on your qualifications to serve in judicial office. Briefly state the nature of your relationship with each person.

The Honorable Thomas D. Waterman, Justice, Iowa Supreme Court
Scott County Courthouse
400 W. Fourth St.
Davenport, Iowa 52801
563-326-8725

The Honorable Christopher McDonald, Justice, Iowa Supreme Court
Iowa Judicial Branch Building
1111 East Court Avenue
Des Moines, Iowa 50319
515-348-4974

The Honorable John A. Jarvey, Chief United States District Court Judge,
Southern District of Iowa
United States Courthouse
123 East Walnut Street, Room 221
Des Moines, Iowa 50309
515-284-6279

The Honorable Marlita A. Greve, Chief Judge, Seventh Judicial District
Scott County Courthouse
400 W. Fourth St.
Davenport, Iowa 52801
(Contact District Court Administrator Kathy Gaylord at 563-328-4139)

The Honorable Thomas J. Shields, Senior United States Magistrate Judge,
(Former Chief United States Magistrate Judge)
United States Courthouse
131 E. 4th St.
Davenport, IA 52801
563-884-7601

Professor James A. Albert
Drake University Law School
Cartwright Hall
2507 University Avenue
Des Moines, Iowa 50311
515-271-2061

William C. Purdy, Chief, Civil Division
United States Attorney's Office
U.S. Courthouse Annex
110 East Court Avenue, Suite 286
Des Moines, Iowa 50309-2053
515-473-9300

I would consider all of these individuals to be professional colleagues and friends.

27. Explain why you are seeking this judicial position.

I have enjoyed serving as a district court judge. I would like to take that experience to the Iowa Court of Appeals, both for the fresh challenge it would present and for the opportunity to have an impact on a statewide basis. I have always enjoyed the more academic aspects of the profession, the research and writing. That is reflected in my hobby as a novelist. I believe that I could craft opinions in a useful, clear and concise manner, and do so with maximum efficiency.

I believe that I have demonstrated a patient, thoughtful judicial temperament while on the bench, a strong work ethic, and a firm grasp of the issues. I make certain that litigants have been heard, and that they feel they have been heard. My broad experience as a litigator, appellate advocate and judge leave me thoroughly equipped to meet this challenge. Being appointed to the Court of Appeals would be a great honor. As a child support recovery attorney, state prosecutor, federal prosecutor and judge, I have spent my career working to improve the lives of the citizens of Iowa. I would be honored to continue that work as a judge on the Iowa Court of Appeals.

28. Explain how your appointment would enhance the court.

I believe that I could offer a useful perspective if given the opportunity to serve on our Court of Appeals. I have litigated cases in state and federal court, argued dozens of appeals before the United States Court of Appeals for the Eighth Circuit and presided over a wide variety of cases as a trial judge. I have civil and criminal experience, both as a litigator and as a judge. As an Assistant United States Attorney, I handled cases of immense complexity, including: tax fraud, bank fraud, mail fraud, wire fraud, mortgage fraud, and, environmental crimes. These cases often involved dissecting and understanding business and banking practices, including analysis of accounting records. I was also both the Computer Hacking and Intellectual Property Coordinator and Project Safe Childhood Coordinator for the Southern District of Iowa. This afforded me the opportunity to become trained in, and experienced with, cutting-edge issues of electronic evidence and computer forensics, including the complicated topic of privacy in the age of the internet. I have maintained an interest in this area and believe that my knowledge of the subject matter could be useful to the Court of Appeals as it continues to grapple with those issues. Just a few examples of what they might confront in these areas would be the following: what metadata is covered by the discovery process; what tracking data will require a warrant; and, what is the reasonable expectation of privacy in the wide variety of digital information shared with, or otherwise provided to, app developers or social media platforms. I have overseen the Seventh Judicial District's Drug Court program, completing my rotation in January of this year. This was a profound experience that gave me insight into the challenges faced by those in our criminal justice system who struggle to break the grip of addiction as they attempt to rehabilitate their lives. I believe that specialty courts are a cost-effective and humane way to deal with many non-violent offenders, especially those who suffer from drug addiction and mental illness. The things I have learned in this role inform much of what I do as a judge. I believe that experience as a district court judge is essential to most effectively serve on the appellate court that reviews the actions of the district court. And finally, I believe that my life experience and personality would equip me to contribute to the collegial atmosphere on the Court of Appeals.

29. Provide any additional information that you believe the Commission or the Governor should know in considering your application.

In addition to my legal experience, I have considerable business experience helping to build a family company into a sizeable corporation. I was employed by the Compliment Division of NEOAX (formerly Barrows Enterprises) at their Camanche, Iowa location. While there, I worked in the accounting and purchasing departments, did various types of sales and production analysis, and functioned as a plant foreman, quality control inspector and warranty officer. This was from the mid-'70s through 1986. During my high school and college years I also worked for the Clinton Park Board, a lumberyard and at a fence and pool construction company.

I am proud to be a small-town Iowan raised by small-town Iowans. I grew up in Folletts and Camanche, both in Clinton County. My parents were children of the Depression who worked hard and eventually built a successful family business. I am the first in my family to go to college, conscious of the sacrifices of those who made that possible. All of this informs my character and fuels my work ethic. I hope to take what I have learned to the Iowa Court of Appeals.

I hereby certify all the information in this joint judicial application is true and correct to the best of my knowledge.

Signed: Joel William Barrows Date: May 6, 2021

Printed name: Joel William Barrows

IN THE COURT OF APPEALS OF IOWA

No. 14-1411
Filed July 22, 2015

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TYLER HOWELL,
Defendant-Appellant.

Appeal from the Iowa District Court for Muscatine County, Joel W. Barrows (plea) and Paul L. Macek (sentencing), Judges.

Tyler Howell appeals the sentence imposed upon his guilty plea. **SENTENCE VACATED; REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Katie Fiala, Assistant Attorney General, and Alan Ostergren, County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Mullins, JJ.

POTTERFIELD, J.

Tyler Howell appeals from the sentence imposed upon his plea of guilty to the charge of lascivious acts with a child.[1] Howell contends the district court erred in sentencing him because it considered improper factors, employed a fixed sentencing policy, failed to exercise its discretion because it was unaware that deferral of judgment was an available option, and did not properly consider all pertinent factors in sentencing the defendant who was a juvenile at the time the offense was committed. Because the memorandum of plea agreement erroneously states a deferred judgment was not an available sentencing option, and nothing in this record indicates the sentencing court was aware of that option, we vacate the sentence and remand for resentencing.

I. Scope and Standard of Review.

We review a sentence in a criminal case for the correction of errors at law. *State v. Kramer*, 773 N.W.2d 897, 898 (Iowa Ct. App. 2009). "A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure, such as trial court consideration of impermissible factors." *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995). Where a court has discretion, it must exercise its discretion, and failure to do so requires vacation of the sentence and remand for resentencing. *State v. Ayers*, 590 N.W.2d 25, 27 (Iowa 1999).

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[1] On July 3, 2013, Howell was charged by trial information with three counts of second-degree sexual abuse, a class "B" felony, in violation of Iowa Code section 709.3(2) (2013). On June 13, 2014, Howell pled guilty to one count of lascivious acts with a child, in violation of section 709.8(3). That provision was renumbered as section 709.8(1)(d) in a chapter containing "nonsubstantive code corrections." *See* 2013 Iowa Acts ch. 30, § 202.

II. Pertinent Facts and Discussion.

As noted above, Howell makes several allegations of error on appeal. Because we find one issue dispositive—the availability of a deferred judgment as a sentencing option—we recite facts pertinent to that issue.

On June 13, 2014, a memorandum of plea agreement was filed with the district court which states in part: "The defendant will plead guilty to an amended and substituted Trial Information which charges one count of Lascivious Acts with a Child in violation of Iowa Code § 709.8(3)—class 'D' felony."[2] Further, the plea was "[o]pen" as to the sentencing disposition. The memorandum of plea agreement also provides: "Defendant faces a maximum sentence of incarceration for a term not to exceed five years and a fine of $7500. Defendant is *not eligible for a deferred judgment* as the victim was under the age of twelve. *See* Iowa Code § 907.3(1)(a)(13)."[3] (Emphasis added.)

During the June 13, 2014 guilty plea proceeding, Howell's attorney explained that the defendant had been evaluated and it had been determined he had an I.Q. of about 70 and read at a fourth-grade level. Howell admitted that between November 2012 and March 2013, he solicited M.C. to engage in a sex act by requesting to touch M.C.'s genital area for purposes of sexual gratification.

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[2] An amended trial information was filed that same date accusing Howell of lascivious acts with a child, citing section 709.8(1)(d). *See* footnote 1.

[3] 2013 Iowa Acts chapter 90, section 214 amended section 907.3, moving what was previously paragraph (a) to subparagraph (1)(a)(13), which as amended reads:

> (a) With the consent of the defendant, the court may defer judgement and a place the defendant on probation upon conditions as it may require. . . . However, the court shall not defer judgment if any of the following is true:
>
> . . . .
>
> (13) The offense is a violation of section 709.8 and the child is twelve years of age or under.

2013 Iowa Acts ch. 90, § 214.

M.C. was eight years old, and Howell was seventeen years old at the time of the offense.

The prosecutor stated at the plea hearing,

> There is a sentencing provision that would say, if the victim was under the age of 12, that the defendant would not be eligible for a deferred judgment, which is set forth in the plea agreement, and the information in my file would show that M.C. was eight years old during the offensive conduct.
>
> . . . .
>
> As the Court had indicated, the defendant's plea is to an amended trial information. The defendant faces a maximum prison sentence not to exceed five years and a fine of $7500. As I indicated, he's not eligible for a deferred judgment. Other than that, it's an open plea, and so the defendant could receive a sentence of incarceration or he could receive a suspended sentence of incarceration.
>
> The Court would also be free to select some intermediate criminal sanctions, such as placing the defendant at the Residential Correctional Facility if he was otherwise eligible. And then there are the collateral consequences that were discussed including the special sentence of supervised release, sex offender registry implications, and residency, employment and activity restrictions as well.
>
> THE COURT: Okay. I don't know if you mentioned it at this time, but the ineligibility for a deferred [is] because of the age of the victim, correct?
>
> [PROSECUTOR]: Correct.
>
> THE COURT: Do you agree with that, [defense attorney] Mr. Morrison?
>
> MR. MORRISON: I do, Your Honor . . . .

The court noted, "I know a deferred is not an option here." A June 13, 2014 court calendar entry indicates the court "accepts and enters Defendant's plea of guilty." The court ordered a presentence investigation (PSI) report be completed and requested a search of the deferred docket.

On July 22, 2014, the PSI report was filed. It states, "Deferred Eligibility: To be determined." The report did not further indicate whether a deferred judgment was an available sentencing option. In addition, the report mistakenly

stated the offense for which Howell was convicted was a class "C" felony, when Howell was convicted a class "D" felony. *See* Iowa Code § 709.8 (2013)[4] ("Any person who violates a provision of this section involving an act included in subsection 1 or 2 shall, upon conviction, be guilty of a class 'C' felony. Any person who violates a provision of this section involving subsection 3 or 4 shall, upon conviction, be guilty of a class 'D' felony."). The PSI recommended a prison sentence, without giving reasons for that recommendation.

The sentencing hearing was held on July 25, 2014. The prosecutor and Howell's attorney both commented on the misidentification of the type of felony noted in the PSI report. The prosecutor characterized it as a typographical error. Howell's attorney stated,

> that [the erroneous felony class] may well have affected the recommendation of this case because apparently the PSI preparer—I don't know if it was a typographical error or if he just didn't look into it deeply enough to know it was a class "D" solicitation, rather than a class "C."

When asked if the State had a sentencing recommendation, the prosecutor read a letter submitted to the court from the child victim's parents, which includes the statement, "She rarely sleeps in her own room because she was told if she said anything, he would come back and get her." The family requested that a prison term be imposed.

The defense presented expert testimony from two psychologists, Drs. Kirk Witherspoon and Luis Rosell, the defendant's grandfather, and a counselor. The defense requested that the court grant a term of probation.

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[4] The PSI references section 709.8(2), a class "C" felony, which was renumbered in 2013 Iowa Acts chapter 30, section 202 as section 709.8(1)(b).

The district court noted it had reviewed the PSI report (and "understand[ing] at all times it was a D felony"), the victim impact letter, the minutes of testimony, Dr. Rosell's report and testimony, and Dr. Witherspoon's testimony. The court entered judgment imposing a five-year prison term. No mention was made by the court or either party of the availability of a deferred judgment as a sentencing option.

As noted above, memorandum of plea agreement filed here and before the sentencing court states the defendant was not eligible for a deferred judgment, citing Iowa Code section 907.3(1)(a)(13). Section 907.3(1)(a)(13) removes the option of a deferred judgment if "the offense is a violation of section 709.8 and the child is twelve years of age or under." However, Iowa Code section 901.5(14)—which became effective on July 1, 2013—allows the court to defer judgment and place the defendant on probation if the defendant was under eighteen at the time of the crime. *See* 2013 Iowa Acts ch. 42, § 14 (adding new subsection: "14. Notwithstanding any provision in section 907.3 or any other provision of law prescribing a mandatory minimum sentence for the offense, if the defendant . . . is guilty of a public offense other than a class 'A' felony, and was under the age of eighteen at the time the offense was committed, the court may suspend the sentence in whole or in part, including any mandatory minimum sentence, or with the consent of the defendant, defer judgment and sentence, and place the defendant on probation upon such conditions as the court may require"). Howell was sentenced on July 25, 2014, more than a year after the July 1, 2013 effective date of section 901.5(14).

The record in this case provides no indication the district court was aware of new subsection 901.5(14). Because the parties were in error that a deferred judgment was not an available option, and the memorandum of plea agreement clearly states that defendant is not eligible for deferred, the court did not exercise the discretion it possessed and we must vacate the sentence and remand for resentencing.[5] *See Ayers*, 590 N.W.2d at 27 ("When a sentencing court has discretion, it must exercise that discretion. Failure to exercise that discretion calls for a vacation of the sentence and a remand for resentencing." (internal citation omitted)).

SENTENCE VACATED; REMANDED FOR RESENTENCING.

[5] We observe that the sentencing court stated, "For . . . the fact that this little girl's parents will be able to go home and tell her that she is being protected to the extent possible, prison is the appropriate result of your actions." Such a consideration has been determined to be improper. *See State v. Laffey*, 600 N.W.2d 57, 62 (Iowa 1999) (finding it impermissible to consider what a child will think of a sentence); *see also State v. Pickering*, No. 14-0701, 2014 WL 5862147, at *1 (Iowa Ct. App. Nov. 1, 2014) (finding court's statements—"I'm of a mind to send her to prison right now, so that you can tell your daughter that's precisely what happened. . . . I think you can tell your daughter then in two days this lady is going to prison."—showed consideration of an impermissible factor).

IN THE COURT OF APPEALS OF IOWA

No. 15-0196
Filed December 9, 2015

STATE OF IOWA,
Plaintiff-Appellee,

vs.

HARRY JAY PERKINS JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Henry W. Latham II (plea) and Joel W. Barrows (sentencing), Judges.

A defendant appeals his conviction and sentence, based upon a guilty plea, alleging counsel was ineffective in allowing him to plead guilty without a factual basis. **REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.**

Mark C. Smith, State Appellate Defender, and Maria L. Ruhtenberg, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Kevin Cmelik, Assistant Attorney General, for appellee.

Considered by Doyle, P.J., and Mullins and Bower, JJ.

MULLINS, Judge.

Harry Perkins Jr. appeals his conviction and sentence following his guilty plea to domestic abuse assault, third offense, in violation of Iowa Code section 708.2A(4) (2013), a class "D" felony. Perkins asserts his trial counsel was ineffective in allowing him to plead guilty to domestic abuse assault without a factual basis for the crime.

I. Background Facts and Proceedings

On January 24, 2014, Perkins assaulted his on-again/off-again girlfriend, Camilla.[1] Camilla told police she and Perkins were drinking alcohol and got into a verbal argument when Perkins pushed her, kicked her, and stomped on her hand causing it to break. Camilla told police she and Perkins were living together at the time of the assault. Police arrested Perkins on March 24, 2014.

On April 11, 2014, the State filed a trial information charging Perkins with domestic abuse assault, third offense, in violation of Iowa Code section 708.2A(4), a class "D" felony, and willful injury resulting in serious injury, in violation of Iowa Code section 708.4(1), a class "C" felony. On September 5, 2014, Perkins entered into a written plea agreement, agreeing to plead guilty to domestic abuse assault in exchange for a dismissal of the willful-injury charge and the State's agreement not to pursue an habitual offender enhancement. That same day, Perkins entered a plea of guilty on the record and the court accepted it. During the plea colloquy, Perkins denied living with Camilla within the previous year. The State did not challenge Perkins's denial.

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[1] Camilla and Perkins do not have any children together and have never been married.

On September 25, 2014, Perkins filed a pro se motion in arrest of judgment. On October 2, 2014, Perkins's counsel filed another motion in arrest of judgment and a motion to withdraw as counsel. On October 9, 2014, Perkins withdrew his motions in arrest of judgment. On November 12, 2014, Perkins reasserted his motion in arrest of judgment on the record, again claiming that he had not lived with Camilla in over a year. Perkins's counsel then refiled his motion to withdraw. The following day, the court granted counsel's motion to withdraw, appointed new counsel to represent Perkins, and set a hearing on the motion in arrest of judgment. On December 31, 2014, Perkins again withdrew his motion in arrest of judgment, and the court proceeded to sentencing, imposing a sentence of an indeterminate term not to exceed five years, with a one-year mandatory minimum. Perkins appeals.

II. Standard of Review

In order to challenge a guilty plea on appeal, a defendant must file a motion in arrest of judgment.[2] *State v. Bearse*, 748 N.W.2d 211, 218 (Iowa 2008); *see also* Iowa R. Crim. P. 2.24(3)(a). However, when a defendant raises a claim that counsel was ineffective in allowing him to plead guilty to a charge that lacked a factual basis, he may challenge the guilty plea on appeal. *State v. Finney*, 834 N.W.2d 46, 49 (Iowa 2013). We review claims of ineffective assistance of counsel de novo because the claims implicate the defendant's Sixth Amendment right to counsel. *State v. Thorndike*, 860 N.W.2d 316, 319 (Iowa 2015). An ineffective-assistance-of-counsel claim may be raised and

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[2] Perkins filed two motions in arrest of judgment but later withdrew both of them.

decided on direct appeal when the record is adequate to address the claim. Iowa Code § 814.7(2), .7(3). To succeed on a claim of ineffective assistance of counsel, the defendant must show by a preponderance of the evidence: "(1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice." *Thorndike*, 860 N.W.2d at 320 (quoting *State v. Adams*, 810 N.W.2d 365, 372 (Iowa 2012)); *accord. Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Where a factual basis for a charge does not exist, and trial counsel allows the defendant to plead guilty anyway, counsel has failed to perform an essential duty. Prejudice in such a case is inherent." *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999) (citation omitted); *see also State v. Ortiz*, 789 N.W.2d 761, 764–65 (Iowa 2010).

