IN THE SUPREME COURT OF IOWA
Supreme Court No. 16–0955

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WONETAH EINFELDT,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DALLAS COUNTY
THE HON. RANDY HEFNER, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

Einfeldt asks for retention to resolve the conflict between *State v. Jacoby*, 260 N.W.2d 828 (Iowa 1977) and *State v. Dunson*, 433 N.W.2d 676 (Iowa 1988) regarding Iowa Rule of Evidence 5.405(b) and the admissibility of evidence of specific instances of conduct to show a victim's pertinent character trait to prove a self-defense claim. *See* Def's Br. at 11. The State agrees there is substantial disagreement between the Iowa Supreme Court's published cases on this topic, and it joins in the request for retention. *See* Iowa R. App. P. 6.1101(2)(b).

STATEMENT OF THE CASE

Nature of the Case

Wonetah Einfeldt was charged with willful injury causing bodily injury, a Class D felony, in violation of Iowa Code section 708.4(2). Her two daughters, Beatrice Abang-Ntuen and Danielle Abang-Ntuen, were her co-defendants. Danielle and Einfeldt claimed self-defense, and Beatrice argued that she was not involved. Danielle and Einfeldt were both found guilty of willful injury, as charged; Beatrice was found guilty of the lesser-included offense of simple assault, a simple misdemeanor, in violation of Iowa Code sections 708.1 and 708.2(6).

In this direct appeal, Einfeldt argues (1) the trial court should have ordered a competency evaluation when the issue was raised

during trial; and (2) the trial court erred in excluding three classes of evidence offered by Einfeldt and her co-defendants about the victim, Mulika "Nikki" Vinson, that would have shown her propensity for violent behavior or the reasonableness of Einfeldt's use of force.

Statement of Facts & Course of Proceedings

Einfeldt, Danielle, and Beatrice, were each charged for their participation in a fight where they attacked Mulika "Nikki" Vinson. Vinson and Danielle were once co-workers, but they had a falling-out over another co-worker named Jake Peitzman (who dated Vinson, then Danielle, then Vinson again). TrialTr.V3 p.416,ln.5–p.419,ln.8. On multiple occasions, Danielle and Vinson called each other names; on at least one occasion, Einfeldt participated too. *See* TrialTr.V3 p.419,ln.9–p.421,ln.6; *see also* TrialTr.V3 p.469,ln.3–p.473,ln.11.

On July 14, 2015, Vinson saw Einfeldt at the Dollar General—but they did not interact. *See* TrialTr.V3 p.421,ln.15–p.423,ln.14. Later that day, while Vinson was at home with her two children, she heard a loud knock on her door. It was Einfeldt at her door; Danielle and Beatrice were "standing in the street." *See* TrialTr.V3 p.428,ln.7–p.429,ln.19. Vinson went outside to talk with Einfeldt and Danielle; then, Danielle became extremely aggressive.

> [S]he was saying like today is the day. I'm going to fuck you up, like bitch this and that. And she's like doing her hands like [punching one fist into her other hand], and she had her phone in her pocket, and she took it out and like threw it on the ground and was like, cross this line, I'll fuck you up. She was down at the end of the driveway at my street, and as she was doing that and saying that, I was telling [Einfeldt], I'm not going to fight your daughter. You should get your daughter and go home. I told her this is not going to end well for either one of us. You should just take your kid and go home, you know, that kind of thing. But you know, she was just kind of letting me know she was there to fight me.

See TrialTr.V3 p.429,ln.20–p.431,ln.23. Vinson made further efforts to de-escalate the situation, but when she turned around to walk away, Danielle and Einfeldt "lunged" at her. *See* TrialTr.V3 p.431,ln.24–p.437,ln.14. "[W]hen the third girl jumped in, Beatrice, they took [Vinson] to the ground in like that middle spot of [her] driveway." *See* TrialTr.V3 p.437,ln.18–p.439,ln.22.

A construction worker who was on-site nearby heard the fight, and he started recording video as he approached to investigate. Video of that short portion of the fight was admitted into evidence at trial. *See* TrialTr.V3 p.442,ln.24–p.445,ln.9; State's Ex. 1. Vinson sustained injuries, and she went to the hospital that evening. *See* TrialTr.V3 p.447,ln.20–p.455,ln.12; State's Ex. 9–25; 33; ExApp. 4–20; C-App 4.

Jeremy Cooper was the construction worker who took the video, and Nicholas Hardcastle was with him. Nicholas Hardcastle described essentially the same events that Vinson described in her testimony. *See* TrialTr.V3 p.530,ln.23–p.538,ln.20. Cooper described the same events. *See* TrialTr.V4 p.689,ln.1–p.718,ln.25.

Additional facts will be discussed when relevant.

ARGUMENT

I. No Unresolved Question of Einfeldt's Competency Reasonably Appeared at Any Point During Trial.

Preservation of Error

Einfeldt's attorney raised this issue at the beginning of the second day of testimony, and the court found no cause to suspend the proceedings for a competency evaluation. *See* TrialTr.V4 p.565,ln.10–p.575,ln.14. That challenge was renewed in a post-trial motion, and the court ruled upon it again. PostTrialTr. p.1171,ln.3–p.1173,ln.20. These rulings preserved error. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review

"[T]he constitutional basis of a claim the defendant is not competent to be tried requires a de novo review on appeal." *State v. Johnson*, 784 N.W.2d 192, 194 (Iowa 2010) (quoting *State v. Lyman*, 776 N.W.2d 865, 873 (Iowa 2010)).

Merits

A competency hearing is generally required "when the record contains information from which a reasonable person would believe a substantial question of the defendant's competency exists." *See State v. Kempf*, 282 N.W.2d 704, 706 (Iowa 1979). The ultimate question is

"whether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial.'" *State v. Rhodes*, No. 11–0812, 2012 WL 5536685, at *6 (Iowa Ct. App. Nov. 15, 2012) (quoting *State v. Mann*, 512 N.W.2d 528, 531 (Iowa 1994)). Here, there was no doubt as to Einfeldt's competency.