III. Analysis

Perkins contends his attorney was ineffective in allowing him to plead guilty to domestic abuse assault without a factual basis. We find the record adequate to address this claim. *See State v. Utter*, 803 N.W.2d 647, 651 (Iowa 2011).

Iowa Rule of Criminal Procedure 2.8(2)(b) requires a district court to find a factual basis supporting the guilty plea before accepting it. A factual basis differs from the evidence required at a trial to prove a defendant's guilt beyond a reasonable doubt. *Finney*, 834 N.W.2d at 62 ("Our cases do not require that the district court have before it evidence that the crime was committed beyond a reasonable doubt, but only that there be a factual basis to support the charge."). Establishing a factual basis requires the defendant "to acknowledge facts that are consistent with the elements of the crime." *Rhoades v. State*, 848 N.W.2d 22, 30

(Iowa 2014). When a defendant challenges the factual basis to support a guilty plea, our court examines the entire record before the district court at the guilty-plea hearing. *Finney*, 834 N.W.2d at 62. Generally, this includes "any statements made by the defendant, facts related by the prosecutor, the minutes of testimony, and the presentence report." *Schminkey*, 597 N.W.2d at 788.

Perkins entered a plea of guilty to domestic abuse assault, third offense, in violation of Iowa Code section 708.2A(4). Section 708.2A(1) provides "domestic abuse assault" means an assault as defined in section 708.1, which is domestic abuse as defined in section 236.2, subsection 2, paragraph 'a', 'b', 'c', or 'd'."[3] Section 708.2A does not include paragraph (e) of section 236.2(2), which provides an assault is "domestic abuse" if it is "between persons who are in an intimate relationship or have been in an intimate relationship and have had contact within the past year of the assault." At the plea proceeding, Perkins specifically denied living with Camilla both at the time of the assault and in the year leading up to the assault. *See* Iowa Code § 236.2(2)(a), (d). He had never been married to Camilla and did not have any children with her. *See id.*

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[3] Domestic abuse is defined in section 236.2(2) as

> [C]ommitting assault as defined in section 708.1 under any of the following circumstances:
>
> a. The assault is between family or household members who resided together at the time of the assault.
>
> b. The assault is between separated spouses or persons divorced from each other and not residing together at the time of the assault.
>
> c. The assault is between persons who are parents of the same minor child, regardless of whether they have been married or have lived together at any time.
>
> d. The assault is between persons who have been family or household members residing together within the past year and are not residing together at the time of the assault.

§ 236.2(2)(b), (c). Perkins admitted that he had been in an intimate relationship with Camilla. *See id.* § 236.2(2)(e). At the sentencing hearing, the State conceded on the record that Perkins's motion in arrest of judgment was a valid challenge to the plea proceeding. The State acknowledged that section 708.2A(1) did not extend to paragraph (e) of section 236.2(2). The record shows "that all parties understand that there is a potential problem with the factual basis that [Perkins] gave," but all also assumed that withdrawal of the motion in arrest of judgment would constitute a waiver of any future postconviction challenge to the plea proceeding. The State also asserted that a jury could find the two were cohabiting based upon Camilla's statements to police contained within the minutes of testimony that she and Perkins lived together at the time of the assault.

The State's argument is a misapplication of the principles reviewed in *Finney*. The lesson from *Finney* is that a guilty-plea colloquy that results in minor omissions of facts may be supplemented by other portions of the record in the district court, including the minutes of testimony. *See* 834 N.W.2d at 62. There is no suggestion in *Finney* that a plea-taking court should look to other portions of the record to determine whether the defendant's denial of an element of an offense would be rejected by a jury. Our law will not permit a court to accept a guilty plea when a defendant affirmatively maintains a denial of facts necessary to support an element of the crime.[4] *See Rhoades*, 848 N.W.2d at 30. "Nothing

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[4] The State asks us to find Perkins's plea constituted an *Alford* plea. At the sentencing hearing, Perkins admitted he could be convicted of domestic abuse assault and asked the court to consider his plea an *Alford* plea; a request the court denied. We agree with

in [the *Finney*] opinion . . . should be construed as an invitation to district courts to short circuit rule 2.8(2)(b) when taking a guilty plea." 848 N.W.2d at 62.

When a defendant specifically denies an element of the offense charged, as Perkins did here, "it is error for the court to find that a factual basis exists when the defendant actively contests a fact constituting an element of the offense in the absence of circumstances warranting the conclusion that the defendant's protestations are 'unworthy of belief.'" *State v. Elphic*, No. 14-0600, 2015 WL 408092, at *4 (Iowa Ct. App. Jan. 28, 2015) (quoting *United States v. Culbertson*, 670 F.3d 183, 190–91 (2d Cir. 2012)). We conclude that a factual basis to support a guilty plea is so fundamental that it cannot be waived. *See id.*; *see also United States v. Adams*, 448 F.3d 492, 502 (2d Cir. 2006) ("A lack of a factual basis for a plea is a substantial defect calling into question the validity of the plea. 'Such defects are not technical, but are so fundamental as to cast serious doubt on the voluntariness of the plea,' and require reversal and remand so that the defendant may plead anew or stand trial." (quoting *Godwin v. United States*, 687 F.2d 585, 591 (2d Cir. 1982) (citations omitted))). Therefore, we reverse and remand Perkins's conviction and sentence for domestic abuse assault, third offense, for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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the district court that Perkins entered a plea of guilty, not an *Alford* plea, and decline to consider his plea in the context of an *Alford* plea on appeal.

IN THE COURT OF APPEALS OF IOWA

No. 3-903 / 13-0051
Filed November 6, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SAUNDERS E. PIKE,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Marlita A. Greve (plea) and Joel W. Barrows (sentencing), Judges.

A defendant appeals his forgery conviction and sentence. **CONVICTION AFFIRMED, SENTENCE VACATED IN PART AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Michael J. Walton, County Attorney, Joseph Grubisich and Joel Barrows, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

TABOR, J.

The State charged Saunders Pike with theft in the fourth degree and forgery of a financial instrument. In return for Pike's guilty plea to forgery, the State agreed to dismiss the theft charge. Then the plea agreement took an unusual turn. If Pike deposited $685 in restitution into his attorney's client trust account by the date of sentencing, the State agreed not to pursue the habitual offender enhancement. If Pike did not make the deposit, he agreed to stipulate to his habitual offender status. Ultimately, Pike was unable to come up with the money and received an indeterminate fifteen-year sentence. Pike now appeals, alleging no factual basis for his guilty plea and constitutionally deficient representation in negotiating the plea agreement. He also contests the imposition and suspension of a fine on his habitual offender sentence.

Because the plea record provides a factual basis for forgery, we affirm Pike's conviction. As for his Sixth Amendment claim, we find the record inadequate to gauge the effectiveness of counsel's performance and preserve the issue for possible postconviction proceedings. We vacate the portion of his sentence imposing the fine and remand for entry of a revised sentencing order.

I. Background Facts and Proceedings

According to the minutes of testimony, Pike worked for KJS Janitorial. On April 3, 2012, he was cleaning the offices of Diotte Chiropractic Center in Davenport when he found checks belonging to the business. Chiropractor Ron Diotte was away on vacation in early April. When he returned to his office he noticed four checks were missing from his business accounts with Blue Grass

Savings Bank. In checking with his bank, Dr. Diotte learned that so far only one of the checks had been cashed. Dr. Diotte told the police the amount of that check was approximately $300.

Ken Anderson, an employee of Sub Express gas station, recalled Pike coming into the station on a recent Sunday and asking him to cash a "pay check" from a doctor's office. Pike told Anderson he needed the money and all the banks were closed. Anderson said he checked with the owner of Sub Express and received approval to cash the check for Pike. On Monday Pike returned to the gas station and told Anderson the doctor's office had been broken into and the doctor was stopping payment on all the checks. Pike promised to repay Sub Express. Anderson submitted a restitution claim in the amount of $385 for the check cashed by Pike.

In response to Dr. Diotte's complaint, Davenport police officers interviewed Pike on April 13, 2012. Detective Brandon Noonan read Pike his *Miranda* warnings, and Pike signed a waiver form, agreeing to speak with the officer. Pike admitted stealing several checks and writing his name on them. The detective compared Pike's signature from the *Miranda* form and from the copy of the check provided by Dr. Diotte and "noticed the signatures were very similar in nature."

The Scott County Attorney filed a trial information charging Pike with theft in the fourth degree, a violation of Iowa Code sections 714.1(1), 714.1(6), and 714.2(4) (2011), and forgery of a financial instrument, a violation of Iowa Code section 715A.2(1)(b) or (c) and 715A.2(2)(a)(3). The trial information also

alleged Pike was an habitual offender. Pike reached a plea agreement with the State and entered a plea of guilty to forgery on October 12, 2012. The court continued his sentencing hearing from November 29 to December 28, 2012. Pike stipulated to prior offenses qualifying him as an habitual offender. The court sentenced Pike to an indeterminate term of fifteen years with a mandatory minimum of three years under Iowa Code section 902.8. The court also fined Pike $750 but suspended his obligation to pay that fine. Pike challenges his plea and sentence.

II. Standards of Review

We review the guilty plea and sentencing issues for errors at law. *State v. Meron*, 675 N.W.2d 537, 540 (Iowa 2004); *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001). But Pike's claim of ineffective assistance of counsel calls for de novo review. *See State v. Brothern*, 832 N.W.2d 187, 192 (Iowa 2013).

III. Analysis

A. Did the Plea Record Show a Factual Basis for Forgery?

1. Preservation of Error

We first address error preservation. Filing a motion in arrest of judgment is essential to preserving a direct appellate challenge to one's guilty plea. Iowa R. Crim. P. 2.24(3)(a). But the failure to file such motion will not prohibit a defendant from alleging defects in the guilty plea on appeal if the district court did not comply with Iowa Rule of Criminal Procedure 2.8(2)(d).[1] *Meron*, 675 N.W.2d at 540.

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[1] Iowa Rule of Criminal Procedure 2.8(2)(d) states:

Here, the district court told Pike he had the right to file a motion in arrest of judgment to challenge any mistake in the plea and informed him of the deadline for doing so. But when articulating the consequences, the court strayed from the language of rule 2.8(2)(d). The court said: "If you fail to file that motion in that time frame, then you can lose your right to file your plea of guilty later to the Iowa Supreme Court." Pike contends the right to "file a plea" does not inform a lay person that he has the right to challenge the plea on appeal. The State argues the court substantially complied with rule 2.8(2)(d). *See State v. Straw*, 709 N.W.2d 128, 132 (Iowa 2006).

While the district court does not have to quote the arrest-of-judgment rule verbatim, it must ensure the defendant understands the necessity of filing the motion and the appeal consequences of not doing so. In *Straw*, the court "commendably" used plain English to explain a motion in arrest of judgment. *Id.* Here, the district court failed to use the word "appeal" and may have left Pike with a misimpression of the consequences of not filing a motion in arrest of judgment. We conclude the court did not substantially comply with rule 2.8(2)(d), and therefore, Pike is not precluded from directly challenging his plea on appeal.

2. Merits

Challenging pleas of guilty. The court shall inform the defendant that any challenges to a plea of guilty based on alleged defects in the plea proceedings must be raised in a motion in arrest of judgment and that failure to so raise such challenges shall preclude the right to assert them on appeal.

The district court may not accept a guilty plea without first determining that the plea has a factual basis. Iowa R. Crim. P. 2.8(2)(b). "A factual basis can be discerned from four sources: (1) inquiry of the defendant, (2) inquiry of the prosecutor, (3) examination of the presentence report, and (4) minutes of evidence." *State v. Ortiz*, 789 N.W.2d 761, 768 (Iowa 2010). When a defendant challenges the factual basis for a plea, "the entire record before the district court may be examined." *State v. Finney*, 834 N.W.2d 46, 62 (Iowa 2013). The record, as a whole, must disclose facts to satisfy the elements of the crime. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001). We only need to "be satisfied that the facts support the crime." *Id.* Establishing the factual basis supporting a guilty plea is less exacting than proving guilt beyond a reasonable doubt at trial. *See State v. Sanders*, 309 N.W.2d 144, 145 (Iowa Ct. App. 1981).

Pike contends the hearing does not show a factual basis for his guilty plea because his actions did not constitute forgery in violation of Iowa Code sections 715A.2(1)(b) or (c) and 715A.2(2)(a)(3). That code section provides:

> 1. A person is guilty of forgery if, with intent to defraud or injure anyone, or with knowledge that the person is facilitating a fraud or injury to be perpetrated by anyone, the person does any of the following:
>
> . . . .
>
> b. Makes, completes, executes, authenticates, issues, or transfers a writing so that it purports to be the act of another who did not authorize that act, or so that it purports to have been executed at a time or place or in a numbered sequence other than was in fact the case, or so that it purports to be a copy of an original when no such original existed.
>
> c. Utters a writing which the person knows to be forged in a manner specified in paragraph "a" or "b".
>
> . . . .
>
> 2. a. Forgery is a class "D" felony if the writing is or purports to be any of the following:

> . . . .
> (3) A check, draft, or other writing which ostensibly evidences an obligation of the person who has purportedly executed it or authorized its execution.

Iowa Code § 715A.2.

Pike argues the record does not show he made or uttered a writing that purported to be the act of another without that person's authorization. To support his position, Pike relies on *State v. Phillips*, 569 N.W.2d 816 (1997). In *Philips*, our supreme court held a defendant who signed his own name as the drawer of a check belonging to his ex-wife upon a bank where he did not have funds deposited did not commit the crime of forgery because the writing did not purport to be the act of another. 569 N.W.2d at 820. "When a check is drawn on an existing bank account and signed by the drawer in his or her own name, the check is exactly what it purports to be—a written request by the drawer to the drawee bank to pay a specified sum of money to a third person." *Id.*

We do not read *Phillips* as helping Pike's argument. Unlike Phillips who signed his own name as the drawer, Pike wrote his name on the check as the payee. *Phillips* explains a person may purport a check to be the act of another, as required for the offense of forgery, by filling in his or her name as the payee without authorization. *Id.* at 819–20 (citing *State v. Ross*, 512 N.W.2d 830, 832 (Iowa Ct. App. 1993)). Under *Ross*, Pike committed forgery by purporting that he had authorization from the chiropractor to endorse the check for himself. Pike told Anderson he needed to cash a paycheck. Pike admitted to Detective Noonan that he signed the back of the stolen check. Noonan also noted the "ID number" on the check matched Pike's State of Iowa identification card and the

signature on the check resembled Pike's signature on the *Miranda* waiver form. Pike told the plea-taking court he "wrote his name on the check" and cashed it, intending to defraud the owners of the check and get cash for his own use. We find a factual basis on this record for the forgery offense.

B. Did Counsel Provide Ineffective Assistance by Allowing Pike to Enter the Plea Agreement Creating a Sentencing Contingency Based on Payment of $685 in Restitution?

The parties filed a memorandum of plea agreement on October 15, 2012. The deal required the State to dismiss the theft count in return for Pike's guilty plea to forgery. The State agreed not to pursue the habitual offender sentencing enhancement at section 902.8 if Pike deposited $685 in restitution into his court-appointed attorney's client trust account by the date set for sentencing. If the $685 was not available at the time of sentencing, Pike agreed to stipulate to his habitual offender status. The parties made the court's concurrence with the agreement as a condition of the plea. The court deferred acceptance of the plea until sentencing.

Pike appeared for sentencing on November 29, 2012. Defense counsel asked to continue the hearing to give his client more time to raise the $685 referenced in the plea agreement. Counsel elaborated:

> Mr. Pike has been trying to get the money together, and he reports to me that on the 31st of October, he had a Social Security disability hearing that he is waiting for the results from which should produce a lump sum settlement. Additionally something monthly. Additionally, he reports his retirement accounts will be starting to be paid on December 21st, which will afford him the possibility of being able to come up with the restitution money.

The court reacted: "What the heck? I don't like this kind of plea agreement. If the guy doesn't come up with the $685, you go through with the habitual?" The court also expressed concern that it "puts the defendant in a pretty big bind."

The prosecutor responded: "On the other side of the coin, the defendant has a horrendous history. We are willing to waive the habitual if he has $685 at this time to do that." Pike spoke up: "I wasn't working, sir." To which the prosecutor replied: "You signed the plea agreement." Defense counsel said Pike "did anticipate being able to make those payments" and "sees an opportunity that the money should be available in the near future." The court granted Pike a thirty-day continuance, concluding: "[I]f he doesn't have the $685, he will face the music." The prosecutor then suggested his office might withdraw the plea agreement, regardless of the continuance.

At the December 28, 2012 hearing, Pike again reported he did not have the restitution amount. Pike admitted being convicted of two prior felony offenses for forgery in Iowa. The State then recommended the fifteen-year sentence under the habitual offender enhancement, noting Pike had "ten prior forgery convictions alone along with various other theft convictions." The court also clarified the amount of restitution owed Anderson was actually $385 and not the $685 included in the plea agreement.

Pike now argues his attorney delivered a subpar performance by condoning a plea agreement where he faced a more severe sentence based on his inability to pay a set amount of restitution. Pike alleges the plea offer violated

the equal protection and due process clauses of the state and federal constitutions because he "ended up with a more severe sentence than a wealthy person would have received under the terms of the plea offer."