Both trial courts and appellate courts may consider a variety of factors in assessing a defendant's apparent competency, including: "(1) the defendant's irrational behavior, (2) any demeanor at the trial that suggests a competency problem, and (3) any prior medical opinion on the defendant's competency to stand trial." *See State v. Edwards*, 507 N.W.2d 393, 395 (Iowa 1993) (citing *Drope v. Missouri*, 420 U.S. 162, 180 (1975)). But those factors are only useful to help answer "the critical question facing the trial judge," which is "whether the defendant has a present ability to (1) appreciate the charge, (2) understand the proceedings, and (3) assist effectively in the defense." *See id.* Moreover, "the mere presence of mental illness does not equate to incompetency to stand trial." *See Jones v. State*, 479 N.W.2d 265, 270 (Iowa 1991) (citing *Hickey v. District Court of Kossuth County*, 174 N.W.2d 406, 410 (Iowa 1970)).

Einfeldt described some mental health issues, and she made some statements that were consistent with paranoid schizophrenia. *See, e.g.*, TrialTr.V4 p.567,ln.7–p.568,ln.14 (discussing statement to her attorney that she wanted to stab him with her pen); TrialTr.V4 p.570,ln.8–14 ("I think she's poisoning the water."); TrialTr.V4 p.573,ln.11–16 ("I called the F.B.I., and they said they don't think I did anything wrong."). This is consistent with mental health records that were attached to her PSI report, which indicated she had some "delusional" thinking. *See* PSI (5/25/16) at 3, 7; C-App. 49, 53. But those moments where she verbalized delusions stand in stark contrast to Einfeldt's apparent comprehension of the nature of the charges and proceedings throughout the trial—Einfeldt clearly understood that these charges arose from "fighting someone," as depicted in the video. *See* TrialTr.V4 p.573,ln.4–10. And she understood she had "a right to defend [her]self," which she could assert as a defense. *See* TrialTr.V4 p.573,ln.17–p.574,ln.10; *see also* PostTrialTr. p.1193,ln.24–p.1194,ln.9; PSI (5/25/16) at 10; C-App. 56; *cf.* TrialTr.V4 p.575,ln.10–14 ("Just the explanation of the defenses that she believes she has, suggest to me that conversely she understands the underlying charges."). Einfeldt's mental health did not detract from that critical understanding.

Indeed, Einfeldt's appreciation of the charge *precipitated* most of her outbursts. Einfeldt clearly understood her theory of relevance for evidence Vinson possessed a gun and had incentives to conceal it. *See* TrialTr.V3 p.363,ln.3–p.364,ln.10. Einfeldt knew that if jurors thought she and her daughters initiated the fight "without warning," they would be convicted—which is why she interrupted the State's opening statement to call that characterization a "lie." *See* TrialTr.V3 p.370,ln.10–p.371,ln.10. And she tried to object during Hardcastle's testimony when he offered a particularly damaging opinion: "It was pretty obvious that the defendants initiated the fight and that, you know, that's what they were there to do." TrialTr.V3 p.548,ln.12–23. Einfeldt specifically challenged Officer Moore's testimony about the severity of Vinson's injuries. *See* TrialTr.V4 p.600,ln.19–p.601,ln.17. She understood that Danielle's injury was also an important part of their case, and she belittled Officer Deaton's characterization of that injury as "a mosquito bite." *See* TrialTr.V4 p.668,ln.4–p.669,ln.13. She belittled Cooper's answer that he had no trouble keeping track of what each person was doing at any given point during the fight, for the same reason. *See* TrialTr.V4 p.730,ln.23–p.731,ln.22. Later, she reacted negatively to efforts to block a rebuttal witness from offering

evidence of pre-existing damage to Vinson's mailboxes and accused the State of "hiding the truth" because she knew that evidence would undermine Vinson's testimony that Einfeldt and her daughters had damaged them just before the assault. *See* TrialTr.V4 p.756,ln.6–p.760,ln.16. Einfeldt spoke up during the State's closing, to dispute the prosecutor's interpretation of the route they took to Vinson's house and to say it was consistent with their stated intention to go visit a nearby park. *See* TrialTr.V6 p.1125,ln.24–p.1126,ln.11. Later on, she spoke up again to reiterate that Vinson brandished a gun at them. *See* TrialTr.V6 p.1132,ln.22–p.1133,ln.4. At that point, she knew she was becoming too emotional to stay silent, so she left the courtroom. *See* TrialTr.V6 p.1133,ln.1–6; TrialTr.V6 p.1141,ln.7–18.

Einfeldt also recognized when evidence/argument was *helpful*. Einfeldt spoke up during Danielle's testimony, but only to affirm Danielle's favorable characterization of the cell phone video. *See* TrialTr.V5 p.980,ln.1–7. She applauded when her attorney finished presenting his closing argument. *See* TrialTr.V6 p.1118,ln.5–15. Such behavior strongly suggests that Einfeldt was "alert and in touch with reality." *See Edwards*, 507 N.W.2d at 396–97. Just like the defendant in *Edwards*, Einfeldt's behavior helps to *demonstrate* competency:

> We agree with the State that Edwards' behavior—though seemingly bizarre—was rationally motivated, purposeful, and in keeping with his expressed intention. For example, during damaging testimony of important State witnesses, Edwards was disruptive, frequently interrupting their testimony and attacking their credibility. In contrast, during the testimony of important defense witnesses, Edwards behaved. At the end of the testimony from his most important witness—the medical expert on the insanity defense—Edwards quipped, "appreciate it, man."

Edwards, 507 N.W.2d at 396. Einfeldt's disruptions were similarly oriented in relation to her defense at trial: she spoke up to celebrate helpful statements and to disparage harmful ones—which indicates she understood the nature of the charge and her defense against it.