We review Pike's complaints against his counsel under the familiar standard in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* held that legal representation violates the Sixth Amendment if it falls "below an objective standard of reasonableness," as indicated by "prevailing professional norms," and the defendant suffers prejudice as a result of counsel's omissions. 466 U.S. at 687–88. The two-part *Strickland* test applies to guilty plea challenges based on ineffective assistance of counsel. *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012). Here, the performance prong requires Pike to show counsel breached professional norms when he advised Pike to enter a plea agreement that included the restitution contingency. The prejudice prong requires Pike to show a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985). When a defendant raises an ineffective-assistance claim on direct appeal, we may decide the record is adequate to decide the claim or we may preserve the claim for postconviction proceedings. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). It is the unusual case when the record will be sufficient to resolve the claim on direct appeal. *Id.*

Pike cannot establish his ineffective-assistance claim without developing an additional record. *See id.* at 138 ("In only rare cases will the defendant be able to muster enough evidence to prove prejudice without a postconviction relief

hearing."). We appreciate that Pike was indigent and could not take advantage of a restitution payment plan by virtue of the plea agreement. We also note the $685 in restitution designated in the plea agreement differed from the $385 eventually ordered as victim restitution. But we are not prepared to say Pike's attorney was ineffective on this record.

A plea agreement does not violate the state or federal equal protection or due process clauses simply because it requires payment of restitution. *See generally Iowa Supreme Court Bd. of Prof'l Ethics and Conduct v. Runge*, 588 N.W.2d 116, 118 (Iowa 1999) (noting condition of attorney's probation was that he make restitution payments of not less than $300 per month and finding "Runge was indeed fortunate to have struck a plea bargain with the State absolving him of four felony convictions. Nevertheless, the record is clear that Runge—knowing full well the filing deadlines— . . . failed to pay the amounts stated in the restitution statement on the due dates"); *State v. Petrie*, 478 N.W.2d 620, 622 (Iowa 1991) (stressing nothing prevents the parties to a plea agreement from making a provision covering the payment of costs and fees); *Earnest v. State*, 508 N.W.2d 630, 633 (Iowa 1993) (finding applicant was "clearly informed of and agreed to restitution provisions of the plea agreement"). We acknowledge that because of his indigency Pike may have a stronger argument regarding differential treatment than would other defendants who enter plea agreements that require the payment of restitution. But the existing record indicates Pike and his attorney were aware of Pike's financial situation and may have accepted the

plea agreement in the belief that its benefit outweighed the risk of a longer sentence.

Pike bears the burden to show his attorney performed below professional norms in negotiating the plea deal in this case and that Pike suffered prejudice as a result. On this record we decline to adjudicate defense counsel's competency. *See State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978) ("Even a lawyer is entitled to his day in court."). The development of a full record is necessary to decide Pike's allegation of ineffective assistance.

We affirm Pike's conviction and preserve his ineffective-assistance-of-counsel claim for possible postconviction relief proceedings.

C. Did the District Court Err in Imposing and Suspending a Fine on Pike's Habitual Offender Sentence?

Pike argues, and the State agrees, the portion of the sentencing order imposing and suspending the $750 fine must be vacated. If Pike had been convicted of the class "D" felony of forgery without the habitual offender enhancement, he would have been subject to a fine of no less than $750 and no greater than $7500. *See* Iowa Code § 902.9(5). But because Pike stipulated to habitual offender status, his sentence falls under section 902.9(3). Although the habitual offender sentencing provision does not provide for a fine, it does not preclude another statute from imposing such a fine. *State v. Halterman*, 630 N.W.2d 611, 613 (Iowa Ct. App. 2001). The forgery statute does not impose a separate fine. *See* Iowa Code § 715A.2. Accordingly, we vacate the fine and

remand for the district court to enter a modified sentencing order reflecting that change.

CONVICTION AFFIRMED, SENTENCE VACATED IN PART AND REMANDED.

IN THE COURT OF APPEALS OF IOWA

No. 16-0137
Filed January 11, 2017

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT A. HOWARD,
Defendant-Appellant.

Appeal from the Iowa District Court for Jackson County, Joel W. Barrows (suppression ruling), Mark R. Lawson (trial on the minutes), and Paul L. Macek (sentencing), Judges.

A defendant challenges the traffic stop leading to his operating-while-intoxicated conviction. **REVERSED AND REMANDED.**

Joshua J. Reicks of Schoenthaler, Bartlett, Kahler & Reicks, Maquoketa, for appellant.

Thomas J. Miller, Attorney General, and Jean C. Pettinger and Tyler J. Buller, Assistant Attorneys General, for appellee.

Considered by Potterfield, P.J., and Doyle and Tabor, JJ.

TABOR, Judge.

Tires squealed. The sound came from the intersection of Platt and Niagra Streets in downtown Maquoketa, which was also the location of the police station. Officer Kody Sieverding heard the tires squeal from inside the station, rushed to the back door, and saw a Chevy Monte Carlo heading west on Platt Street. The officer took off in his squad car and stopped the Chevy in the Kwik Star parking lot, a few blocks from the station. During his investigation, Officer Sieverding detected the driver, Robert Howard, was intoxicated. On appeal, Howard contests the basis for the traffic stop that resulted in his arrest and conviction for operating while intoxicated.

In his motion to suppress, Howard asked the district court to exclude evidence of his intoxication discovered during the stop, alleging the officer lacked either probable cause or reasonable suspicion to pull him over. Howard's motion cited both the Fourth Amendment of the United States Constitution and article I, section 8 of the Iowa Constitution.

At the suppression hearing, the State offered testimony from Officer Sieverding, who believed it was Howard who squealed his tires[1] because Howard's car was the only one traveling west on Platt Street immediately after the officer heard the noise. The officer also testified Howard's car "appeared to be going over the posted speed limit" of thirty-five miles per hour. After the

[1] While not citing specific code sections, the officer's testimony suggested the tire squealing violated Iowa Code sections 321.277A and 321.313 (2015). Section 321.277A(1) provides: "A person commits careless driving if the person intentionally operates a motor vehicle on a public road or highway in any one of the following ways: 1. Creates or causes unnecessary tire squealing, skidding, or sliding upon acceleration or stopping." Section 321.313 states: "No person shall start a vehicle which is stopped, standing, or parked unless and until such movement can be made with reasonable safety."

officer's testimony, the court viewed a video and audio recording of the traffic stop.[2] The defense then called Howard and Howard's passenger to the stand. They both testified the driver of the car in front of them at the intersection, not Howard, was responsible for the squealing tires.

In a ruling from the bench, the district court found all three witnesses credible. The court then reasoned:

> But the Court doesn't need to make a credibility determination here to decide this case. Probable cause is a close call here and the officer arguably did not have probable cause to stop this vehicle, but I don't think that the Court necessarily needs to get there. The real question for the Court is whether or not there was reasonable suspicion to stop this vehicle.

The court discussed the case law governing reasonable suspicion for investigatory stops and concluded "based on the stated observations of Officer Sieverding, the fact that they were close in time and place to the investigatory stop based on his own observations that he did, in fact, have reasonable suspicion to stop this vehicle."

After losing his motion to suppress, Howard stipulated to the minutes of evidence, including expected testimony that Howard's blood alcohol concentration was .113. The court found Howard guilty of operating while intoxicated, first offense, in violation of Iowa Code section 321J.2. He received a thirty-day jail sentence with all but two days suspended. His appeal focuses solely on the suppression ruling.

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[2] The video shows Officer Sieverding at the driver's window asking Howard: "Did you squeal your tires back there?" Howard responds: "No, sir." When asked who did squeal their tires, Howard blames "the guy in front" of him. But the officer tells Howard he did not see another car driving away from the stop sign "in front of the PD." Later during the encounter, the officer asks Howard: "Do you think that was a wise decision to squeal your tires right by the police department?" Howard responds he didn't remember squealing his tires, but "if I did I'm sorry. I didn't realize it."

Our review is de novo, which means we independently evaluate the entire record under the totality of circumstances. *State v. Tyler*, 830 N.W.2d 288, 291 (Iowa 2013). Because the district court had the chance to assess the credibility of the witnesses first hand, we defer to its factual findings, but we are not bound by them. *Id.*

This appeal presents a matrix of possible outcomes. The parties debate the legality of the stop under both the Fourth Amendment and article I, section 8 and whether the officer acted with probable cause or reasonable suspicion. The parties also clash on the question whether the alleged criminal activity was ongoing or completed.[3]

Probable Cause. We turn first to the State's argument Officer Sieverding had probable cause to stop Howard for a traffic offense—namely, careless driving or speeding. Probable cause is measured by "the totality of the circumstances as viewed by a reasonable and prudent person" and must lead to the reasonable belief that a crime occurred and the would-be arrestee committed the offense. *See State v. Tague*, 676 N.W.2d 197, 201 (Iowa 2004). "When a peace officer observes a violation of our traffic laws, however minor, the officer has probable cause to stop a motorist." *Id.* Probable cause would justify a stop under either the Federal or Iowa Constitution. *See Tyler*, 830 N.W.2d at 292.

After independently reviewing the record, we find the facts before the officer did not amount to probable cause to stop Howard's car. The officer may

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[3] The State contends Howard did not preserve error on his argument that an investigatory stop based solely on reasonable suspicion of a completed misdemeanor is unconstitutional because the position was not fully formed until the defense motion to reconsider. Because we resolve Howard's case without reaching that argument, we need not address the error-preservation question.

have reasonably deduced the offense of careless driving[4] occurred when he heard squealing tires, but the officer's inability to see the intersection from inside the police station left too much doubt surrounding the officer's assumption Howard was the careless driver. The officer testified only a few seconds elapsed between the squealing tires and his observation of Howard driving west on Platt Street, the only car moving that direction. But even if the officer's timing estimate was accurate concerning westbound traffic, he could not rule out the possibility the actual offender headed east, north, or south from the intersection. It was only 8:30 p.m. when the officer saw Howard's car, and the video exhibit shows that while Maquoketa's downtown streets were not jam-packed at that hour, neither were they deserted. Because the officer did not witness the careless-driving violation, the State did not establish probable cause for the stop.[5] *See id.* ("If a traffic violation actually occurred and the officer witnessed it, the State has established probable cause.").

We are likewise leery of the officer's conclusory testimony that Howard's car "appeared to be going over the posted speed limit." The officer did not use radar, nor was he able to keep pace with Howard's car to compare its speed with the squad car. *See State v. Johnson*, No. 14-0833, 2015 WL 1817108, at *2 (Iowa Ct. App. Apr. 22, 2015) ("An officer may use several methods to determine

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[4] The State does not explain how squealing tires fits the elements of an unsafe start under section 321.313. That section prohibits motorists from moving their cars until they can do so "with reasonable safety." *See Janvrin v. Broe*, 33 N.W.2d 427, 433 (Iowa 1948).

[5] We realize probable cause does not mean "more probable than not" and probable cause may exist even if two or more possible suspects are involved. *See State v. Horton*, 625 N.W.2d 362, 365 (Iowa 2001) (citation omitted). But here, the officer could not meaningfully identify possible suspects because, from his vantage point, he could not see motorists leaving the intersection.

whether a person is driving at an excessive speed."). Unlike the patrol officer in *Johnson*, who testified to his extensive training and experience in visually estimating speed, *see id.*, here the State did not elicit any testimony from Sieverding regarding his credentials in speed estimation. On cross-examination, the officer acknowledged he had not received specific training on how to gauge distances and generate a speed determination. We find this case is more akin to *State v. Petzoldt*, No. 10-0861, 2011 WL 2556961, at *3–4 (Iowa Ct. App. June 29, 2011), where our court found insufficient foundation for the officer's belief the motorist was speeding when the officer did not use radar or pacing and instead based his conclusion on his "years of experience looking at vehicles and the speeds they are going."

Reasonable Suspicion. Finding no probable cause for the traffic stop, we shift to the question whether Officer Sieverding had reasonable suspicion to believe Howard was engaging in criminal activity. *See State v. Pals*, 805 N.W.2d 767, 774 (Iowa 2011) (explaining "police may detain persons in the absence of probable cause if the police have reasonable suspicion to believe criminal activity is taking place"). Reasonable suspicion is a less demanding standard than probable cause. *See Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). The State has the burden to show by a preponderance of the evidence the stopping officer possessed specific and articulable facts, which, when taken together with rational inferences from those facts, provided reason to believe criminal activity may have occurred. *Tague*, 676 N.W.2d at 204 ("Mere suspicion, curiosity, or hunch of criminal activity is not enough."). We determine whether reasonable suspicion exists for an investigatory stop in light of the totality of the circumstances

confronting a police officer, including all information available to the officer at the time the decision to stop is made. *State v. Kreps*, 650 N.W.2d 636, 642 (Iowa 2002).

Howard argues Officer Sieverding had "only a hunch"[6] it was Howard who squealed his tires. We agree the officer acted on "unparticularized suspicion" when stopping Howard. *See Terry*, 392 U.S. at 27. Officer Sieverding could not see the source of the squealing tires; he was only aware the noise came from the intersection outside of the police station. The officer hurried to the back door to see a single car driving west from the intersection. The district court concluded the officer had reasonable suspicion because his aural and visual observations were close in time and place to the investigatory stop.

But as discussed in our probable cause analysis, the officer had no information available regarding cars that may have been traveling in the other three directions from the intersection or regarding cars that may have been ahead of Howard's car traveling west. The uncertainty in the situation was too great to justify the arbitrary police intrusion upon Howard's right of privacy. *See Tague*, 676 N.W.2d at 205–06. The possibility Howard was the source of the criminal conduct was not "strong enough that, upon an objective appraisal of the situation, we would be critical of the officer[] had [he] let the event pass without investigation." *See Kreps*, 650 N.W.2d at 642. Because the officer did not have reasonable suspicion to stop Howard's vehicle, all evidence flowing from the stop

[6] The term "hunch" appeared in *Terry v. Ohio*, 392 U.S. 1, 27 (1968), where the court contrasted such an "inchoate and unparticularized suspicion" with "specific reasonable inferences" drawn from the facts in light of the officer's experience.

is inadmissible. We reverse the district court's denial of Howard's motion to suppress and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

IN THE SUPREME COURT OF IOWA

No. 14–0798

Filed September 16, 2016

STATE OF IOWA,

Appellee,

vs.

ROMEO CASINO HARDIN,

Appellant.

Appeal from the Iowa District Court for Scott County Joel W. Barrows, Judge.

A defendant appeals the district court's imposition of a life sentence without parole for murder in the first degree, a crime he committed as a juvenile. **DISTRICT COURT SENTENCE VACATED AND CASE REMANDED WITH INSTRUCTIONS.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney General, and Michael Walton, County Attorney, for appellee.

PER CURIAM.

Romeo Casino Hardin appeals the district court's imposition of a life sentence without parole following his conviction for murder in the first degree, a class A felony in violation of Iowa Code sections 707.1 and 707.2 (1995). The district court imposed the life sentence on Hardin, who was a juvenile when he committed the crime, following a resentencing hearing. On appeal, Hardin claims his sentence of life in prison without parole constitutes cruel and unusual punishment in violation of article I, section 17 of the Iowa Constitution.

In *State v. Sweet*, 879 N.W.2d 841, 839 (Iowa 2016), we held that under the cruel and unusual punishment clause contained in article I, section 17 of the Iowa Constitution, juvenile offenders may not be sentenced to life in prison without the possibility of parole. Accordingly, we reverse the sentence imposed by the district court and remand the case to the district court for resentencing consistent with *Sweet*.

DISTRICT COURT SENTENCE VACATED AND CASE REMANDED WITH INSTRUCTIONS.

This opinion shall not be published.

IN THE COURT OF APPEALS OF IOWA

No. 3-835 / 12-2223
Filed October 23, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JESSICA CHRISTINE BURTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Gary D. McKenrick (trial), and Joel W. Barrows (revocation and sentencing), Judges.

The defendant appeals her conviction for willful injury causing bodily injury. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Melinda Nye, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, Michael Walton, County Attorney, and Joseph Grubisich and Kimberly Shepard, Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

TABOR, J.

Jessica Christine Burton appeals her conviction for willful injury causing bodily injury in violation of Iowa Code section 708.4(2) (2009). She alleges insufficient evidence to convict, ineffective assistance of counsel, and sentencing error. We find substantial evidence of willful injury as the district court marshaled that offense for the jury. But we find Burton was prejudiced by counsel's failure to object to an incomplete aiding and abetting instruction and remand for a new trial. Because of the remand, we don't need to address the improper sentence.

I. Background Facts and Proceedings

On May 27, 2010, Jessica Burton called Luciano Garcia to complain that his girlfriend, Destiny Castaneda, was "fooling around" with her boyfriend and father of her children, Matt Hernandez. Later that day Burton, her sister Marisa Navarrett, and their friend Monica Morris arrived at the Wendy's restaurant where Garcia worked and told him they were going to go to Castaneda's workplace and "beat her ass."

Castaneda then received a phone call from Burton. Burton called Castaneda a "stupid fucking oompa-loompa fat bitch." That night Burton, Navarrett, and Morris went to the Days Inn where Castaneda worked. Navarrett and Morris went in while Burton stayed in the car. Castaneda did not know either Navarrett or Morris. The two women asked about room rates. After a few minutes, Navarrett and Morris said: "We're not here for room rates, we're here to fuck you up for Jessica." They began knocking over papers and other items. They threw a cordless phone at Castaneda. They hit her face with a flat-screen

computer monitor. The two women then opened the door between the lobby and the front desk and pulled Castaneda from the room. The two women began pulling her hair. Castaneda tried to fend them off with a plastic "wet floor" sign but the two women took it from her and began hitting her with it. Eventually, Castaneda ended up curled in a ball on the floor. Morris and Navarrett continued to kick her in the back and head until Castaneda's boss walked into the lobby. Navarrett and Morris walked out the front door, where Burton picked them up. The whole fight lasted two minutes.

Castaneda followed them outside and asked Burton, "[W]hy would they have done this to me?" Navarrett stopped Castaneda and told her, "You've already got your ass beat enough. Do you want me to beat your ass more? Just leave already. Back off." The three women then left. Castaneda sustained head, neck, and back injuries, along with severe facial bruises.

On October 13, 2010, the State charged Burton and her companions with willful injury causing serious injury under Iowa Code section 708.4(1), a class "C" felony. Before trial, the State amended the trial information to charge willful injury causing bodily injury under section 708.4(2), a class "D" felony. The district court tried Burton, Navarrett, and Morris together. The State prosecuted Burton under an aiding and abetting theory, stating in closing argument:

> If you determine Jessica Burton, who stayed in the car, knew what was going to happen, drove the other two ladies up there, waited for the assault to end, and left, she is an aider and abetter and she is just as guilty as the person who threw the punches.

A jury found all three defendants guilty of willful injury causing bodily injury. On July 14, 2011, the district court granted Burton a deferred judgment

and ordered her to pay a civil penalty of $750. On November 29, 2012, the court revoked Burton's probation due to an unrelated charge, and sentenced her to a term of incarceration not to exceed five years to be served concurrently with another conviction. The court also imposed a $750 fine. Burton now appeals.

II. Standard of Review

We review a challenge to the sufficiency of the evidence for correction of errors at law. *State v. Millsap*, 704 N.W.2d 426, 430 (Iowa 2005). We review ineffective assistance of counsel claims de novo. *State v. Brothern*, 832 N.W.2d 187, 192 (Iowa 2013).

III. Analysis

A. Did the State Offer Sufficient Evidence To Establish The Specific Intent Element Of Burton's Conviction For Willful Injury?

Our goal is to determine whether the evidence could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Anspach*, 627 N.W.2d 227, 231 (Iowa 2001). We view the evidence in the light most favorable to the State in making this determination. *Millsap*, 704 N.W.2d at 429.

The court instructed the jury as follows:

> The State must prove all of the following elements of Willful Injury.
>
> 1. On or about the 27th day of May, 2010, the defendant, without justification, assaulted Destiny Castaneda.
> 2. The defendant specifically intended to cause a serious injury to Destiny Castaneda.
> 3. Destiny Castaneda suffered a bodily injury.

The court also gave the jurors the following instruction on aiding and abetting:

> All persons involved in the commission of a crime, whether they directly commit the crime or knowingly "aid and abet" its commission, shall be treated in the same way.
>
> "Aid and abet" means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed. Conduct following the crime may be considered only as it may tend to prove the defendant's earlier participation. Mere nearness to, or presence at, the scene of the crime, without more evidence, is not "aiding and abetting". Likewise, mere knowledge of the crime is not enough to prove "aiding and abetting."
>
> The guilt of a person who knowingly aids and abets the commission of a crime must be determined only on the facts which show the part [he] [she] has in it, and does not depend upon the degree of another person's guilt.
>
> If you find the State has proved the defendant directly committed the crime, or knowingly "aided and abetted" other person(s) in the commission of the crime, then the defendant is guilty of the crime charged.

But the court did not include an additional paragraph from the uniform jury instruction that addresses specific intent offenses. That paragraph reads:

> The crime charged requires a specific intent. Therefore, before you can find the defendant "aided and abetted" the commission of the crime, the State must prove the defendant either has such specific intent or "aided and abetted" with the knowledge the others who directly committed the crime had such specific intent. If the defendant did not have the specific intent, or knowledge the others had such specific intent, [he] [she] is not guilty.

Burton did not object to the instructions given to the jury at trial. Therefore, the aiding and abetting instruction—without the specific-intent paragraph—became the law of the case for purposes of our review to determine if the State presented sufficient evidence. *See State v. Canal*, 773 N.W.2d 528, 530 (Iowa 2009).

Burton argues that because she did not go inside the hotel with her co-defendants, she did not know what their intent was. She also argues threats to

"fuck [Castaneda] up" and "beat her ass" are too ambiguous to express the necessary intent to cause serious injury.

The State's evidence revealed Burton's animosity toward Castaneda and her recruitment of two friends to harm Castaneda. Castaneda did not know Navarrett or Morris. Only Burton knew Castaneda. Earlier in the day Burton, Morris, and Navarrett went to Castaneda's boyfriend and told him they were going to "beat her ass." Thirty minutes before the assault Burton telephoned Castaneda, calling her derogatory names and accusing her of sleeping with Burton's boyfriend, who is also the father of Burton's children. Burton then took Navarrett and Morris to the Days Inn where Castaneda worked.

The State also presented ample evidence to show Burton's accomplices had specific intent to inflict serious injury on Castaneda. First, it was two against one. Second, Navarrett and Morris used everyday items as weapons against Castaneda. Navarrett hit Castaneda with a flat screen computer monitor on the side of her face. Navarrett and Morris kicked Castaneda on the head and back while she was on the ground. The only reason why the two women stopped the beating was because the hotel manager came into the room.

The evidence Navarrett and Morris acted on their specific intent to cause serious injury to Castaneda, combined with the proof Burton aided and abetted the vicious attack carried out by her friends, qualified as substantial evidence under the instructions given. An actor's specific intent is a mental process seldom capable of direct proof. *State v. Walker*, 574 N.W.2d 280, 289 (Iowa 1998). But specific intent "may be shown by circumstantial evidence and the

reasonable inferences drawn from that evidence." *Id.* A rational jury could view all the State's evidence together and find beyond a reasonable doubt that Burton's co-defendants had the necessary intent and Burton aided and abetted their endeavor. As instructed, the jurors were not required to find Burton knew Navarrett and Morris specifically intended to cause serious injury to Castaneda. When viewed in the light most favorable to the verdict, the evidence was sufficient to convict Burton of aiding and abetting willful injury causing bodily injury.

B. Was Burton's Trial Counsel Ineffective In Failing To Request The Additional Paragraph of the Uniform Jury Instruction On Aiding And Abetting that Addressed Specific Intent Offenses When Burton's Intent Was A Determinative Factor In The Prosecution?

In her second assignment of error, Burton alleges her counsel breached a duty in not objecting to an incomplete aiding-and-abetting instruction. As discussed in the first issue, the district court did not give the jury the supplementary paragraph from the uniform jury instruction explaining how the concept of aiding and abetting works in the context of specific-intent crimes. Burton contends she was prejudiced because it was reasonably probable the jurors reached their guilty verdict without finding she had specific intent or knew the friends she aided and abetted had the specific intent to cause serious injury.

Normally we deal with ineffective-assistance-of-counsel claims after postconviction-relief proceedings. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa

2008). But if the record is sufficient to permit a ruling, as it is here, we will decide such a claim on direct appeal. *Id.*

To demonstrate ineffective assistance of counsel, Burton must prove: first, her counsel failed to perform an essential duty and second, prejudice resulted. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove counsel failed to perform an essential duty, Burton "must show that counsel's performance was deficient" meaning her attorney committed errors so serious that he "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *See id.* We measure effective performance by determining "whether counsel's assistance was reasonable considering all the circumstances." *See id.* at 688. To prove prejudice, Burton must prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. To show a reasonable probability the result would have been different, Burton must demonstrate the probability of a different result is enough to undermine our confidence in the outcome. *See Bowman v. State*, 710 N.W.2d 200, 206 (Iowa 2006) (quoting *State v. Graves*, 668 N.W.2d 860, 882–83 (Iowa 2003)).

Under Iowa Code section 708.4, "any person who does an act which is not justified and which is intended to cause serious injury to another" commits willful injury. Willful injury is a specific intent crime. *See State v. Smith*, 739 N.W.2d 289, 292 (Iowa 2007). When specific intent is an element of the crime charged a person maybe convicted on a theory of aiding and abetting only if that person

participated while possessing the required intent or with knowledge the principal had the required intent. *State v. Tangie*, 616 N.W.2d 564, 574 (Iowa 2000).

The district court has a "duty to instruct fully and fairly" on the law applicable to "all issues raised by the evidence." *State v. Schuler*, 774 N.W.2d 294, 297 (Iowa 2009). Here, the court provided the jury with Iowa Uniform Jury Instruction 200.8, Aiding and Abetting. But it did not include the additional paragraph of the uniform instruction (quoted above) required for offenses involving specific intent.[1]

We believe trial counsel breached an essential duty in not objecting to the absence of this paragraph and the breach resulted in prejudice to Burton. The State argues Burton cannot show prejudice because "[r]ational jurors would infer that Burton specifically intended to cause a serious injury to Castaneda and used Navarrett and Morris to accomplish that intention." We agree rational jurors could have inferred Burton's specific intent to cause serious injury, but that is not the only fair inference available from the evidence. Rational jurors also could have rejected such an inference, finding the violence perpetrated by Navarrett and Morris exceeded Burton's intent when she aided and abetted their assault on Castaneda.

Our confidence in the outcome is undermined because the jurors were improperly instructed. Without the missing paragraph, the jury could convict Burton of willful injury without finding *either* that she personally possessed the

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[1] We also note the marshaling instruction for willful injury did not include aiding and abetting language. This omission from the marshalling instruction magnified the risk that jurors would not understand how to assess Burton's specific intent if she was not a principal in the assault of Castaneda.

specific intent to cause serious injury when she aided and abetted her co-defendants in the attack *or* that she had knowledge her co-defendants had specific intent to cause serious injury. The full instruction would have offered the jurors clear guidance regarding the State's burden to prove specific intent in an aiding-and-abetting scenario. The State has the duty to prove every element of the crime beyond a reasonable doubt. *See State v. McMullin*, 421 N.W.2d 517, 519 (Iowa 1988). The failure to include the specific intent paragraph in the aiding and abetting instruction denied Burton the due process right of having the State meet that burden here.

Where the issue of specific intent is "vital" to the defense, as it was here, trial counsel's failure to object to its omission from the jury instruction is a breach of duty which results in prejudice to the defendant. *See State v. Goff*, 342 N.W.2d 830, 838 (Iowa 1983). Accordingly, we reverse and remand for a new trial.

REVERSED AND REMANDED.

IN THE COURT OF APPEALS OF IOWA

No. 18-0522
Filed March 6, 2019

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TOBY RICHARDS,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Joel W. Barrows, Judge.

Toby Richards appeals from judgment and sentences imposed upon his convictions for domestic abuse assault, third or subsequent offense; domestic abuse assault by strangulation; and possession of a firearm by a domestic abuse offender. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR RESENTENCING.**

Lauren M. Phelps, Davenport, for appellant.

Thomas J. Miller, Attorney General, and Darrel Mullins, Assistant Attorney General, for appellee.

Heard by Vogel, C.J., Vaitheswaran, J., and Danilson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2019).

DANILSON, Senior Judge.

Toby Richards appeals from judgment and sentences imposed upon his convictions for domestic abuse assault, third or subsequent offense; domestic abuse assault by strangulation; and possession of a firearm by a domestic violence offender. *See* Iowa Code §§ 708.2A(4), 708.2A(5), 708.2A(7)(b), 724.26(2)(a), 902.3, 902.9, 902.13 (Supp. 2017). He asserts the trial court erred in allowing bodycam video of the complaining witness under the excited-utterance exception to the hearsay rule. He also contends the court abused its discretion in allowing evidence of his prior bad acts. He argues there in insufficient evidence to sustain the convictions, the court erred in failing to give his requested instruction about expert-witness testimony, and his confrontation rights were violated. Richards also challenges the sentences imposed.

We find no error in the admission of the bodycam video and no abuse of discretion as to admission of prior bad acts on the grounds asserted. We find sufficient evidence to sustain the convictions of domestic abuse assault, third or subsequent offense, and domestic abuse assault by strangulation. However, we find there is insufficient evidence of possession of a firearm to sustain that conviction. The district court did not abuse its discretion in denying Richards' proposed instruction as to expert-witness testimony. Because we reverse the conviction on count 3, we remand for resentencing, at which time Richards may assert his request that he be allowed to serve his sentences for prior offenses concurrently with the sentences for the instant convictions.

I. Background Facts and Proceedings.

Toby Richards was charged on August 6, 2017, by complaint with domestic abuse assault as a third or subsequent offender. A no-contact order protecting Emily issued that day.[1]

Less than a week later, Emily moved to dismiss the no-contact order. At a hearing on the motion to dismiss, Emily testified, "He's never done anything to hurt me ever." She stated a person who had just been released from prison for attempted murder had assaulted her on August 6. She denied talking to an attorney from the Scott County Attorney's office (who made a statement to the contrary). She also said that Richards did not have a gun: "Toby doesn't have a gun. . . . It wasn't Toby's, and he did not have dominion or control over it." She also stated, "I have never called the police on Toby." The district court denied the motion to dismiss the no-contact order.

A trial information was filed on September 13 charging Richards with three offenses—domestic abuse assault as a third or subsequent offender, domestic abuse assault by strangulation causing bodily injury, and possession of a firearm by a domestic violence offender—all class "D" felonies. At the criminal trial held in December 2017, the manager of a convenience store testified Emily had come to the store on August 6 at about 1:45 p.m. bloody and crying, and asked him to call police and have them meet her by her red Toyota at a nearby McDonald's store "because she said he would find her here."

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[1] We will refer to the protected party throughout the opinion by her first name only.

Responding officers, Brian Hanssen and Dennis Tripp, encountered a woman who was "distraught," "crying," "shaking," and bleeding. Officer Tripp's bodycam video shows he asked the woman, "What's going on?" The woman told Officer Tripp, "he beat me up" and "he said 'give me the .22'." She later identified herself and stated her boyfriend, Toby Richards, had punched and kicked her in the head, "he wants me to die," and "he tried to choke me again but I felt that I could breathe this time." She told Officer Tripp that Richards told her to kill herself with the .22. Emily asked the officer if he knew why she could not see out of her left eye. Emily stated that if Richards found out she had called police, "he's going to kill me." Officer Tripp recalled Emily was "just very upset." He testified Emily was bleeding and her mouth appeared injured. Her mouth and eye on the left side of her face were swollen.

Emily was transported to the hospital and remained upset and shaken. Photographs taken at the hospital show bruising and cuts on Emily's face and abrasions and blood on her hands.

Police went to the address for Richards that Emily had given them, which was just a few minutes away. Police created a perimeter around the residence. Richards' mother eventually gave officers permission to enter[2] and informed them Richards was hiding in the attic. Officers were able to convince Richards to emerge.

Officer Christina Thomas testified she responded to a domestic-assault dispatch to Richards' residence. She transported Richards to the county jail and

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[2] The residence was rented to Richards' mother. Richards, his son, and Emily lived there with Richards' mother.

then returned to the residence upon receiving information that a firearm "involved in the earlier incident" was there. She was able to locate the weapon from the information received.

Officer Ashley Guffey testified that she, too, responded to Richards' residence about 2:00 p.m. on August 6. After Richards was detained, Officer Guffey went to the hospital to speak with Emily and photograph her injuries. Office Guffey testified Emily "was really upset" and "really shaken." She stated Emily "said she had been through a lot and was scared of the defendant." Officer Guffey testified Emily's injuries included swelling, redness, and a bruise underneath her left eye, a cut on her left eyelid, and redness in her left eye, her nose was swollen, her cheek was bruised, and her lips were cut and swollen. Emily also had cuts on her hands, cuts on the inside of her mouth, and a chipped tooth. Officer Guffey stated, "I had obtained information that there was a gun in the residence still, and I relayed that to the other officers, to go retrieve it."

Officer Jon Ronnebeck testified he obtained information concerning Richards' jail house phone calls. On August 6, Richards was on the phone from the jail and was told that the police had come and taken the gun. Richards stated, "I told her [Emily] that she should get it and kill herself." In a call on August 7, Richards told his son, "I did hit her." And later that day, he told his mother, "Look, what I did to her again, Mom. She has every right to be upset." In an August 27 phone call, Richards said he had told the classification staff, "I've been suffering from anger . . . that I'm lucky nobody has died."

A domestic-abuse therapist testified that it is not unusual for survivors of domestic abuse to deny that it occurred. She testified how abusers use violence

to maintain control over an intimate partner and described the cycle of violence—a "honeymoon" period, a building of tension, and then acute verbal, emotional, or physical abuse. She also testified it is not uncommon for victims to decline to participate in a prosecution because they know or think they know what will occur when the perpetrator is no longer incarcerated. She testified she had not met Emily or Richards.

The State was allowed to present testimony over Richards' relevance objections that on September 17, 2015, Richards admitted injuring Emily at the Jumer's casino and hotel in Rock Island, Illinois. Emily had swelling on the left side of her face and a "C" shaped cut to her temple. On May 1, 2016, police responded to Genesis East Hospital where they found Emily in a neck brace. Richards pled guilty to domestic abuse assault related to this incident (FECR377195). And on August 31, 2016, surveillance cameras at the Isle of Capri Casino captured video of Richards shoving Emily from a stool. An officer later found Emily lying on her back in pain. Richards pled guilty to domestic abuse assault for this incident (AGCR379842).

Richards intended to call Emily as a witness. However, through counsel, Emily informed the court she would "plead the Fifth" if called, and the court refused to require her to take the stand.

Richards testified in his own defense. He testified he got up at about 10:00 a.m. on August 6 and awakened Emily to ask "if she had handled it." "I was mad because she didn't keep her word." He stated Emily had not "take[n] care of what she said she would take care of." He stated he started calling her names,

told her their April 1st marriage was off, and "she wasn't worth my time anymore." He further testified:

> I was mean to her, and I told her, you know, you got your dad's car, just get out of my life, get out of my son's life, get out of our life, you know. You're just—you're not doing what you say you're going to do, and I do what I say I'm going to do, just please get out. And I said no, just get the F out, just get out of our lives.
>
> And I left the room. We were in the bedroom at that time, and I left the room. And I was trying to cool off because I was way out of control, and I went into my son's room and he wasn't awake, and I went ouside just to cool off, so I could get calm and not act like an ass any longer.
>
> Whenever I came back in, I didn't see her, so I laid back down on the bed and my son came in and asked me what happened and I told him that we'd gotten into it, told him that she didn't keep her word, and he said yeah. And I looked for her and then I seen that her dad's car was gone.

When asked what time Emily left, Richards testified, "About 11, maybe." He stated his mother came to tell him the police were outside so he hid in the attic because he "was scared to death."

Richards admitted he had once had a .22 rifle but stated Emily was tasked with getting rid of it. He denied the rifle in evidence was his. He stated, "This is not my rifle, but that was the only—only thing I knew about a gun is I used to have a .22 rifle also, and to my understanding that it had been taken out of the house whenever I got my first domestic conviction."

On cross-examination Richards admitted he is prohibited from a possessing a firearm. He also attempted to explain his statement in the jail house phone call, "I hit her," stating: "Whenever I said I hit her, that was referring to the past incident." And, "What I'm saying is that I didn't hit her this time, and I was saying that it had to do with another incident."

The jury found Richards guilty as charged. The district court sentenced him to three, concurrent sentences not to exceed five years, with a three-year mandatory minimum, which were to be served consecutively to his convictions for the May 1 (FECR377195) and August 21, 2016 (AGCR379842) domestic abuse assault incidents. Richards now appeals.

II. Scope and Standards of Review.

"Although we normally review evidence-admission decisions by the district court for an abuse of discretion, we review hearsay claims for correction of errors at law." *State v. Smith*, 876 N.W.2d 180, 184 (Iowa 2016). "'[T]he question whether a particular statement constitutes hearsay presents a legal issue,' leaving the trial court no discretion on whether to admit or deny admission of the statement." *Id.* (quoting *State v. Dullard,* 668 N.W.2d 585, 589 (Iowa 2003)).