Moreover, while Einfeldt often needed clarifications, she was ultimately able to understand the proceedings. Einfeldt understood Mr. Macro was her appointed attorney. *See* TrialTr.V4 p.572,ln.15–p.573,ln.1. Einfeldt reacted negatively to denial of the motions for judgment of acquittal because she understood the charges against her and her daughters would be resolved if these cases were dismissed. *See* TrialTr.V4 p.750,ln.3–p.755,ln.21. She spoke out during an offer of proof, voicing her frustrations with the trial court's evidentiary gatekeeping function (which seemed, to her, to be unfairly applied when the court excluded defense evidence but permitted the State to offer Vinson's testimony); after some explanation, she acquiesced and

let the proceedings continue. *See* TrialTr.V4 p.799,ln.6–p.801,ln.18; *see also* TrialTr.V5 p.942,ln.17–p.943,ln.3. And, after the verdict had been read, she thanked the prosecutor for her post-verdict request to continue bond for all three co-defendants through sentencing. *See* TrialTr.V6 p.1156,ln.25–p.1157,ln.11.

Finally, Einfeldt was able to participate in the trial and assist in her own defense. Einfeldt was able to listen to and understand the lengthy admonitions (even if she sometimes disregarded them). *See* TrialTr.V1 p.41,ln.7–p.44,ln.5.; TrialTr.V1 p.136,ln.9–p.139,ln.19; TrialTr.V3 p.410,ln.14–p.411,ln.6. Einfeldt also remembered prior discussions about the plea offer, and was able to evaluate its terms. *See* TrialTr.V2 p.151,ln.6–p.152,ln.9; *cf.* TrialTr.V4 p.571,ln.11–24 ("She told the Court she understands that she's looking at the possibility of a five-year incarceration term."). Additionally, she informed her attorney that he could elicit testimony from Chicoine that would help discredit Vinson (though Einfeldt did not know that such testimony would have been inadmissible character evidence). *See* TrialTr.V4 p.797,ln.9–20. She also corrected her attorney during his closing argument, when he said "Beatrice" but meant "Danielle." *See* TrialTr.V6 p.1116,ln.4–18.

Conceptually, making the decision on whether to testify is probative of a defendant's ability to understanding the proceedings *and* her ability to assist in her own defense. Here, Einfeldt listened to the colloquy on Danielle's choice to testify and understood she had the option of "getting on the stand" and "telling the truth to the jury." *See* TrialTr.V4 p.760,ln.17–p.764,ln.24. Einfeldt understood the discussion about her right to testify, and she recognized that being questioned about prior convictions and prior inconsistent statements would portray her in a negative light (which she thought was unfair, because she thought the State's witnesses should have been cross-examined in that manner). *See* TrialTr.V5 p.880,ln.20–p.885,ln.3. She remembered the advice that her family and her attorney gave her, but desired to testify because she felt that important and favorable facts were being left out. *See* TrialTr.V5 p.884,ln.1–p.888,ln.3. And she understood that her testimony would have been less persuasive if it appeared that she had been coached on what to say. *See* TrialTr.V5 p.889,ln.10–p.891,ln.25. Subsequently, Einfeldt changed her mind and decided not to testify after she observed Danielle's full testimony and Beatrice's direct examination. *See* TrialTr.V5 p.1011,ln.20–p.1013,ln.25. This strongly weighs against any doubt on competency.

See PostTrialTr. p.1172,ln.12–16 (recalling, in considering post-trial competency motion, that Einfeldt "responded appropriately during the colloquy regarding her decision to not testify").

Recordings of the defendants' initial conversations with police revealed that Einfeldt was excitable, but coherent: she described her version of events, including her allegation that she was responding to Vinson's threatening display of a gun, and she affirmatively asked for her interactions with the officers to be recorded in anticipation of future litigation. *See* Pretrial Ex. 1. She also attempts to minimize Danielle's involvement in the assault, and claim all responsibility for Vinson's injuries—which strongly suggests that she realized, from the very beginning, that there would be consequences. *See id.*

Einfeldt's non-custodial interview showed her to be coherent and able to recall/convey an extended history of interactions between herself, Danielle, Vinson, Peitzman, and Harker (and she was able to distinguish between those "two guys named Jake"). *See* Pretrial Ex. 2. She wrote out a statement that was consistent with her descriptions. *See* State's Ex. 32; ExApp. 23. Then, she forcefully asserted her rights and challenged Officer Deaton to arrest her or allow her to leave. *See* Pretrial Ex. 2 at 24:12–25:30.

The trial court judge would have already reviewed both videos in connection with Einfeldt's motion to suppress. *See* TrialTr.V1 p.61,ln.1–p.62,ln.25. Einfeldt's ability to converse intelligently with police officers would have been probative on the competency issue, and would have helped dispel any doubt that arose during trial. *See Jones*, 479 N.W.2d at 270 (no error in declining to order competency hearing when "Jones spoke in full sentences, explained the events of the night of Stevens' murder and Jones' involvement with Elam, and indicated that he understood the questions being asked of him"). Indeed, the trial court referenced those videos in its post-trial ruling:

> The other evidence that I have considered in determining whether these proceedings should be stayed at this juncture and Ms. Einfeldt evaluated was the interview with law enforcement, the video. I was the presiding judge that ruled upon the motion to suppress, and certainly, though Ms. Einfeldt appeared excited, perhaps a bit manic, she was very talkative and did ramble during the course of that interview.
>
> Nothing during that interview suggested to me that she did not understand what was going on, that she faced the possibility of criminal charges. She did intelligently invoke her right to counsel during the course of that interview.

See PostTrialTr. p.1173,ln.2–15. This description of the video footage is wholly accurate—nothing about Einfeldt's conduct or statements during those interactions suggested any glaring competency issue.

On appeal, this Court can review those videos, but it cannot relive trial proceedings (except through cold transcripts). However, "the trial court has the ability to observe a defendant's demeanor in the courtroom and is better able to determine whether there is probable cause to question a defendant's competency." *See State v. Young*, No. 12–1445, 2013 WL 5760959, at *4 (Iowa Ct. App. Oct. 23, 2013) (citing *State v. Johnson*, 784 N.W.2d 192, 195 (Iowa 2010)). Here, the trial court relied on its observations from throughout the prior proceedings and the first two days of trial when it rejected the first motion for a full competency evaluation:

> Based upon my observations, not only during the first two days of this trial, but during previous hearings, it appears to me as if Ms. Einfeldt is capable of assisting Mr. Macro in providing a defense.