"In considering whether the trial court properly admitted prior-bad-acts evidence, we apply an abuse-of-discretion standard of review." *State v. Taylor*, 689 N.W.2d 116, 124 (Iowa 2004). The abuse-of-discretion standard means "we give a great deal of leeway to the trial judge who must make [a] judgment call." *State v. Newell*, 710 N.W.2d 6, 20-21 (Iowa 2006). "If an abuse of discretion occurred, reversal will not be warranted if error was harmless." *State v. Reynolds*, 765 N.W.2d 283, 288 (Iowa 2009).

We may affirm an evidentiary ruling on any valid alternative ground supported by the record. *See DeVoss v. State*, 648 N.W.2d 56, 62 (Iowa 2002). We give deference to the lower court's finding of facts because it has a better opportunity to assess the credibility of witnesses, but we are not bound by them. *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001).

We review claims involving the Confrontation Clause de novo. *State v. Bentley*, 739 N.W.2d 296, 297 (Iowa 2007).

We review a district court ruling denying a motion for judgment of acquittal for errors of law. *State v. Hearn*, 797 N.W.2d 577, 579 (Iowa 2011).

III. Discussion.

A. Bodycam Video. Richards first challenges the district court's admission of Officer Tripp's bodycam video, which includes Emily's statements implicating Richards. He asserts those statements were inadmissible hearsay. He also contends admission of the video violated his right to confront the witness.

1. Hearsay. "Hearsay 'is a statement, other than one made by the declarant while testifying at . . . trial, . . . offered in evidence to prove the truth of the matter asserted.'" *Newell*, 710 N.W.2d at 18 (citation omitted). Such statements "must be excluded as evidence at trial unless admitted as an exception or exclusion under the hearsay rule or some other provision." *Id.* (citation omitted). Iowa Rule of Evidence 5.803 sets forth numerous exceptions to the rule against hearsay, proclaiming certain statements are not excluded "regardless of whether the declarant is available as a witness." Rule 5.803(2) allows the admission of "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."

> The application of the exclusion lies largely within the discretion of the trial court, which should consider (1) the time lapse between the event and the statement, (2) the extent to which questioning elicited the statements that otherwise would not have been volunteered, (3) the age and condition of the declarant, (4) the characteristics of the event being described, and (5) the subject matter of the statement.

State v. Atwood, 602 N.W.2d 775, 782 (Iowa 1999). "In construing the exception, the Iowa court has noted the statement must be spontaneous and not the product of reflection or fabrication. The determination of the foundational requirements for admission of evidence under the excited utterance exception is within the trial court's discretion." *State v. Watts*, 441 N.W.2d 395, 398 (Iowa Ct. App. 1989) (citations omitted).

The district court allowed Emily's statements via the bodycam recording based upon its finding that the statements were excited utterances. Richards argues, however, that because the statements were made more than two hours after Richards' encounter with Emily, the exception is inapplicable. This is based upon Richards' version of the August 6 events, i.e., that Emily left the residence at 11:00 a.m. and her whereabouts were unaccounted for until the 911 call about 1:45 p.m. He also relies heavily on Emily's testimony at the hearing to dismiss the no-contact order in which she denied Richards had ever hit her and that she was assaulted by some unnamed, recently-released person. The district court apparently did not give credence to Emily's recantation during the no-contact order hearing.[3]

Here, the time lapse between the assault and the statements was not long. Emily drove from the residence and then traveled just a few blocks in an attempt to find help. Although the exact amount of time that had lapsed is not known, Emily was still bleeding when officers approached her. *Cf. Atwood*, 602 N.W.2d at 782 (upholding a statement as an excited utterance made "at most two and one-half

[3] We note the recantation is contradicted by Richards' own admissions and two prior convictions for domestic abuse assault against Emily.

hours" after the event); *State v. Mateer*, 383 N.W.2d 533, 535 (Iowa 1986) (made more than an hour after the event); *State v. Stafford*, 23 N.W.2d 832, 835–36 (Iowa 1946) (made fourteen hours later). Although Officer Tripp asked Emily a general question about what had happened, "the fact that a statement was prompted by a question does not automatically disqualify it as an excited utterance." *State v. Harper*, 770 N.W.2d 316, 320 (Iowa 2009); *Atwood*, 602 N.W.2d at 782-83 (finding a statement in response to "what happened" to be excited utterance); *State v. Mateer*, 383 N.W.2d 533, 534-36 (Iowa 1986) (noting witnesses to assault "hysterical" and tearful; officer's questions merely anticipatory of their condition); *Stafford*, 23 N.W.2d at 835 (allowing witness's statements in response to question "what had happened"). And Officer Tripp did not know why Emily had asked the store manager to call police and why she did not want to wait at the store. Both the store manager and the responding officers described Emily as crying and upset. The trial court was within its discretion to find Emily's statements were spontaneous and not the product of reflection or fabrication. *See Watts*, 441 N.W.2d at 398. Emily's condition at the time of the statements supports the court's determination the statements were excited utterances. *See id.*

2. Confrontation rights. Richards also asserts the admission of Emily's statements via the bodycam recording violated his confrontation rights.[4] The Sixth Amendment prohibits the introduction of testimonial statements by a nontestifying witness, unless the witness is "unavailable to testify, and the

[4] Richards does not seek a different interpretation of his confrontation rights under the state and federal constitutions and, therefore, we do not interpret the two differently. *See In re J.C.*, 877 N.W.2d 447, 452 (Iowa 2016).

defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 54 (2004). "If the statements are testimonial, they are inadmissible against [the defendant] at trial; but if they are nontestimonial, the Confrontation Clause does not prevent their admission." *J.C.*, 877 N.W.2d at 452 (citation omitted).

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Hammon v. Indiana, 547 U.S. 813, 822 (2006); *see also Ohio v. Clark*, 135 S. Ct. 2173, 2180-81 (2015).[5]

The district court determined that Emily's statements were made in the course of an ongoing emergency, rendering them non-testimonial. We agree with the district court's ruling.

B. Prior Bad Acts Evidence. Richards contends the district court abused its discretion in allowing evidence of prior assaults against Emily.

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[5] In *Ohio v. Clark*, the Supreme Court stated:

> [A] statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial. "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." But that does not mean that the Confrontation Clause bars every statement that satisfies the "primary purpose" test. We have recognized that the Confrontation Clause does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of the founding. Thus, the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause.

135 S. Ct. at 2180 (citations omitted).

"A court abuses its discretion when its 'discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v. Long*, 814 N.W.2d 572, 576 (Iowa 2012) (citation omitted). "'A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law.'" *State v. Putman*, 848 N.W.2d 1, 7 (Iowa 2014) (citations omitted).

In order for prior-bad-acts evidence to be admissible under Iowa Rule of Evidence 5.404(b):

> (1) "the evidence must be relevant and material to a *legitimate* issue in the case other than a general propensity to commit wrongful acts"; (2) "there must be clear proof the individual against whom the evidence is offered committed the bad act or crime"; and (3) if the first two prongs are satisfied, "the court must then decide if [the evidence's] probative value is substantially outweighed by the danger of unfair prejudice to the defendant."

State v. Richards, 879 N.W.2d 140, 145 (Iowa 2016) (alteration in original) (quoting *State v. Sullivan*, 679 N.W.2d 19, 25 (Iowa 2004)).

During the discussion between the court and counsel on Richards' motion in limine challenging the prior bad acts, the following colloquy occurred:

> MR. TUPPER [defense counsel]: Thank you, your Honor. The sole concern of the jurors should be on was there an assault, who committed the assault. When we start allowing all these prior bad acts to come in, the danger is the jury will simply confuse—decide that in fact my client is quote unquote a bad guy, instead—
>
> THE COURT: Well, obviously the courts have considered this in the domestic violence context, and they've considered it with issues such as motive, intent, absence of mistake or accident. Would you agree with that?
>
> MR. TUPPER: I would agree.
>
> THE COURT: Okay.
>
> MR. TUPPER: And again, your Honor, the question here I believe in this case is really very specifically related to identity. It

isn't going to be a question about whether it occurred, but whether—but who committed that assault.

THE COURT: Well, that certainly invokes motive, intent, absence of mistake or accident, doesn't it?

MR. TUPPER: I think it certainly does, your Honor. As I understand, though, the court is engaging in a balancing act in terms of the probative value versus the prejudicial effect. It seems to me that, again, the focus here is on the identity of the perpetrator, and that that will be shown through other evidence. Again, this would seem to have little probative value and the potential for a very high prejudicial effect.

THE COURT: Obviously related to motive, intent, absence of mistake or accident is another issue that the court discusses in these cases, and that is the nature of the defendant's relationship and feelings towards the victim. You would agree with that, wouldn't you?

MR. TUPPER: I would.

. . . .

THE COURT: And it does appear that this has been considered extensively by the Iowa courts. I would note, including in a case involving Mr. Richards. There's a few things the court needs to discuss in this regard, and there is a three-part test. First of all, the evidence must be relevant and material to a legitimate issue in the case other than, obviously, the general propensity to commit wrongful acts. I do believe in the context of this case the evidence goes to motive, intent, absence of mistake or accident, and it does go to the nature of the defendant's relationship and his feelings toward the victim.

The second aspect of the test is there must be clear proof that the defendant committed these acts. I take it no one's disputing that, as these are convictions. Or are you disputing that, Mr. Tupper?

MR. TUPPER: At least two of the actions, your Honor, are currently subject to postconviction matters, and my client is disputing that. I don't believe that he is disputing the matter related to the incident at the casino in Rock Island.

THE COURT: But as it stands, they are convictions at this point, is that correct?

MR. TUPPER: That is correct, your Honor.

THE COURT: The court thinks the second prong is satisfied by that. And of course the third prong is the evidence—is the probative value of the evidence outweighed by the prejudicial effect. There are several things that the Court needs to consider there. It's clear from what counsel have told me during the course of these proceedings that the victim either has refused to testify for the State, or will testify for the defendant. As we just discussed, it seems clear to the court that the priors were committed by the defendant. The evidence that the State intends to put on by way of prior bad acts involving [Emily] strongly go to the factors that the court discussed

> under the first part of this test. In this court's opinion, they're not unduly prejudicial versus the probative value, as I consider the case law cited by the State, which seems to be compelling on this issue.
>
> I do think that there are some limitations that have to be put in place with respect to their admission. Obviously, and the State has indicated this, they can only put on the priors that involve [Emily]. I think that in questioning [Emily] the State should limit itself to short and concise questions of her. I do think that there needs to be a limiting instruction in this case as to what the jury can use these acts for, and I'd like to hear counsel address what exactly they would like that limiting instruction to be. Obviously they go to motive, intent, absence of mistake or accident. I think they also go to the nature of the defendant's relationship and the feelings toward the victim.

"Domestic violence is never a single isolated incident. Rather, domestic violence is a pattern of behavior, with each episode connected to the others." *State v. Taylor*, 689 N.W.2d 116, 128 n.6 (Iowa 2004) (quoting Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 Fam. L.Q. 43, 56 (2000)). "Thus, "[e]vidence of prior bad acts is especially relevant and probative in domestic violence cases because of the cyclical nature of domestic violence.'" *Id.* We find no reason to disturb the district court's ruling on this issue.

On appeal, Richards asserts, "The large amount of bad acts evidence simply overwhelmed the current facts." This claim is best left for a possible postconviction proceeding because the only objections made at trial were that the evidence was not relevant. Richards has made no claim on appeal that counsel was ineffective in challenging the amount of bad acts evidence.

C. Sufficiency of the Evidence.

A motion for judgment of acquittal challenges the sufficiency of the evidence. *State v. Serrato*, 787 N.W.2d 462, 465 (Iowa 2010). The jury's verdict is binding on appeal unless there is an absence of substantial evidence in the record to sustain it. *State v. Hennings*, 791 N.W.2d 828, 832 (Iowa 2010).

Evidence is sufficient if it could persuade a rational jury that the defendant was guilty beyond a reasonable doubt. *Id.* "The evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." *State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2002). Generally, we will not resolve conflicts in the record, pass upon the credibility of witnesses, or weigh the evidence. *See State v. Hutchinson*, 721 N.W.2d 776,780 (Iowa 2006) (reserving those assessments for the jury). We view the record in the light most favorable to the State. *State v. Showens*, 845 N.W.2d 436, 439–440 (Iowa 2014).

1. Domestic abuse assault. Richards contends there is insufficient evidence to sustain his conviction under count 1, domestic abuse assault. Richards notes that the jury instructions "correctly set out the elements of the offense" of domestic abuse assault:

> (1) On or about the 6th day of August, 2017, the defendant did an act which was meant to cause pain or injury; or result in physical contact which was insulting or offensive; or place [Emily] in fear of immediate physical contact which would have been painful, injurious, insulting or offensive to [Emily].
>
> (2) The defendant had the apparent ability to do the act.
>
> (3) The act occurred between persons who were family or household members residing together at the time of the incident or persons who were family or household members residing together within the past year but were not residing together at the time of the incident.

Viewing the evidence in the light most favorable to the State, we find substantial evidence supports the conviction for domestic abuse assault. Emily's statements to the responding officers;[6] her injuries, which are visible on the bodycam video and the subsequent photographs taken at the hospital; and

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[6] Richards' repeated references to Emily's testimony at the hearing on the application to lift the no-contact order were never presented to the jury is this matter.

Richards' own admissions made during the jailhouse phone calls that he hit her support the jury's finding of domestic abuse assault. The jury was free to reject Richards' testimony as to his version of the day's events. *See State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994) ("Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury was free to reject certain evidence and credit other evidence."), *overruled on other grounds by State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006).

2. Domestic abuse assault by strangulation. Richards asserts there is insufficient evidence to sustain the conviction for domestic abuse assault by strangulation.

A person is guilty of domestic abuse assault by strangulation "if the domestic abuse assault is committed by knowingly impeding the normal breathing or circulation of the blood of another by applying pressure to the throat or neck of the other person or by obstructing the nose or mouth of the other person." Iowa Code § 708.2A(2)(d).

In *State v. Kimbrough*, this court upheld a conviction for domestic abuse assault by strangulation. No. 16-1280, 2017 WL 2876244, at *2 (Iowa Ct. App. July 6, 2017). We noted the victim testified she had trouble breathing and her breathing was affected when the defendant put his hands around her neck. *Id.* In addition, an examining physician testified the victim had injuries consistent with strangulation, and the State introduced photographs of bruising on the victim's thoat. *Id.* "The statute does not require the State to prove [the victim']s breathing stopped or [she] lost consciousness. Rather, it requires the State to prove [the

defendant] 'impeded [the victim's] normal breathing' by applying pressure to the throat or neck." *Id.* (quoting now Iowa Code § 708.2A(2)(d))

Here, the only evidence in the record supporting this charge is Emily's statement, "He tried to choke me again but I felt like I could breathe this time." We have previously considered the definition of the term "choke," stating,

> We find no statute defining "choke" or "choked." We thus look to dictionary definitions to determine the meaning of the term.
>
> The term "choke" is defined as "to check or block normal breathing of by compressing or obstructing the trachea or by poisoning or adulterating available air." *See* Webster's New Collegiate Dictionary 194 (1981). To "check" is "to slow or bring to a stop," or "to restrain or diminish the action or force of." Id. at 188. To "block" is "to make unsuitable for passage or progress by obstruction," or "to hinder the passage, progress, or accomplishment of by or as if by interposing an obstruction." Id. at 118.
>
> Under the foregoing definitions, choking can consist of as little as a momentary and slight slowing or diminishing of breathing.

State v. Amadeo, No. 11-1426, 2012 WL 2122262, at *6 (Iowa Ct. App. June 13, 2012). Although *Amadeo* did not involve an assault by strangulation we find the analysis of the pertinent terms persuasive.

In a dissent in *Amadeo*, it was also noted,

> Experts in the field of domestic violence urge professionals to use the term "strangulation" when referring to external compression of the neck and "choking" when discussing internal airway blockage. *See* Gael Strack & Casey Gwinn, *On the Edge of Homicide: Strangulation as a Prelude*, 26 Crim. Just. 32, 34 (Fall 2011) (noting that when a victim, perpetrator or witness uses the term "choking," "in nearly all cases, they are describing strangulation").

Id. at *9 (Tabor, J., dissenting). Of course here, we do not know Emily's intent in her use of the term but it is clear she believed Richards was going to kill her.

Much like the facts in *Amadeo*, our "record on appeal gives no indication of either the length of time or the severity of the . . . choking. For all that can be

determined from the record, it may have lasted only momentarily, and it may have only slightly slowed or diminished [the victim's] breathing." *See id.* at *6. The evidence reflects, however, by her statement to law enforcement officers that Emily's breathing was not entirely impeded. Viewing the evidence in the light most favorable to the State, we conclude the evidence raises a fair inference that Richards caused some level of blood flow or breathing to be impeded, although it may have only been momentarily or slight. Thus, we conclude there is sufficient evidence to sustain the conviction and affirm as to this count.

3. Possession of a firearm. Richards also challenges the sufficiency of the evidence that he possessed a firearm. Richards stipulated he was prohibited from possessing a firearm. And there is no doubt a firearm was found in the residence where Richards lived. But, possession requires more than that a defendant is in the same location as a firearm. Here, the State asserts Richards had constructive possession of the firearm.

Constructive possession exists when the evidence shows the defendant has knowledge of the presence of firearm and has the authority or right to maintain control of it. *See State v. Reed*, 875 N.W.2d 693, 705 (Iowa 2016); *see also State v. Maxwell*, 743 N.W.2d 185, 193 (Iowa 2008) (constructive possession of controlled substance). "Constructive possession may be proved by inferences." *Reed*, 875 N.W.2d at 705.

> "The existence of constructive possession turns on the peculiar facts of each case." Constructive possession may be inferred when the drugs or firearms are found on property in the defendant's exclusive possession. . . . When the premises are jointly occupied, additional proof is needed.
>
> "[P]roximity to the [contraband], though pertinent, is not enough to show control and dominion." We have identified several

> nonexclusive factors to consider in determining whether the defendant possessed contraband discovered in jointly occupied structures:
>
> > (1) incriminating statements made by a person; (2) incriminating actions of the person upon the police's discovery of a controlled substance among or near the person's personal belongings; (3) the person's fingerprints on the packages containing the controlled substance; and (4) any other circumstances linking the person to the controlled substance.
>
> The last factor is a "catchall" that captures other relevant circumstantial or direct evidence. "The evidence of guilt must generate more than mere suspicion, speculation, or conjecture."

Id. at 705-06 (citations omitted).