TrialTr.V4 p.575,ln.2–14. After trial, it reaffirmed its observations:

> During the trial it did appear to me as if Ms. Einfeldt was participating in her defense. . . .
>
> Without question, Ms. Einfeldt did engage in disruptive behavior during the trial, but that may have been simple disrespect. Or I think in Ms. Einfeldt's case it was probably spontaneous emotional outbursts. But that is different from being legally incompetent.
>
> I did not observe behavior that suggested Ms. Einfeldt did not understand the charge or the proceedings or that she was unable to assist with her own defense.

PostTrialTr. p.1171,ln.3–p.1173,ln.20.

To be sure, Einfeldt's paranoid schizophrenia diagnosis is the most worrying component of her competency-related challenge. *See* PSI (5/25/16) at 2–3, 6–7; C-App. 48–49, 52–53. But it appears those symptoms only struck intermittently. *See* TrialTr.V4 p.568,ln.18–p.569,ln.2. When she disrupted the trial, it was not because of those symptoms recurring—it was because she became emotionally agitated when the State offered evidence she considered to be "blatant lie[s]." *See, e.g.*, TrialTr.V3 p.375,ln.14–p.378,ln.17. When Einfeldt did have symptoms that resembled a "panic attack," she could identify them and inform her attorney. *See* TrialTr.V3 p.380,ln.16–p.381,ln.18. And Einfeldt's written description of events seemed coherent, and it remained consistent with what she said throughout the proceedings. *See* PSI (5/25/16) at 10; C-App. 56; *see also* State's Ex. 32; ExApp. 23; PostTrialTr. p.1193,ln.24–p.1194,ln.9.

Einfeldt may be emotional, reckless, and off-balance, and she may have struggled intermittently with paranoid schizophrenia—but she knew what she was charged with, she understood her justification defense, and she knew what view of the evidence her defense required. Even given her paranoid schizophrenia, the facts dispelled any doubt about Einfeldt's competency to stand trial. *See, e.g.*, *Young*, 2013 WL

5760959, at *3 (Iowa Ct. App. Oct. 23, 2013) (finding no unresolved competency question when "the record before us shows a defendant who was able to consult with his attorney . . . , had an appreciation of the charges against him, had a rational and factual understanding of the proceedings, and who actively participated in his own defense"). The Illinois Court of Appeals put this in no uncertain terms:

> Fitness to stand trial and mental illness are not synonymous. . . . A defendant can be fit for trial although his or her mind may be otherwise unsound. . . . The issue is not mental illness, but whether defendant could understand the proceedings against him and cooperate with counsel in his defense. If so, then, regardless of mental illness, defendant will be deemed fit to stand trial.

People v. Tuduj, No. 1–09–2536, 2014 WL 1156308, at *24 (Ill. App. Ct. Mar. 21, 2014) (citations to published Illinois cases omitted); *cf. Fontenoy v. State*, No. 98–2276, 2000 WL 504509, at *2 (Iowa Ct. App. Apr. 28, 2000) (noting "Fontenoy testified that he suffers from depression, anxiety and explosive disorder," but concluding "these conditions do not by themselves require a finding of incompetence").

"[T]he mere presence of mental illness does not equate to incompetency to stand trial." *Jones*, 479 N.W.2d at 270. Although Einfeldt certainly had mental health issues, the trial court was right to conclude that there were no lingering doubts about her competency.

II. All of the Proffered Evidence of Specific Instances of Vinson's Conduct Was Properly Excluded.

Preservation of Error

Error was preserved for these arguments because the trial court ruled on each one of them, and Einfeldt joined in each offer of proof. TrialTr.V3 p.356,ln.1–p.361,ln.4; TrialTr.V5 p.875,ln.23–p.880,ln.16; TrialTr.V5 p.942,ln.17–25; *Lamasters*, 821 N.W.2d at 864.

Standard of Review

Evidentiary rulings are reviewed for abuse of discretion. *See State v. Huston*, 825 N.W.2d 531, 536 (Iowa 2013). An abuse of discretion occurs when "discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *See State v. Long*, 814 N.W.2d 572, 576 (Iowa 2012) (quoting *State v. Teeters*, 487 N.W.2d 346, 349 (Iowa 1992)). "Weighing probative value against prejudicial effect 'is not an exact science,' so 'we give a great deal of leeway to the trial judge who must make this judgment call." *See State v. Putman*, 848 N.W.2d 1, 10 (Iowa 2014) (quoting *State v. Newell*, 710 N.W.2d 6, 20–21 (Iowa 2006)); *see also State v. Bayles*, 551 N.W.2d 600, 607–08 (Iowa 1996) (noting fact-specific weighing of probative value and danger of unfair prejudice is a "judgment call," where "the district court had considerable discretion").

Merits

Generally, "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." *See* Iowa R. Evid. 5.404(a)(1). An exception allows a defendant to offer evidence of a victim's pertinent character traits. *See* Iowa R. Evid. 5.404(a)(2)(ii). Even so, a person's character trait may not be proved with evidence of specific instances of conduct unless the trait is "an essential element of a charge, claim, or defense." *See* Iowa R. Evid. 5.405(b).

Einfeldt challenges the trial court's refusal to admit evidence of Vinson's specific instances of conduct that could demonstrate that she had character traits that made her likely to be the first aggressor, to help establish that Einfeldt acted in self-defense. Def's Br. at 67–74. But character is not an essential element of a self-defense claim:

> [A] claim of self-defense does not involve proof of character or a trait of character *as an essential element of the defense*. Self-defense can be proven in many instances without introduction of any character evidence. Indeed, a victim can possess a peaceful character and still be the aggressor in a confrontation. Likewise, a victim can possess a violent character and not be the aggressor in a particular deadly encounter.

Laurie Kratky Doré, 7 IA. PRAC. SERIES: EVIDENCE § 5.404:3(A)(1). Rule 5.405(b) expressly prohibits admission of this type of evidence.

Einfeldt argues that character becomes an "essential element" in "circumstances wherein character or propensity evidence *goes to* an essential element." *See* Def's Br. at 63–64. But this is not what the term means, as the Tenth Circuit Court of Appeals explained:

> Character is directly in issue in the strict sense when it is "a material fact that under the substantive law determines rights and liabilities of the parties." [E. Cleary, *McCormick on Evidence* § 187, at 551 (3d ed. 1984)]. In such a case the evidence is not being offered to prove that the defendant acted in conformity with the character trait; instead, the existence or nonexistence of the character trait itself "determines the rights and liabilities of the parties." *Id.* at 552 n. 5. In a defamation action, for example, the plaintiff's reputation for honesty is directly at issue when the defendant has called the plaintiff dishonest. . . .
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> Defendants here offered character evidence for the purpose of proving that Perrin was the aggressor. "[E]vidence of a violent disposition to prove that the person was the aggressor in an affray" is given as an example of the circumstantial use of character evidence in the advisory committee notes for Fed.R.Evid. 404(a). When character is used circumstantially, only reputation and opinion are acceptable forms of proof. . . . We therefore find that the district court erroneously relied upon the character evidence rules in permitting testimony about specific violent incidents involving Perrin.

Perrin v. Anderson, 784 F.2d 1040, 1044–45 (10th Cir. 1986); *see also United State v. Thomas*, 134 F.3d 975, 978–80 (9th Cir. 1998) (noting character was an "essential element" of an entrapment defense because fact-finder ultimately needed to assess whether defendant

"was predisposed to engage in large-scale drug trafficking" absent government inducement); *Shafer v. Time, Inc.*, 142 F.2d 1361, 1371–72 (11th Cir. 1998) ("[A] charge of defamation or libel commonly makes damage to the victim's reputation or character an essential element of the case."); *McClellan v. State*, 570 S.W.2d 278, 280 (Ark. 1978) ("For example, in a tort case involving the defendant's asserted negligent entrustment of his vehicle to an incompetent driver, the plaintiff must show as a part of his substantive proof that the defendant was aware of the driver's trait of incompetence."). There is a wide gulf between an instrumentally useful showing and an "essential element" of a claim.

The Iowa Court of Appeals has used the correct question to assess whether character is an essential element of a claim:

> The relevant question should be: *would proof, or failure of proof, of the character trait by itself actually satisfy an element of the charge, claim, or defense?* If not, then character is not essential and evidence should be limited to opinion or reputation.

State v. Hebeler, No. 00–0377, 2001 WL 736025, at *8 (Iowa Ct. App. June 13, 2001) (quoting *United States v. Keiser*, 57 F.3d 847, 856 (9th Cir. 1995)). Here, Einfeldt did not have to prove Vinson was an aggressive/violent person to prevail on her justification defense—*this incident* was the focus, and character traits were collateral at best.

The vast majority of state courts with evidentiary rules that mirror the FRE have determined that a victim's character for violence or aggression is *not* an essential element of a typical self-defense justification claim; those courts reject similar thinly-veiled attempts to use specific instances of victims' conduct as propensity evidence:

> [N]either Labat's character for violence nor Allen's character for violence was "an essential element" of the State's murder charge or of Allen's self-defense defense. The jury could adopt Allen's self-defense theory even if they concluded that Labat was not a characteristically violent man; that is, a characteristically peaceful person may yet be an aggressor. Similarly, the jury could acquit Allen under a self-defense theory even if they concluded that Allen was characteristically given to violence; the defense of self-defense is available to all, even to characteristically violent people. By the same token, the jury could reject Allen's claim of self-defense and convict Allen of murder even if they disbelieved the State's evidence of Allen's violent character and instead concluded that Allen was, by nature, a peaceful man.
>
> In sum, when a defendant raises a claim of self-defense and the court admits evidence of either the victim's or the defendant's character for violence or non-violence, this evidence is not admitted to prove an essential element of the crime or of the defense. The character evidence is relevant, not because character is an essential element of self-defense, but because the participants' character is circumstantial proof of the participants' likely conduct during the episode in question. This being so, Evidence Rule 405 limits the parties to the use of reputation or opinion evidence when they seek to prove the victim's or the defendant's character.

Allen v. State, 945 P.2d 1233, 1239–24 (Ala. Ct. App. 1997); *see also McClellan*, 570 S.W.2d at 280 ("One might plead self-defense after having killed the most gentle soul who ever lived. In such a situation the decedent's character as a possible aggressor is being used circumstantially, not as a direct substantive issue in the case. The trial judge was therefore correct in disallowing the proffered proof of a specific instance of aggression on the part of the decedent."); *Brooks v. State*, 683 N.E.2d 574, 576–77 (Ind. 1997) (concluding that victim's character was not an essential element of a self-defense claim and was properly excluded under Rule 405(b) because "[w]hether or not Jackson had violent propensities, the jury could still determine that Brooks did not act in self-defense"); *City of Red Lodge v. Nelson*, 989 P.2d 300, 303 (Mont. 1999) ("We note that Donna Nelson's prior convictions also lacked relevance under the first prong of Rule 405(b), because a victim's character for violence is not an "essential element" of the defense of justifiable force."); *State v. Newell*, 679 A.2d 1142, 1144–45 (N.H. 1996) ("[E]vidence of Chase's convictions and the conduct underlying them was inadmissible as substantive evidence because Chase's character was not an essential element of the defense of self-defense."); *State v. Jenewicz*, 940 A.2d 269, 281

(N.J. 2008) ("An accused can assert self-defense successfully without offering any evidence regarding a victim's character. Therefore, character evidence cannot be regarded as 'essential.'"); *State v. Kelly*, 685 P.2d 564, 570–71 (Wash. 1984) ("Since character is not an essential element of a self-defense claim, petitioner's character was irrelevant, and evidence of her prior aggressive acts was inadmissible to show her character."). Nearly every state follows this approach.