Here, the record provides no indication where the firearm was located in the residence. We have a bare statement from Richards on a jailhouse phone call—"yup"—in response to a statement that a firearm was taken away. Emily's statements to Officer Tripp were that Richards told her to get the rifle and shoot herself. This statement allows an inference that he knew there was a firearm on the premises, but does not support a finding that Richards exercised "dominion or control" over the weapon. On this record, we decline to conclude that proof of Richards' constructive possession of the firearm was sufficient to sustain the conviction. We reverse as to this count.

D. Expert Witness Jury Instruction. The trial court instructed the jury:

> You have heard testimony from persons described as experts. Persons who have become experts in a field because of their education and experience may give their opinion on matters in that field and the reasons for their opinion.
>
> Consider expert testimony just like any other testimony. You may accept it or reject it. You may give it as much weight as you think it deserves, considering the witness's education and experience, and all the other evidence in the case.

Richards objected to the instruction, which is a slightly modified Iowa State Bar Association uniform jury instruction,[7] and asked that the court give this proposed alternate:

> You have heard testimony from Nikki E. regarding the effects of domestic violence. Nikki E.'s testimony about domestic violence is not evidence that the defendant committed any of the crimes charged against him. You may consider this evidence only in evaluating the believability of [Emily]'s statements.

"We generally review refusals to give jury instructions for errors at law; however, if the requested jury instruction is not required or prohibited by law, we review for abuse of discretion." *State v. Plain*, 898 N.W.2d 801, 816 (Iowa 2017). "Iowa law requires a court to give a requested jury instruction if it correctly states the applicable law and is not embodied in other instructions." *Id.* (citation omitted).

We find no authority for the sentence in Richards' proposed instruction—"You may consider this evidence only in evaluating the believability of Emily Emily's statements." Our rules of evidence provide the following standard for the admission of expert testimony:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Iowa R. Evid. 5.702. Thus, "[e]xpert testimony is admissible if it is reliable and 'will assist the trier of fact in resolving an issue.'" *State v. Rodriquez*, 636 N.W.2d 234, 245 (Iowa 2001) (citations omitted). Our supreme court has allowed testimony

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[7] Uniform Jury Instruction No. 200.37 includes in the last sentence, "considering the witness's education and experience, *the reasons given for the opinion*, and all the other evidence in the case." The emphasized phrase was not included in the instruction given.

from domestic abuse experts to help the jury understand the nature of the relationship involving domestic violence as well as to understand a defendant's conduct and a victim's reaction to that conduct. *See id.* While the *Rodriquez* court cited a case that allowed expert testimony on the issue of a victim's credibility, *see id.* (citing *State v. Griffin*, 564 N.W.2d 370, 374 (Iowa 1997)), it did not limit the jury's consideration to such an extent. The district court did not abuse its discretion in denying Richards' proposed instruction.

E. Consecutive Sentences. Lastly, Richards contends the district court abused its discretion in ruling the sentences for the convictions should would run consecutive to sentences from two other convictions.

After judgment was entered in this case, the district court heard the question of probation revocation in two cases: FECR377195 and AGCR379842—both of which related to previous assaults against Emily. The court revoked Richard's probation. Richards asked that he be allowed to serve his sentences for these offenses concurrently with the sentences for the instant convictions. Because we are reversing one of the convictions and remanding for resentencing, the district is free to consider Richards's claims.

IV. Conclusion.

We find no error in the admission of the bodycam video and no abuse of discretion as to admission of prior bad acts on the grounds asserted. We find sufficient evidence to sustain the convictions of domestic abuse assault, third or subsequent offense, and domestic abuse assault by strangulation. However, we find there is insufficient evidence of possession of a firearm to sustain that conviction. The district court did not abuse its discretion in denying Richards'

proposed instruction as to expert-witness testimony. Because we reverse the conviction on count 3, we remand for resentencing, at which time Richards may assert his request that he be allowed to serve his sentences for prior offenses concurrently with the sentences for the instant convictions.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR RESENTENCING.

IN THE COURT OF APPEALS OF IOWA

No. 18-0023
Filed December 19, 2018

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EVAN BLAKE WOOTEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Joel W. Barrows, Judge.

The defendant challenges his sentences for attempt to disarm a peace officer of a dangerous weapon and assault on persons engaged in certain occupations. **SENTENCE AFFIRMED IN PART, VACATED IN PART, AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Mary K. Conroy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Zachary Miller, Assistant Attorney General, for appellee.

Considered by Potterfield, P.J., and Bower and McDonald, JJ.

McDONALD, Judge.

Evan Wooten pleaded guilty to attempt to disarm a peace officer of a dangerous weapon, in violation of Iowa Code section 708.13(2) (2016), and assault on persons engaged in certain occupations, in violation of Iowa Code section 708.3A(3). The district court sentenced Wooten to indeterminate terms of incarceration not to exceed five years for the first offense and two years for the second offense, said sentences to run concurrent to each other.

In this direct appeal, Wooten raises three challenges to his sentences. First, he contends the district court erroneously concluded that attempt to disarm a peace officer was a forcible felony requiring imprisonment. Second, Wooten argues the district court considered an impermissible factor in imposing sentence. Specifically, Wooten argues the district court impermissibly considered the sentencing recommendation of the presentence investigation (PSI) report writer. Third, Wooten argues the court erred in "ordering appellate attorney fees to be assessed in their entirety unless [he] filed a request for hearing on the issue of his reasonable ability to pay."

I.

We first address Wooten's claim that the district court erroneously concluded that attempt to disarm a peace officer of a dangerous weapon was a forcible felony. "A 'forcible felony' is any felonious child endangerment, assault, murder, sexual abuse, kidnapping, robbery, human trafficking, arson in the first degree, or burglary in the first degree." Iowa Code § 702.11(1). The district court may not defer judgment, defer sentence, or suspend sentence following conviction

for a forcible felony. *See* Iowa Code § 907.3. In other words, a term of incarceration is mandatory following conviction of a forcible felony.

The question of whether the offense was a forcible felony was briefed and argued in the district court. The district court flagged the issue at the time of Wooten's guilty plea:

> THE COURT: Right, and I want to discuss that a little bit. Mr. Wooten, do you understand that it's an open question as to whether or not count 1 may be a forcible felony?
> THE DEFENDANT: Yes, sir, I do.
> THE COURT: Do you understand that if it's a forcible felony, incarceration would be mandatory on count 1?
> THE DEFENDANT: Yes, sir.
> THE COURT: All right. I've had some discussion with counsel in chambers, and I think the agreement, counsel, was to leave this issue for sentencing so that counsel could present argument to the Court on whether or not this is a forcible felony. Is that correct?
> MR. BERGER: That is correct, your Honor, from the State.
> MR. DIRCKS: Yes, that is correct, your Honor.
> THE COURT: But you understand, Mr. Wooten, that if the court determines it's a forcible felony, incarceration would be mandatory on count 1. Do you understand that?
> THE DEFENDANT: Yes, I do, sir.
> THE COURT: Do you still wish to plead guilty?
> THE DEFENDANT: Yes, sir.

At the time of sentencing, the parties submitted briefing and argument to the district court on the question of whether attempt to disarm a peace officer of a dangerous weapon was a forcible felony. After hearing argument, the district court concluded the offense was a forcible felony. However, the district court explicitly stated that it would have made the same sentencing decision even if it had reached the opposite conclusion on the forcible-felony question:

> The reasons for the sentence obviously include the fact that the court's determined that count 1 is a forcible felony, but the court also notes that you have a significant criminal history, a significant history of problems on supervision, including numerous failures to appear. Although the court does note, on the other hand, that Mr.

> Wooten has appeared for everything in this case. The court is concerned about protection of the community, and of course the court took into account the recommendation of the PSI author, as well. And the reason I note all of that is that the sentence in this case would have been the same regardless of the court's determination that count 1 is a forcible felony.

Wooten contends the district court failed to consider other sentencing alternatives because the court concluded the offense was a forcible felony. Wooten requests his sentences be vacated and the matter be remanded for resentencing. *See State v. Ayers*, 590 N.W.2d 25, 27 (Iowa 1999) ("When a sentencing court has discretion, it must exercise that discretion. Failure to exercise that discretion calls for a vacation of the sentence and a remand for resentencing." (citations omitted)); *State v. Kramer*, 773 N.W.2d 897, 898 (Iowa Ct. App. 2009) ("Failing to exercise discretion in determining what sentence to impose when a sentence is not mandatory is a defective sentencing procedure, which requires vacation of the sentence and a remand for resentencing.").

The State concedes the "district court erroneously concluded Wooten committed a forcible felony requiring prison" but argues the error, if any, was harmless and remand is unnecessary.

We conclude the error was harmless and remand is unnecessary. Under a harmless-error analysis, we presume prejudice and reverse unless the record affirmatively establishes the defendant suffered no prejudice. Here, the district court explicitly stated it would have imposed the same sentence regardless of its determination that attempt to disarm a police officer was a forcible felony. The additional record made by the district court affirmatively establishes the defendant suffered no prejudice and obviates the need for remand. *See State v. Cason*, 532

N.W.2d 755, 757 (Iowa 1995) (holding any failure to formally afford defendant his right to allocution was harmless where defendant "affirmatively stated [he] agreed [with] the recommendation of sentence proposed by the State," "[t]he trial court on several occasions asked [defendant] whether he had any questions regarding his plea agreement or the sentencing recommendations," and defendant "had several opportunities to state any objections to the proposed sentence"); *State v. Mabry*, No. 14-1424, 2015 WL 4642483, at *1 (Iowa Ct. App. Aug. 5, 2015) (applying harmless-error analysis to sentencing error); *State v. James*, No. 11-1207, 2012 WL 1612329, at *3 (Iowa Ct. App. May 9, 2012) (applying harmless-error analysis to sentencing); *see also Davis v. State,* 617 So.2d 1140, 1141 (Fla. Dist. Ct. App. 1993) (per curiam) (holding remand was not necessary where the sentencing court stated it "would have imposed the same sentence" even if not mandatory); *Rubi v. State*, 575 S.E.2d 719, 724 (Ga. Ct. App. 2002) (holding error was harmless where the district court stated it would have imposed the same sentence even without considering improper factor); *People v. Anderson*, 825 N.W.2d 678, 687 (Mich. Ct. App. 2012) ("If the trial court would have imposed the same sentence regardless of a misunderstanding of the law, this [c]ourt may affirm."); *State v. Ortega-Gonsalez*, 404 P.3d 1081, 1084 (Or. Ct. App. 2017) ("We will affirm a judgment even though we determine that the trial court erred in sentencing when the record shows that the trial court could have imposed the same total sentence without the error and we are 'completely confident' that the trial court would impose the same sentence if the case were remanded for resentencing." (quoting *State v. Calderon-Ortiz*, 191 P.3d 808, 812 (Or. Ct. App. 2008)); *State v. Binkerd*, 310 P.3d 755, 764 (Utah Ct. App. 2013) ("The court explained, however, that had it correctly

understood the statute at the time of sentencing, it would have imposed the same sentence regardless—a sentiment that is entirely credible given the record before us. Therefore, the error was harmless."); *State v. Weller*, 344 P.3d 695, 705 (Wash. Ct. App. 2015) (stating the appellate court will affirm the sentence despite error "when the trial court expressly states" the same sentence would have been imposed).

II.

In his next claim of error, Wooten argues it was improper for the PSI report to contain a sentencing recommendation. He also argues the district court erred in considering the PSI report writer's sentencing recommendation.

We first note the claim is not preserved for appellate review. Our courts require that a defendant interpose an objection at the time of sentencing to preserve error on a claim that the PSI report contains improper information. *See, e.g.*, *State v. Grandberry*, 619 N.W.2d 399, 402 (Iowa 2000); *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998); *State v. Buck*, No. 14-0723, 2015 WL 1046181, at *2 (Iowa Ct. App. Mar. 11, 2015); *State v. Thonethevaboth*, No. 05-1821, 2006 WL 1751295, at *1 (Iowa Ct. App. June 28, 2006). Here, the presentence investigation report contained the following recommendation: "Based on the nature of the crimes to which the defendant has pled guilty, and has [sic] prior criminal record, incarceration is recommended." At the time of sentencing, the district court afforded the defendant and defendant's counsel the opportunity to object to information contained in the PSI report, and the defendant failed to object to the writer's recommendation. Thus, error is not preserved.

Wooten requests that we review the claim as a claim of ineffective assistance of counsel. "[W]e review ineffective-assistance-of-counsel claims de novo." *State v. Hopkins*, 860 N.W.2d 550, 553 (Iowa 2015). To prevail on his claim, Wooten must show by a preponderance of the evidence that his counsel failed to perform an essential duty and prejudice resulted. *See id.* at 556.

Wooten argues counsel failed to perform an essential duty by failing to object to the inclusion of the PSI writer's opinion in the report. Wooten cites to Iowa Code sections 901.2, prescribing the manner of completing the PSI, and 901.3, stating what the PSI must contain. He argues that neither section authorizes the department of correctional services to include a sentencing recommendation in the PSI report. According to Wooten, without express instruction, the department of correctional services cannot provide a sentencing recommendation. Wooten further argues that the district court is thus prohibited from considering the writer's sentencing recommendation.

The State argues counsel had no duty to object. The State notes the district court can consider any information relevant to sentencing. The Iowa Code allows for the district court to "receive . . . any information which may be . . . relevant to the question of sentencing." Iowa Code § 901.2(1). In addition to this statutory authority, the State notes, "The sentencing judge should be in possession of the fullest information possible concerning the defendant's life and characteristics . . . ." *See State v. Stanley*, 344 N.W.2d 564, 570 (Iowa Ct. App. 1983). A "judge may resort to such sources of information as he[/she] thinks might be helpful to his[/her] judgment as to sentencing." *Id.* The State argues the department of correctional services' recommendation for sentencing, based on the

department's understanding of the defendant's needs and the services available to meet those needs, is relevant to the question of sentencing. Because the sentencing recommendation is relevant to sentencing, the State argues, counsel had no duty to object.

We decline to address the claim on the merits. "Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge." *State v. Pearson*, 547 N.W.2d 236, 241 (Iowa Ct. App. 1996). Here, the defendant's counsel made a strong sentencing recommendation to the court. It is long-standing practice for all PSI reports to contain a sentencing recommendation. It is also long-standing practice for the sentencing court to take into consideration the sentencing recommendation of the department of correctional services. Given the long-standing practice, defendant's counsel should have the opportunity to make a record to defend against this claim of ineffective assistance of counsel. We thus preserve the claim for postconviction-relief proceedings.

III.

In his third claim, Wooten challenges the provision of the sentencing order providing that he shall be responsible for appellate attorney fees unless he requests a hearing on his reasonable ability to pay the same. Challenges to restitution are reviewed for errors at law. *State v. Coleman*, 907 N.W.2d 124, 134 (Iowa 2018).

The challenged portion of the order provides as follows:

> The defendant is advised that if he determines to appeal this ruling, he may be entitled to court-appointed counsel to represent him in an appeal. The defendant is advised that if he qualifies for

> court-appointed appellate counsel then he can be assessed the cost of the court-appointed appellate attorney when a claim for such fees is presented to the clerk of court following the appeal. The defendant is further advised that he may request a hearing on his reasonable ability to pay court-appointed appellate attorney fees within 30 days of the issuance of the procedendo following the appeal. If the defendant does not file a request for a hearing on the issue of his reasonable ability to pay court-appointed appellate attorney fees, the fees approved by the State Public Defender will be assessed in full to the defendant.

We conclude this provision of the sentencing order was erroneous. The district court can only order the defendant to repay court-appointed attorney fees after making a finding the defendant has the reasonable ability to pay the same. *See* Iowa Code § 910.2(1). In *State v. Coleman*, the defendant brought the same challenge as Wooten does now. 907 N.W.2d at 148-49. The supreme court vacated the defendant's sentence on other grounds and did not reach the merits of the issue. *See id.* at 149. However, the supreme court instructed the district court on remand to "follow the law and determine the defendant's reasonable ability to pay the attorney fees without requiring him to affirmatively request a hearing on his ability to pay" before assessing future attorney fees. *Id.* Given this direction, it is apparent the supreme court would hold the challenged portion of the sentencing order is erroneous. *Cf. Goodrich v. State*, 608 N.W.2d 774, 776 (Iowa 2000) ("Constitutionally, a court must determine a criminal defendant's ability to pay before entering an order requiring such defendant to pay criminal restitution.").

Accordingly, we vacate the portion of the sentencing order requiring Wooten affirmatively request a hearing on his ability to pay and remand for entry of a corrected sentencing order.

SENTENCE AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

IN THE COURT OF APPEALS OF IOWA

No. 3-683 / 12-2178
Filed July 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TIMOTHY LAWAYNE WILLIAMS JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Joel W. Barrows, Judge.

Timothy Williams Jr. appeals the sentence and fine imposed following revocation of his deferred judgment for burglary in the third degree. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Michael J. Walton, County Attorney, and Kimberly Shepherd, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Vaitheswaran and Doyle, JJ.

DOYLE, J.

Timothy Williams Jr. appeals the sentence and fine imposed following revocation of his deferred judgment for burglary in the third degree. We affirm in part and reverse in part and remand with directions.

I. Background Facts and Proceedings.

In December 2011, the State filed a trial information charging Williams with the crimes of third-degree burglary and possession of a controlled substance (marijuana). Williams entered guilty pleas to both charges pursuant to a plea agreement. Under the agreement, Williams would request a deferred judgment and the State agreed to recommend against incarceration.

Williams was sentenced in May 2012. On the charge of third-degree burglary, the district court granted Williams request for a deferred judgment. A $750 civil penalty was imposed. Williams was placed on supervised probation for three years and a number of specific conditions of probation were included.

Less than a week after his sentencing, and then again in October 2012, the State reported Williams had violated the conditions of his probation. Williams admitted to the reported violations. As a result of Williams's second violation, the court on November 30, 2012, entered its ruling revoking Williams's deferred judgment status and probation. The court's order, set forth via a court calendar entry, stated:

> It is ordered that deferred judgment heretofore granted is set aside. Pursuant to [Williams's] plea of guilty to the charge . . . of burglary in the third degree . . . , it is the judgment and sentence of the court that [Williams] is committed . . . for a term not to exceed five years, with credit on said sentence for time spent in custody to date. [Williams] is further sentenced to pay a fine of $750. The fine is suspended.