Much like those states' evidentiary rules, Iowa Rule 5.405(b) is identical to FRE 405(b). Federal courts reach the same conclusion when applying FRE 405(b) in similar contexts:

> Even had Keiser proven that Romero is a violent person, the jury would still have been free to decide that Romero was not using or about to use unlawful force, or that the force Romero was using was not likely to cause death or great bodily harm, or that Keiser did not reasonably believe force was necessary, or that he used more force than appeared reasonably necessary. On the other hand, a successful defense in no way depended on Keiser's being able to show that the Romero has a propensity toward violence. A defendant could, for example, successfully assert a claim of self-defense against an avowed pacifist, so long as the jury agrees that the defendant reasonably believed unlawful force was about to be used against him. Thus, even though relevant, Romero's character is not an essential element of Keiser's defense.

Keiser, 57 F.3d at 856–57; *see also United States v. Gulley*, 526 F.3d 809, 817–19 (5th Cir. 2008) (determining "Brown's character was not

an essential element of the self-defense claim in the 'strict sense' because a self defense claim may be proven regardless of whether the victim has a violent or passive character" and concluding that "Brown's prior specific acts were not admissible to prove his alleged propensity for violence"); *United States v. Gregg*, 451 F.3d 930, 933–35 (8th Cir. 2006) ("Since James's violent character is not an essential element of a claim of self-defense, the district court properly excluded evidence relating to specific instances of James's violent conduct to prove James was the aggressor in the altercation.").

Einfeldt points out the tension between *State v. Dunson* and *State v. Jacoby* on this issue. *See* Def's Br. at 58–65; *State v. Dunson*, 433 N.W.2d 676, 679–81 (Iowa 1988); *State v. Jacoby*, 260 N.W.2d 828, 838 (Iowa 1977). *Dunson* held that evidence of specific instances of a victim's conduct would be admissible if it "relates to a character trait of the victim: her aggressiveness and propensity for violence." *Dunson*, 433 N.W.2d at 680. But *Dunson* is flatly inconsistent with the plain text of Iowa Rule 5.405(b). Moreover, jurisdictions with similar rules overwhelmingly reject the principle that Einfeldt seeks to extract from *Dunson*, for the reasons noted above. And *Dunson* is of questionable precedential value, for three additional reasons.

First, *Dunson* was inconsistent with Iowa law when it was initially decided. Einfeldt notes that "*Jacoby* predated the adoption of Iowa's Rules of Evidence, whereas such rules were already in effect at the time of *Dunson* and explicitly discussed therein." *See* Def's Br. at 62–63. While *Jacoby* may have been decided before adoption of the Iowa Rules of Evidence, it noted "the new Federal Rules of Evidence indicate a shift to the majority rule where . . . character is sought to be shown circumstantially"—specifically, the majority rule that "the quarrelsome, violent, aggressive or turbulent character of a homicide victim cannot be established by proof of specific acts." *See Jacoby*, 260 N.W.2d at 838. And *Jacoby*'s pragmatic rationale still holds true:

> The reasons for the rule prohibiting proof of specific acts of violence appear to be at least threefold: (1) A single act may have been exceptional, unusual, and not characteristic and thus a specific act does not necessarily establish one's general character; (2) although the state is bound to foresee that the general character of the deceased may be put in issue, it cannot anticipate and prepare to rebut each and every specific act of violence; and (3) permitting proof of specific acts would multiply the issues, prolong the trial and confuse the jury.

Id. (quoting *Henderson v. State*, 218 S.E.2d 612, 615 (Ga. 1975)). *Dunson* did not address these concerns—it primarily discussed the distinction between *prior* violent acts and *subsequent* violent acts, and it did not mention *Jacoby*. *See Dunson*, 433 N.W.2d at 680–81.

Indeed, *Dunson* was inconsistent with other Iowa precedent that had construed and applied the nascent Iowa Rules of Evidence in the context of self-defense claims—specifically, *Klaes v. Scholl*:

> In *Klaes v. Scholl*, the Iowa Supreme Court interpreted Rule 405(b) . . . to mean that "only when character or a trait of character is an operative fact determining the parties' rights and liabilities are specific instances of conduct a proper method of proving character." . . . *Dunson* is inconsistent with *Scholl* and general practice whereby character is merely circumstantial evidence offered to show that the victim was the first aggressor or, *when prior acts are known to the defendant*, that the defendant's response to danger was reasonable. Victim character evidence is not an element or essential to the first form of self defense and only those events known to the defendant would appear relevant or essential to the defendant's state of mind claim.

Doré, 7 IA. PRAC. SERIES: EVIDENCE § 5.405:2 (quoting *Klaes v. Scholl*, 375 N.W.2d 671, 676 (Iowa 1985)); *cf.* James Adams, *Admissibility of Proof of an Assault Victim's Specific Instances of Conduct as an Essential Element of a Self-Defense Claim Under Iowa Rule of Evidence 405*, 39 DRAKE L. REV. 401, 422–28 (1990) (arguing *Dunson* "made a substantial change in Iowa law that is not justified by rule or prior case law"). *Dunson* ignored Iowa precedent holding that "[o]nly when character is in issue in the strictest sense, and is thus deserving of searching inquiry, is proof by specific acts allowed under rule 405(b)." *Scholl*, 375 N.W.2d at 676. Its own precedential value is questionable.

Second, *Dunson* relied on California authority—but California evidentiary rules differ significantly from the Iowa Rules of Evidence, and they make no distinctions between proof of a victim's character "in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct." *See* Cal Evid. Code § 1103(a)(1); *see also People v. Shoemaker*, 185 Cal. Rptr. 370, 372–73 (Ct. App. 1982) ("It is now permissible under section 1103 of the Evidence Code to prove the aggressive and violent character by specific acts of the victim on third persons."); *cf. State v. Fish*, 213 P.3d 258, 268–69 (Ariz. Ct. App. 2009) (distinguishing California's approach because California rules "expressly allow specific act evidence to show the character of the victim of a crime and to prove action in conformity with that character"). That critical difference was noted in *Jacoby*. *See Jacoby*, 260 N.W.2d at 838 (noting the "minority rule permitting evidence of specific acts unknown to the defendant, to show the victim was the aggressor" took hold in California "following a 1967 change in its Evidence Code"). In contrast, *Dunson* overlooked it entirely. *See Dunson*, 433 N.W.2d at 680 ("[S]imilar to the Iowa rule, California evidence code permits admission of evidence of subsequent conduct of the victim in a criminal case to prove victim's character . . . .").

Third, and most importantly, *Dunson* muddled the analysis of the "essential element" relevancy requirement by misapprehending the *sine qua non* of self-defense claims: the victim's character only matters if it impacted the reasonableness of the defendant's beliefs/actions.

> In a claim for self-defense, *the essential element is whether the defendant subjectively believed the use of force was necessary for his protection*, and not whether the victim acted in conformity with a character trait of aggressiveness. The character of the victim is not, therefore, an essential element of a self-defense claim. Accordingly, specific instances of past conduct cannot be used as circumstantial evidence of a victim's character for violence or aggression under D.R.E. 405(b).
>
> [. . .]
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> Since one of the factors that influences the reasonable belief of a defendant, threatened with imminent assault, is the defendant's *knowledge or awareness* of the victim's past acts of violence, these instances are relevant for their proper noncharacter purpose. . . . [T]he defense was entitled to use this evidence under D.R.E. 404(b) to show the fear experienced by the defendant, and thus, *establish the subjective state of mind required to assert the claim of self-defense*.

Tice v. State, 624 A.2d 399, 401–02 (Del. 1993) (emphasis added). The West Virginia Supreme Court of Appeals agreed: "an essential element of a claim of self-defense or provocation is the defendant's knowledge of the aggressive and violent character of the victim"—which means such evidence is only admissible "if the defendant has *knowledge* of specific acts of violence" committed by the victim. *See*

State v. Woodson, 382 S.E.2d 519, 523–24 (W.Va. 1989). In contrast, *Woodson* expressly foreclosed any possibility that a defendant could "introduce specific acts of violence by the victim against third parties even though he has no knowledge of them at the time he claimed to have acted in self-defense." *Id.* at 524 n.5; *see also State v. Johnson*, No. 2006AP736-CR, at *3 (Wis. Ct. App. Mar. 6, 2007) (quoting *Werner v. State*, 226 N.W.2d 402, 405 (Wis. 1975)) ("[A] defendant who claims self-defense may testify about prior specific acts of violence by the victim only when this specific conduct was '*within his knowledge to show his state of mind*' at the time of the alleged offense."); *cf. State v. McCarter*, 604 P.2d 1242, 1246 (N.M. 1980) ("[E]vidence of specific acts of violence on the part of the deceased could be introduced by a defendant if there was evidence that the defendant had been informed of, or had knowledge of, those acts at the time of the homicide. Such evidence would have some bearing on the reasonableness of defendant's apprehension for his life.").

By misapprehending this "essential element," *Dunson* painted with overly broad strokes. Some specific instances of a victim's conduct could be admissible to show "Dunson reasonably believed he needed to defend himself"—but only if Dunson knew about them at the time.

See Dunson, 433 N.W.2d at 681. Indeed, *Dunson* could have simply quoted *Jacoby* to make this point much clearer:

> [I]f, prior to the homicide, the defendant, either through his own observation or through information communicated to him by others, including the deceased himself, knew of other acts of violence of the deceased, he may, in support of his contention that he had reasonable grounds to believe himself in imminent danger from an assault by the deceased, introduce evidence of such prior unlawful acts of violence by the deceased.

Jacoby, 260 N.W.2d at 838–39 (quoting 40 Am.Jur.2d, *Homicide*, § 306 at 575 (1968)). As for *Dunson*'s primary holding—that a victim's subsequent acts may be admissible to prove what happened earlier—it should have noted it was applying the other exception discussed in *Jacoby*: that "specific acts to prove the victim's violent, dangerous, turbulent or quarrelsome character, even though unknown to the defendant, are admissible if so closely related to the fatal event as to constitute part of the res gestae." *Jacoby*, 260 N.W.2d at 838 (citing *State v. Beird*, 92 N.W. 694, 696 (Iowa 1902)); *cf. State v. Nelson*, 791 N.W.2d 414, 420–21 (Iowa 2010) (noting "res gestae" is now analyzed through framework for "inextricably intertwined" evidence).

At best, *Dunson*'s imprecise language has muddied the waters; the State submits *Dunson* disregarded the plain text of the Iowa Rules of Evidence and the Iowa Supreme Court's precedent construing them.

This Court should take this opportunity to "correct an incorrect analysis that sent us down the wrong path." *See State v. Williams*, 895 N.W.2d 856, 867 (Iowa 2017). It should reaffirm the general rule that "only when character or a trait of character is an operative fact determining the parties' rights and liabilities are specific instances of conduct a proper method of proving character." *Scholl*, 375 N.W.2d at 676 (citing McCormick on Evidence § 187 (2d ed. 1972)); *see also* Doré, 7 IA. PRAC. SERIES: EVIDENCE § 5.405:2. And this Court should reaffirm that it applies here—that aside from "the special situation in which the person claiming self defense had *actual knowledge* of the other person's prior acts of violence," those claiming self-defense cannot establish the victim's aggressive or violent character through proof of specific instances of his/her prior conduct. *See id.* (emphasis added); *cf. State v. Church*, No. 15–1904, 2017 WL 2461429, at *3 (Iowa Ct. App. June 7, 2017) ("The purposes of admitting the evidence proffered by Church . . . are merely repackaged versions of the improper purpose rule 5.404(b)(1) aims to exclude, that is, asserting the officer was prone to aggression to show that he acted aggressively on the night of the altercation with Church."). To the extent *Dunson* is incompatible with that analysis, it should be expressly disavowed.