Williams now appeals. He contends the district court erred in failing to reduce the fine imposed by an amount equal to civil penalty imposed as a part of his deferred judgment. A claim that the district court exceeded its jurisdiction or otherwise acted illegally by incorrectly applying the law and imposing a sentence not allowed by law is reviewed for correction of errors at law. *State v. Keutla*, 798 N.W.2d 731, 732 (Iowa 2011). We also review issues of statutory interpretation and application for errors of law. Iowa R. App. P. 6.907. "When we interpret statutes, our primary goal is to ascertain the legislature's intent." *Keutla*, 798 N.W.2d at 734.

III. Discussion.

Iowa Code chapter 908 (2011) "addresses probation and parole violations, and section 908.11 specifically speaks to probation violations." *Id.* at 733. Relevant here, section 908.11(5) provides:

> Notwithstanding any other provision of law to the contrary, if the court revokes the probation of a defendant who received a deferred judgment *and imposes a fine, the court shall reduce the amount of the fine by an amount equal to the amount of the civil penalty previously assessed against the defendant pursuant to section 907.14.* However, the court shall assess any required surcharge, court cost, or fee upon the total amount of the fine prior to reduction pursuant to this subsection.

(Emphasis added.)

Williams argues the district court's failure to expressly reduce the amount of his criminal fine by the amount of his $750 civil penalty previously imposed against him violated section 908.11(5). He asserts the proper remedy for the error is to vacate the entire sentence and remand the case for resentencing.

The State contends that because the court "suspended" Williams's fine, no fine was imposed, and, consequently, a civil-penalty credit was unnecessary. However, the State concedes the district court's use of the word "suspend" as it relates to Williams's fine is "imprecise." Nevertheless, it advocates interpreting the word "suspend" to mean "waived," again, as its argument goes, resulting in no fine imposed against Williams and rendering a civil-penalty credit unnecessary. Finally, it argues that if we find the fine was imposed, the district court's use of the word "suspended" was "the functional equivalent of the credit that is required under section 908.11(5)."

Upon our review, we agree with Williams that the district court was required to expressly reduce the amount of his criminal fine by the amount of his civil fine pursuant to section 908.11(5). Although that appears to be the court's ultimate intent, its language is not crystal clear. Accordingly, we must find the court's failure to expressly follow section 908.11(5) resulted in imposing a sentence not allowed by law.

However, we disagree with Williams's argument that this error by the court requires this court to vacate his entire sentence and remand for resentencing. "Generally, in criminal cases, where an improper or illegal sentence is severable from the valid portion of the sentence, we may vacate the invalid part without disturbing the rest of the sentence." *Keutla*, 798 N.W.2d at 735. In this instance, we conclude the district court's language with regard to the fine is easily severable from the remainder of his sentence. Consequently, we only vacate that portion of Williams's sentence relating to the $750 fine, and we remand that

matter to the district court for resentencing for conformance with the provisions of section 908.11(5). We affirm his sentence in all other respects.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.

IN THE COURT OF APPEALS OF IOWA

No. 18-2003
Filed May 13, 2020

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DEVARIO D. TALLEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Joel W. Barrows, Judge.

A defendant appeals his convictions for eluding and three counts of child endangerment. **REVERSED AND REMANDED FOR NEW TRIAL.**

Martha J. Lucey, State Appellate Defender, and Melinda J. Nye, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Timothy M. Hau, Assistant Attorney General, for appellee.

Considered by Tabor, P.J., and May and Greer, JJ.

TABOR, Presiding Judge.

Devario Talley challenges his convictions for eluding and child endangerment. He contends the State did not offer enough evidence to merit an instruction on the alternative theory of aiding and abetting. Even viewing the evidence in the light most favorable to the State, the record contains insufficient proof that Talley knowingly advised or encouraged his brother to lead Davenport police on a high-speed chase, placing child passengers at risk. Because the jury returned general verdicts, we must reverse and remand for a new trial.

I. Facts and Prior Proceedings

Rock Island Police Officer Philip Ledbetter was driving an unmarked vehicle when he asked fellow officer Luke Serra to pull over a tan Chevrolet Suburban. The Suburban's driver, Talley, was using his cell phone. Officer Serra signaled Talley to stop. Talley complied by pulling into a parking lot but kept his engine running. Officer Serra approached the driver's window and asked for Talley's license and proof of insurance. Talley handed over his driver's license and told Officer Serra that he had proof of insurance saved on his phone. During this exchange, video footage from Officer Serra's body camera showed the legs of another individual sitting in the front passenger seat.

While waiting for Talley to find his proof of insurance, Officer Serra stood outside Talley's vehicle. Still communicating with dispatch, Officer Serra opened the driver's door and asked Talley to step out. Talley shook his head, engaged the gear lever with his left hand, and sped off. The driver's door was still open as Talley made a sharp right turn onto the adjacent road. In that turn, Talley's wallet

fell from the Suburban. After watching the vehicle speed off, Officer Serra picked up Talley's wallet from the road.

Having watched the encounter from his unmarked pickup, Officer Ledbetter followed Talley. Officer Ledbetter later testified that Talley was speeding and driving erratically in Rock Island before he lost sight of Talley's vehicle for a few seconds. When Officer Ledbetter regained sight of the Suburban, Talley was driving toward the Centennial Bridge, which crossed the Mississippi River into Iowa.

To avoid any more police attention, Talley slowed down and obeyed traffic laws on the bridge. Obtaining permission from his supervisors, Officer Ledbetter followed Talley into Davenport. He called dispatch who notified the Davenport police that Talley had run from the police and was heading into their jurisdiction. Officer Ledbetter gave up tailing Talley when the Suburban was about two car lengths ahead of him and Davenport police were three cars lengths behind.

As Davenport police intercepted the Suburban, Corporal Nathan Schroeder turned on his lights and siren near Fifteenth and Ripley Street. He recalled the vehicle traveling "at a high rate of speed" southbound down an alley. The corporal continued the pursuit as the Suburban returned to the city streets, eventually turning northbound, the wrong way, onto Harrison Street. On the border of Vander Veer Park, the Suburban veered onto the sidewalk for a bit before returning to Harrison Street. Corporal Schroeder recalled reaching speeds between 80 and 90

miles per hour several times during the chase.[1] After turning off Harrison Street onto Gaines Street, the Suburban ran two stop signs. Eventually, it pulled into an alley off Division Street.

By the time Corporal Schroeder caught up, Officer Joseph Dorton was already on the scene. When Officer Dorton first saw the Suburban driving down Division Street, it was "[v]ery erratic, that's why officers that were on the pursuit couldn't keep up with it, just because of how fast it was going." As Officer Dorton pulled up behind the Suburban in the alley, he noticed "the vehicle was actually smoking . . . so that's what caught our eye."

Next, both sets of officers approached the Suburban on foot. Because of its tinted windows, they couldn't tell if any occupants had fled but prepared to conduct "a felony stop" with weapons drawn. To their surprise, what the officers saw were two little girls climb out of the back seat, the second holding a baby. After holstering their weapons, the officers found the front seat empty. Officer Dorton described the children as "very, very scared." The three backseat passengers were Talley's daughters, ages eleven, six, and one. The eldest child complained of head pain. She had not been wearing a seatbelt and hit the roof of the Suburban as it careened through Davenport's streets.

When an officer asked the six-year-old who was driving, she said her uncle. She explained "her daddy got into a white car with two girls." The uncle was Queshan Harris, Talley's younger brother. Harris testified that after they drove

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[1] Corporal Schroder worried about the pursuit's threat to public safety: "It was right in the middle of the busiest kind of the rush hour time where people are coming from work, coming home. It was the busiest time of the day."

over the bridge into Iowa, Talley stopped the Suburban behind the YMCA. Harris said Talley "got out and got in the car with two females, and I started to drive." Talley's three little girls remained seated in the back of the Suburban.

Harris testified to heading up the hill toward Harrison Street. By his account, as he was "coming down Ripley and turned into an alley, . . . they kind of tried to swarm me, so I got scared and kept driving." Harris admitted driving the wrong direction down one-way streets and reaching speeds of more than twenty miles above the posted limit. Shortly after finding the children in the abandoned Suburban, Corporal Schroeder located their uncle hiding in a detached garage down the alleyway. Police arrested Harris for child endangerment and eluding. Before Talley's trial, Harris pleaded guilty to those charges.

Unlike the quick arrest of Harris, Davenport police did not track down Talley on March 27, 2018, the day of the chase. The State secured an arrest warrant for Talley on April 3 but did not take him into custody until June. The trial information, filed in July, charged him with one count of eluding or attempting to elude a law-enforcement vehicle in violation of Iowa Code section 321.279(2) (2018). The State also charged Talley with three counts of child endangerment in violation of section 726.6(7)—one count for each of his daughters present for the eluding.

At trial, the State introduced into evidence the recording of a phone call Harris placed from jail to Talley before his arrest. In the call, Harris complains about difficulty obtaining pretrial release. Talley tells him: "They mad as hell . . . , you been driving around Davenport for thirty minutes running from the police. They mad." During the call, Harris acknowledged driving the Suburban. Talley joked about other people calling him mid-chase to comment on his erratic driving in the

neighborhood, but he replied: "no that was lil' bro." Harris described how one of his nieces entreated from the backseat: "I know uncle this is the wrong time to ask, but if you get away from the police, can you take me to use the bathroom?" Talley guffawed: "You scared the piss out of my baby."

The State also introduced two jail phone conversations recorded after Talley's arrest. In the first conversation, Talley asks the woman on the line to get Harris to "take the charges" for him. In the second conversation, the woman says she "talked to Queshan and he took the charge, he took a plea." Talley replies: "Tell him I said thanks."

At the close of trial, the jury returned general verdicts, convicting Talley on all four counts from which he now appeals.

II. Scope and Standards of Review

We review a challenge to the sufficiency of the evidence to submit a jury instruction for correction of legal error. *State v. Neiderbach*, 837 N.W.2d 180, 190 (Iowa 2013). When the disputed instruction defines the parties to a crime under chapter 703, and thus adds a vicarious-liability alternative to the marshalling instructions, we review for substantial evidence. *See State v. Smith*, 739 N.W.2d 289, 293 (Iowa 2007). We find substantial evidence for the alternative theory if, when viewed in the light most favorable to the State, the proof could convince a rational jury the defendant is guilty of the charged crimes beyond a reasonable doubt. *Id.*

III. Analysis

On appeal, Talley raises two issues. One, did the district court err by instructing the jury on the theory of aiding and abetting? Two, was Talley's trial

counsel ineffective for not requesting a jury instruction on territorial jurisdiction? Because our resolution of the first issue is dispositive, we need not address the second claim.

Out of the gate, the State did not advance an aiding-and-abetting theory. The trial information alleged Talley acted as the principal in the eluding and child endangerment counts. At trial, after defense counsel moved for judgment of acquittal, the prosecutor asserted: "A reasonable trier of fact could certainly conclude from this information that Mr. Talley was in fact the person driving, and was the person who began leading all of the officers in Davenport in Scott County on this high-speed chase which has been testified to by multiple officers."

In fact, not until the parties were assembling the jury instructions did the State suggest it was pursuing a theory of aiding and abetting. The prosecutor asked for the aiding-and-abetting instruction, explaining: "we have testimony from Mr. Harris that two different people were involved in the commission of this crime." Over a defense objection,[2] the district court ruled: "the evidence presented so far justifies the instruction for aiding and abetting."

After that ruling, the jury received this aiding-and-abetting instruction:

> All persons involved in the commission of a crime, whether they directly commit the crime or knowingly "aid and abet" its commission, shall be treated in the same way.
>
> "Aid and abet" means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed. Conduct following the crime may be considered only as it may tend to prove the defendant's earlier

[2] The State argues the defense objection was not specific enough to preserve error. We disagree. Defense counsel preserved error by objecting to the prosecutor's proposed aiding-and-abetting instruction and by obtaining the court's decision that sufficient evidence supported that alternative theory.

> participation. Mere nearness to, or presence at, the scene of the crime, without more evidence, is not "aiding and abetting". Likewise, mere knowledge of the crime is not enough to prove "aiding and abetting".
>
> The guilt of a person who knowingly aids and abets the commission of a crime must be determined only on the facts which show the part he has in it, and does not depend upon the degree of another person's guilt.
>
> If you find the State has proved a defendant directly committed the crime, or knowingly "aided and abetted" other person or persons in the commission of the crime, then the defendant is guilty of the crime charged.

That uniform instruction reflected the aiding-and-abetting definition in Iowa Code section 703.1.

Under the marshaling instruction for eluding, the State had to prove Talley "drove a vehicle" and "willfully failed to bring the motor vehicle to a stop or otherwise eluded a marked official law enforcement vehicle driven by a uniformed peace officer after being given a visual and audible signal to stop." *See* Iowa Code § 321.279(2). Alternatively, under its aiding-and-abetting theory, the State had to show Talley knowingly advised or encouraged Harris to do those acts.

Under the marshalling instructions for child endangerment, the State had to prove Talley "was the parent or person having custody or control" of the children, the children were under fourteen, and he "acted with knowledge that he was creating a substantial risk to [their] physical, mental, or emotional safety." *See id.* § 726.6(7). Alternatively, under its aiding-and-abetting theory, the State had to show Talley knowingly advised or encouraged Harris to do those acts.

Talley contends the State presented insufficient evidence to support the aiding-and-abetting instruction. In Talley's estimation, the record lacks substantial

evidence that he "assented to or lent countenance and approval to" Harris's acts of eluding or child endangerment.[3]

It is fundamental that someone convicted of aiding and abetting must be aware of the offense "at the time of or before its commission." *See State v. Henderson*, 908 N.W.2d 868, 876 (Iowa 2018) (quoting *State v. Tangie*, 616 N.W.2d 564, 574 (Iowa 2000)). Knowledge of the crime is essential. *Neiderbach*, 837 N.W.2d at 211. But neither knowledge nor presence at the scene of the crime can alone prove aiding and abetting. *See Henderson*, 908 N.W.2d at 876.

To sustain Talley's convictions on the theory of aiding and abetting, the State must show he advised or encouraged Harris to elude the Davenport police—and thereby endanger the children—before or during the chase. But the State offered no evidence that both Talley and Harris were in the Suburban during the Iowa pursuit. None of the Iowa officers testified to seeing Talley despite chasing the Suburban for ten to fifteen minutes through Davenport. And after the chase, the six-year-old sister told police her uncle, not her father, had been driving.

Likewise, the jail call between Talley and Harris undermines any presumption that both brothers were in the car during the chase in Iowa. Talley told Harris it was hard to secure bail because the authorities were "mad as hell" that Harris was "driving around Davenport for thirty minutes running from police." Talley also recounted how he told others that it was not him who was driving recklessly in Davenport but his little brother. During the same call, Harris admitted

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[3] Although Harris was not the parent, if he was driving the Suburban, he had "control" over the instrumentality contributing to the risk to the children. *See State v. Anspach*, 627 N.W.2d 227, 235 (Iowa 2001).

driving the Suburban in Davenport. In line with that admission, Harris pleaded guilty to eluding and child endangerment.

Without evidence that Talley encouraged or lent countenance to Harris's erratic driving *while it was happening*, the State is left with the option of showing Talley did so *before* his brother's eluding started. Yet the State offered no evidence Talley encouraged Harris—in advance—to go lead police on a high-speed chase through Davenport during rush hour with Talley's three children in the backseat.

Granted, as the State argues, direct evidence is unnecessary to prove aiding and abetting. The State may establish by circumstantial evidence that the accused knew about the crime before or at the time of its commission. *See Tangie*, 616 N.W.2d at 574. Circumstantial evidence may include "presence, companionship, and conduct before and after the offense is committed." *State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994) (citation omitted). In identifying relevant circumstantial evidence, the State concedes "Harris's testimony superficially supported the defense narrative" that Talley was not in the Suburban during the Iowa chase. But the State grades Harris's testimony as "demonstrably false, conveniently vague, and self-sacrificing" thus providing circumstantial evidence of Talley's guilt.

Based largely on its critique of Harris's credibility, the State defends the district court's decision to instruct on both theories. On the theory Talley was the principal, the State contends: "If Harris was lying about driving, then Talley was driving the vehicle in circles waiting for his ride and was liable for his attempt at eluding the police and the danger he created for his children." On the theory Talley was an aider and abettor, the State reasons: "If—as their recorded conversation

suggested—Harris drove the vehicle during some part of the Davenport pursuit as Talley attempted to contact people to pick him up mid-chase, then Harris likely took control of the Suburban and care of Talley's children at his brother's direction."

First, we question whether a "likelihood" is enough to prove beyond a reasonable doubt that Talley aided and abetted Harris's acts of eluding and child endangerment. *See Henderson*, 908 N.W.2d at 876 (explaining "foreseeability, as opposed to knowledge or intent is not enough to sustain aiding-and-abetting conviction"); *Smith*, 739 N.W.2d at 294 (finding insufficient evidence to submit to the jury the State's claim that Smith was guilty—under theory of joint criminal conduct—of crimes committed by his confederate who shot a deputy).

Second, speculation that Harris took control of the vehicle and the children at Talley's direction is not the same as proving Talley aided and abetted those criminal offenses. *See Henderson*, 908 N.W.2d at 877 (citing with approval federal authority holding conviction for aiding and abetting requires "not just an act facilitating one or another element, but also a state of mind extending to the entire crime"); *see also State v. McGrean*, No. 12-0537, 2013 WL 1453147, at *4 (Iowa Ct. App. Apr. 10, 2013) (finding evidence created only "suspicion, speculation, or conjecture" about McGrean's participation as an aider and abettor). Where is the State's proof that, by handing over control of the Suburban, Talley encouraged Harris to exceed the speed limit by more than twenty-five miles per hour and to "willfully fail" to stop when signaled by a uniformed officer? Where is the State's proof that, by leaving the children in their uncle's care, Talley encouraged Harris to knowingly create a substantial risk to their health and safety?

In the end, neither direct nor circumstantial evidence sustains the prosecutor's belated theory of aiding and abetting. The defense case pointing to Harris as the driver did not automatically open the door to a theory of vicarious liability. As the prosecutor said in resisting the motion for judgment of acquittal, a reasonable jury could believe Harris was lying and Talley "was in fact the person driving" during the high-speed chase in Davenport. But conversely, the State did not generate a jury question on the alternative theory that Harris was telling the truth and Talley encouraged Harris to elude the police or endanger Talley's children. The record lacked sufficient evidence to support a jury instruction on aiding and abetting.

Because the jury returned general verdicts—not specifying between the State's two theories—we must reverse and remand for a new trial.[4] *See Smith*, 739 N.W.2d at 295 (citing *State v. Hogrefe*, 557 N.W.2d 881 (Iowa 1996)). Having reversed on the insufficient proof of aiding and abetting, we find it unnecessary to resolve Talley's ineffective assistance claim. But should Talley go to trial again, we emphasize the marshalling instructions should require the jury to find he committed the crimes "wholly or partly within the State of Iowa." *See State v. Liggins*, 524 N.W.2d 181, 185 (Iowa 1994) (discussing territorial jurisdiction).

REVERSED AND REMANDED FOR NEW TRIAL.

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[4] *But see* Iowa Code § 814.28 (2019) (barring appellate revision of a verdict "on the basis of a defective or insufficient theory if one or more of the theories presented and described in the complaint . . . is sufficient to sustain the verdict on at least one count").

IN THE COURT OF APPEALS OF IOWA

No. 14-0645
Filed February 25, 2015

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DANIELLE BUNCE,
Defendant-Appellant.

Appeal from the Iowa District Court for Clinton County, Joel W. Barrows (plea) and Nancy S. Tabor (sentencing), Judges.

Danielle Bunce appeals her sentence following a guilty plea to child endangerment resulting in bodily injury. **SENTENCE AFFIRMED IN PART; VACATED IN PART; REMANDED.**

Mark C. Smith, State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, and Michael L. Wolf, County Attorney, for appellee.

Considered by Vogel, P.J., and Doyle and McDonald, JJ.

VOGEL, P.J.

Danielle Bunce appeals her sentence following a guilty plea to child endangerment resulting in bodily injury. She asserts the district court imposed an illegal sentence when it ordered her to pay court costs associated with a dismissed charge and that it abused its discretion when it relied on improper considerations when imposing the suspended sentence. We conclude the costs assessed based on a dismissed count constitutes an illegal sentence; accordingly, we vacate the imposition of the fine. However, the district court properly considered various factors and did not abuse its discretion when suspending the sentence rather than ordering it deferred. Consequently, we affirm the suspended sentence but vacate the portion of the sentencing order assessing the court costs to Bunce associated with count three.

On June 21, 2013, Bunce was charged by trial information with willful injury causing serious injury and three counts of child endangerment resulting in serious injury. The charges were based on conduct that occurred on February 18, 2013, when Bunce discovered her five-week-old daughter, R.B., was injured but waited twenty-four hours before seeking medical treatment. Bunce had noticed R.B. was twitching, as though she was having a seizure, and could not swallow.[1] The injuries had resulted from abuse perpetrated by R.B.'s father and Bunce's paramour, Eladio Pena.

On March 6, 2014, Bunce pled guilty to one count of child endangerment resulting in bodily injury, in violation of Iowa Code sections 726.6(1)(d) and

[1] The injuries diagnosed at the hospital included a broken neck, a skull fracture, a fractured rib, and bleeding in the brain.

726.6(6) (2013), in exchange for the State's recommendation of supervised probation and Bunce's request for a deferred judgment. Both agreed the sentence should be suspended. A sentencing hearing was held on April 4, 2014, and the district court sentenced Bunce to a term of five years imprisonment, suspended, a fine of $750 plus surcharge and court costs, and two years of probation. It dismissed counts one and two of the trial information at the State's cost, as well as count three, with costs assessed to Bunce. Bunce appeals.

We review challenges to an illegal sentence for correction of errors at law. *State v. Anderson*, 565 N.W.2d 340, 342 (Iowa 1997). To the extent we are reviewing the sentence imposed, we review the district court's decision for an abuse of discretion. *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002).

Bunce first argues the district court imposed an illegal sentence when it ordered her to pay the costs associated with the dismissed count three, and the State concedes the court erred. When the plea bargain is silent as to costs and a statute does not authorize the assessment of costs to the defendant for a dismissed charge, it is error for the district court to order the defendant to pay such costs. *State v. Petrie*, 478 N.W.2d 620, 622 (Iowa 1991). Here, the plea bargain was silent and no statute authorized the imposition of costs. Consequently, the district court imposed an illegal sentence when ordering Bunce to pay the court costs associated with count three, and we sever this portion of the sentence from the balance of the sentence. *See Bonilla v. State*, 791 N.W.2d 697, 702 (Iowa 2010) (holding when part of a sentence is invalid it may be severed from the rest of the sentence so as to leave the valid portions intact).

Bunce further asserts the district court abused its discretion when deciding to suspend the five-year sentence rather than defer it, claiming the court considered improper factors. She takes issue with the court's consideration of unrelated portions of the record and facts that she argues are not supported by the record, including: (1) the consideration of count three when assessing costs to her, which was a dismissed charge; (2) her consumption of alcohol prior to the crime; (3) the court's observation regarding "new moms"; (4) the court's discussion of the child's injuries; and (5) Bunce's knowledge of Pena's propensity to harm young children.

When deciding to impose a suspended sentence rather than deferring judgment, the district court gave the following reasons:

> THE COURT: This is a difficult case. Yes, I agree that [you were not] the one who actually inflicted the injuries.
>
> However, this child suffered injuries to [her] ribs, [her] vertebrae. Those are things that even if the bones heal all throughout life, if you have a broken neck, you're going to be suffering the rest of your life with pain and inability to do things and arthritis and all those kind of things that happen when you have a broken bone, and this is a case where you allowed yourself to get in a position where somebody that you knew that had the history that Mr. Pena had about hurting children was left to take care of your child because of how you let your condition get, and then when you found out your child was in distress, you did nothing for over 24 hours. A screaming baby. New moms, oh, my God, the first born the baby doesn't blink, they're on the phone to their doctor because they're so nervous they don't know what to do. They're constantly on the phone. You did just the opposite. Not going to do a thing. That's very, very distressing to me that we have people who would have that kind of attitude, and then you lie about it to cover your boyfriend? You placed your boyfriend above your own child. Those are all really aggravating circumstances, in my opinion. I also realize that you're young and that a felony record would impede your ability to get school loans, which you probably won't be able to get anyway because you already have bad credit, but it also may be some employment things, so those are factors that I'm considering.

I do consider that you weren't the one who actually inflicted the injuries, but, again, as your attorney has acknowledged, that's not an excuse. It wasn't like you didn't know about Mr. Pena and it wasn't like you just kind of—it accidentally happened. The circumstances of this case, as I understand them, as was revealed in the Minutes of Testimony were that you allowed yourself to get inebriated and couldn't care for your child so he was there. Those are in my mind, again, aggravating factors.

. . . .

[DEFENSE COUNSEL]: The Trial Information, that statement that she was inebriated that night as set out in the Trial Information, that was not addressed at the time of plea because it wasn't substantive to the charge that she was pleading to. The fact of the matter is she wasn't inebriated that night. He was there to watch the child because she had the child the rest of the time and the child wasn't—didn't tend to sleep through the night, so she—he came on the weekends sometimes to watch the child so that she could try to catch up on her sleep.

THE COURT: Well, it said that she'd been drinking, and she's charged with not getting medical care, and in my case it is substantive because it goes to the fact that she knew about Mr. Pena and she wasn't getting up at night taking care of the kid. He was, and she was letting him do that, and that's where it's denying the care and denying the necessary care. So I'm not—that is not the—not a factor in my sentencing. It's merely what the Trial Information said, and I note that in that she woke up and she knew the kid was in distress and did nothing, is my issue.

When she got up in the morning is when she found out the kid was in distress, and that is when she did nothing.

. . . .

That's what I understand that the part of the allegation is, is that once she knew, she didn't—it took 24 hours to get where she needed the—more than 24 hours for the kid to get to some kind of medical care, and it wasn't even the closest medical care, which is another issue. It just doesn't bode well to me with what—how a new mom acts, that whole new mom thing. You're more concerned about kids. When you don't know something, you're always asking and erring on the side of caution. It's when you have that third and fourth one that you kind of know what goes on and whether you need to take them or not.

Anyway, my concern in this is this is a very serious crime, and I think that the gravity of the crime and the aggravating factors in this case outweigh the positives, and I do not feel a deferred judgment is appropriate, and I will not grant one in this case. I will, however, agree reluctantly to grant a suspended prison term.

We note that a sentencing decision is cloaked with a strong presumption in its favor, and a court abuses its discretion only when it imposes a sentence on grounds clearly unreasonable or untenable. *State v. Laffey*, 600 N.W.2d 57, 62 (Iowa 1999). Permissible factors to consider include the nature of the offense; the attending circumstances; the defendant's age, character, and propensities; and THE chances of reform. *Id.*

Upon review of the record, we conclude the district court did not abuse its discretion in suspending the sentence rather than deferring judgment. With regard to Bunce's allegation the court considered unadmitted conduct, this error solely consisted of improperly assigning court costs associated with count three to Bunce, rather than being an improper consideration. Furthermore, the district court explicitly stated it did not consider Bunce's intoxication as a factor in its sentencing decision, and therefore, Bunce's arguments in this regard are also without merit.

Additionally, the court's observation with respect to "new moms," its discussion of the child's injuries, and its noted concern that the mother knew of Pena's violent history were not impermissible factors to consider. Bunce's lack of concern for her child, even as a first-time mother, is part of the attending circumstances of the crime and, therefore, a factor the court could consider during sentencing. *See generally id.* Furthermore, the child's injuries were an acknowledged portion of the record and relevant to the severity of the crime—though R.B.'s injuries included several broken bones, Bunce waited over twenty-four hours before seeking medical care. Furthermore, the district court noted that Bunce was not the one who inflicted these injuries, but the severity was

nonetheless relevant to Bunce's culpability with respect to the degree of child endangerment.

Finally, Bunce cannot succeed on her argument the record does not support the court's statement she knew of Pena's violent history with regard to children. Attached to the minutes of testimony was an incident narrative that contained the officer's interview with Bunce, in which she stated: "All I know is that [Pena] beat the s*** out of [his son] and cracked his skull open and he was taken away." This is clearly an admission she knew that Pena was violent with young children. Moreover, given that she pled guilty to child endangerment, this was a permissible fact for the court to consider when noting how long she waited to seek medical attention after having left R.B. in Pena's care. Consequently, the court did not abuse its discretion when suspending the sentence instead of deferring judgment, and we affirm.

We remand to the district court for entry of judgment consistent with this opinion.

SENTENCE AFFIRMED IN PART; VACATED IN PART; REMANDED.

IN THE COURT OF APPEALS OF IOWA

No. 3-843 / 13-0398
Filed October 2, 2013

STATE OF IOWA,
Plaintiff-Appellant,

vs.

JESSICA CHRISTINE BURTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mary E. Howes (guilty plea), Thomas G. Reidel (deferred judgment), and Joel W. Barrows (revocation and sentencing), Judges.

Burton appeals her conviction and sentence for theft in the second degree, alleging ineffective assistance of counsel at the plea hearing and improper sentence. **CONVICTION AFFIRMED, SENTENCE VACATED IN PART, AND REMANDED WITH DIRECTIONS.**

Mark C. Smith, State Appellate Defender, and Melinda Nye, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney General, Michael Walton, County Attorney, and Melisa Zaehringer, Jay Sommers, and Kimberly Shepherd, Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

TABOR, J.

Jessica Christine Burton appeals her conviction and sentence for theft in the second degree. She alleges ineffective assistance of plea counsel and improper sentencing. Because the minutes of testimony and Burton's own statements show a factual basis supporting the value of the stolen merchandise, Burton cannot prove counsel was ineffective for allowing her to enter the guilty plea. Because the parties agree the district court erred in imposing a fine without the reduction required under Iowa Code section 908.11(5) (2009), we vacate that part of the sentence and remand for entry of an amended sentencing order.

I. BACKGROUND FACTS AND PROCEEDINGS

On October 12, 2010, a Gordman's department store loss-prevention officer, Eleanor Stout, saw on surveillance cameras two women removing bottles of perfume from store shelves and placing the bottles in their purses. When Stout approached the two women, they ran. Authorities later identified these women as Christina Castaneda and Jessica Burton. Castaneda struggled with employees of the store, while Burton was able to flee the scene in a car. Store personnel gave a description of the car to Davenport police officers, who were able to find it.

Police originally asked Burton to come down to the police station to help identify the woman with Castaneda at Gordman's. When the officer saw Burton, he realized she was the other woman in the surveillance video. Burton admitted to officers she had stolen the perfume. Officers recovered fourteen bottles of

perfume valued at $689.86 from Castaneda. Loss-prevention officers determined Burton had taken thirteen bottles worth $634.82.

On November 30, 2010, the State charged Burton with theft in the second degree, in violation of Iowa Code section 714.2(2). She entered a guilty plea in court on April 13, 2011. The court accepted the plea. The court granted Burton a deferred judgment and placed her on probation for two years. The court also ordered her to pay a civil penalty of $750 and $634 in restitution. In November 2012, the court revoked her probation, imposed judgment, and sentenced Burton to a term of incarceration not to exceed five years. The court also imposed and suspended a fine of $750. Burton appeals.

II. STANDARD OF REVIEW

We review claims of ineffective assistance de novo. *State v. Brothern*, 832 N.W.2d 187, 192 (Iowa 2013). Although we often preserve ineffective-assistance claims for postconviction relief actions, "we will address such claims on direct appeal when the record is sufficient to permit a ruling." *State v. Finney,* 834 N.W.2d 46, 49 (Iowa 2013). The record here allows us to address Burton's ineffective-assistance claim on direct appeal.

We review sentencing issues for correction of errors at law. *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001).

III. ANALYSIS

A. Was Trial Counsel Ineffective For Allowing Burton To Enter A Guilty Plea To Theft in the Second Degree?

The plea court informed Burton of her right to file a motion in arrest of judgment to challenge her guilty plea. *See* Iowa Rs. Crim. P. 2.24(3)(a), 2.8(2)(d). Because she did not do so, she raises her challenge on appeal as ineffective assistance of counsel. *See State v. Hallock*, 765 N.W.2d 598, 602 (Iowa Ct. App. 2009) (explaining failure to file motion in arrest of judgment will not preclude challenge if failure resulted from ineffective assistance of counsel).

To prevail on her claims of ineffective assistance of counsel, Burton must show (1) counsel failed to perform an essential duty and (2) prejudice resulted. *See State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007).

The district court may not accept a guilty plea without first determining that the plea has a factual basis. Iowa R. Crim. P. 2.8(2)(b). "A factual basis can be discerned from four sources: (1) inquiry of the defendant, (2) inquiry of the prosecutor, (3) examination of the presentence report, and (4) minutes of evidence." *State v. Ortiz*, 789 N.W.2d 761, 768 (Iowa 2010). When a defendant raises a factual basis issue, "the entire record before the district court may be examined." *State v. Finney*, 834 N.W.2d 46, 62 (Iowa 2013).[1] The record, as a

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[1] Because Burton does not claim her guilty plea was involuntary, and only claims counsel was ineffective for permitting her to enter it without an objective factual basis "on the record," examination of the minutes of testimony is proper under the analysis in *Finney*. This is true even though Burton did not acknowledge the accuracy of the minutes. The absence of an explanation on the record regarding what evidence is considered to support the factual-basis finding is "an omission unrelated to the substantive claim being made." *See Finney*, 834 N.W.2d at 62.

whole, must disclose facts to satisfy the elements of the crime. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001). We only need to "be satisfied that the facts support the crime." *Id.* A factual basis supporting a guilty plea does not have to establish guilt beyond a reasonable doubt. *State v. Sanders*, 309 N.W.2d 144, 145 (Iowa Ct. App. 1981). If a defendant enters a plea of guilty to a crime and the record fails to disclose a factual basis, defense counsel fails to provide effective assistance. *Id.* Prejudice in such a case is inherent. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

The district court advised Burton theft in the second degree required proof she took property not belonging to her which was valued at more than $1000. *See* Iowa Code § 714.2(2).[2] Burton argues the record before the district court did not establish a factual basis that she took perfume worth more than $1000. She does not challenge any facts set forth in the minutes or attached police reports. She also does not dispute she entered the guilty plea knowingly and voluntarily.

As part of her guilty plea colloquy, Burton admitted "[m]e and another girl went to Gordman's and we stole perfume." Burton added "[s]he had half, and I had half." On appeal, Burton contends her statements did not establish she aided and abetted Castaneda's theft, and the value of the merchandise Burton individually took does not meet the threshold for second-degree theft. But when we look to the minutes, we find a factual basis for aggregating the value of the property taken by both women. The minutes show Burton and Castaneda

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[2] Under Iowa Code section 714.3, the value of property may be aggregated if two or more thefts are attributable to a single scheme, plan, or conspiracy.

worked together in taking perfume from Gordman's. The minutes also indicated it was Burton's idea to steal the perfume and Burton offered to pay Castaneda $150 to help her in doing so.

While Burton personally took less than $1000 worth of perfume, the record establishes a factual basis for finding she aided and abetted her companion's theft. "To sustain a conviction on the theory of aiding and abetting, the record must contain substantial evidence the accused assented to or lent countenance and approval to the criminal act either by active participation or by some manner encouraging it prior to or at the time of its commission." *State v. Spates*, 779 N.W.2d 770, 780 (Iowa 2010). Burton admits she actively participated in the thefts and knew her accomplice was stealing as well. Burton did not disagree with the court when specifically asked if the total value of the stolen merchandise was more than $1000. In fact, she admits to taking half of the perfume and Castaneda taking the other half. Given Burton's admissions and the information in the record, a factual basis existed for her plea to second-degree theft. Therefore, counsel had no duty to challenge the entry of Burton's guilty plea.

B. Did The Trial Court Err In Failing To Reduce The Fine Imposed By The Amount of the Civil Penalty Previously Assessed Against Burton?

The district court assessed a civil penalty of $750 when it granted Burton a deferred judgment and placed her on probation. *See* Iowa Code § 907.14. When the court revoked her probation, it imposed (but suspended) a $750 fine. Iowa Code 908.11(5) provides: "[I]f the court revokes probation of a defendant who received a deferred judgment and imposes a fine, the court shall reduce the

amount of the fine by an amount equal to the amount of the civil penalty previously assessed against the defendant pursuant to section 907.14." The provision also states: "[T]he court shall assess any required surcharge, court cost, or fee upon the total amount of the fine prior to reduction."

The parties agree the court erred in failing to reduce the fine under section 908.11(5). The court should have reduced Burton's fine to zero. We vacate the $750 fine and remand for entry of an amended sentencing order reflecting this change.

CONVICTION AFFIRMED, SENTENCE VACATED IN PART, AND REMANDED WITH DIRECTIONS.