Vinson's character was not an essential element of Einfeldt's self-defense claim. Einfeldt could offer evidence of specific instances of Vinson's conduct only if (1) Einfeldt *knew* about that conduct, and it impacted her belief regarding the imminence of Vinson's aggression or the reasonableness of her own response; or (2) it was "res gestae" and was inextricably intertwined with the facts of the crime charged. Moreover, any evidence offered under either rationale would still be excludable at the trial court's discretion under Rule 5.403. *See, e.g.*, *State v. Webster*, 865 N.W.2d 223, 242–43 (Iowa 2015).[1]

A. Vinson's prior convictions were not admissible to bolster Einfeldt's self-defense claim.

Einfeldt provided no evidence to establish that she, Danielle, or Beatrice were aware of Vinson's prior convictions. Moreover, Vinson's

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[1] As an aside, it is not necessary to overrule *State v. Webster*—Einfeldt argues that *Webster* was decided "consistently with *Dunson*," but *Webster* never analyzed or discussed this issue. *See* Def's Br. at 62. *Webster* quoted *State v. Shearon*, in passing, for the proposition that "[s]pecific instances of conduct may be used to demonstrate character when character is an essential element of a claimed defense" before it analyzed the district court's ruling under Rule 5.403. *See Webster*, 865 N.W.2d at 242–45; *State v. Shearon*, 449 N.W.2d 86, 88 (Iowa Ct. App. 1989). But *Shearon* specifically noted the State did not argue that character was not an essential element of a self-defense claim and it did not cite to *Klaes v. Scholl*. *See Shearon*, 449 N.W.2d at 87 n.1. Similarly, in *Webster*, the State argued this evidence was properly excluded because its "probative value was substantially outweighed by its prejudicial impact"—it never raised Rule 5.405(b). *See Webster*, 865 N.W.2d at 241–42. Thus, *Webster* is unaffected by this critique.

convictions were for acts that occurred more than ten years earlier, so they cannot qualify as "inextricably intertwined" with these events.

Even if Rule 5.405(b) permitted Einfeldt to offer this evidence, the trial court would have been correct to exclude it under Rule 5.403. Einfeldt quotes *Dunson* to argue that Vinson's convictions, which related to Vinson's conduct when she was 16–19 years old, were still probative of her character because "character is more or less a permanent quality." *See* Def's Br. at 68–69 (quoting *Dunson*, 433 N.W.2d at 608–81). This further illustrates the absurdity of *Dunson*, especially in light of recent juvenile sentencing jurisprudence. *E.g.*, *State v. Sweet*, 879 N.W.2d 811, 838–39 (Iowa 2016) (emphasizing that "the juvenile character is a work in progress"). Vinson's conduct more than a decade ago has no bearing on whether she threatened Einfeldt and her daughters in a manner that justified their actions, and the trial court was correct to rule such evidence posed a danger of unfair prejudice that far outweighed its minimal probative value. *See* TrialTr.V3 p.358,ln.7–p.359,ln.9 ("[T]he fact that the conviction itself occurred when the defendant was 15 or 16 years old . . . minimizes its probative effect or its probative value."). Keeping minimally probative propensity evidence from the jury was not an abuse of discretion.

B. Evidence of threats against Lacey Chicoine would have been inadmissible under Rule 5.405(b), and alternatively excludable under Rule 5.403 as well.

In an offer of proof, Lacey Chicoine testified Vinson threatened her over the phone, warning Chicoine to stay away from Jake Peitzman or Vinson would "kick [her] ass." *See* TrialTr.V4 p.793,ln.19–p.797,ln.7. Einfeldt argues that "[r]egarding the threats against Lacey Chicoine, the evidence was highly probative in that it would have demonstrated Vinson's propensity for violence or aggression in connection with another woman's interaction with her boyfriend." Def's Br. at 69–70. This is precisely the use of such evidence that Rule 5.405(b) prohibits. *Church*, at 2017 WL 2461429, at *3; *cf. United States v. Talamante*, 981 F.2d 1153, 1156 (10th Cir. 1992) (citing *Perrin*, 784 F.2d at 1045) ("When character evidence is used circumstantially to create an inference that a person acted in conformity with his or her character, Rule 405 allows proof of character only by reputation and opinion.").

There was no evidence that Einfeldt knew about any threats that Lacey had discussed. *See* TrialTr.V5 p.879,ln.5–9. And Lacey was not involved in this incident, so there is no reason to believe these threats could have been inextricably intertwined with this assault. Thus, neither potentially applicable exception could apply here.

Even if Rule 5.405(b) permitted introduction of this evidence, the trial court would have excluded it under Rule 5.403:

> None of those threats were made in person. There were no acts which could be considered constituting an assault by Ms. Vinson on Ms. Chicoine. There were never any face-to-face confrontations. The character trait here that's in issue is whether Mulika Vinson was prone to physical aggression. I consider it to be an entirely different matter when people say things. So I believe that the evidence is marginal at best to prove that Mulika Vinson was prone to physical aggression even when a boyfriend was involved. I believe that evidence is marginally relevant by definition. And second of all, under [Rule 5.403] I'm excluding that evidence as well.
>
> [. . .]
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> Again, the character trait we're concerned with is Ms. Vinson's propensity, if any, toward physical aggression. The fact that two people had an argument or a threat was made over a boyfriend or a girlfriend without any accompanying physical aggression, whether an actual striking occurred or not, is not relevant enough to submit to this jury.

TrialTr.V5 p.875,ln.23–p.877,ln.25. Vinson could have been shouting at Einfeldt and her daughters, and she might have verbally threatened Chicoine over the phone—but neither would make it more likely that Vinson brandished a gun at Einfeldt's family or threw the first punch. The trial court was correct when it identified the missing link in Einfeldt's theory of relevance; even if Rule 5.405(b) did not apply, this evidence would have been properly excluded under Rule 5.403.

C. Evidence of the "shots fired" incident might have been relevant as intricably intertwined evidence if Einfeldt had made a stronger threshold showing that Vinson fired those shots—but she did not.

On direct examination, Vinson affirmed that, while she was with Jake Peitzman and his father on their farm, she handled and fired a small gun; she fired it "[j]ust once," and gave it back. *See* TrialTr.V3 p.456,ln.7–p.458,ln.10. Vinson also confirmed that she had a conviction that prohibited her from possessing a gun. *See* TrialTr.V3 p.421,ln.7–14. That was revisited in cross-examination. *See* TrialTr.V3 p.473,ln.22–p.478,ln.13. Peitzman described the same: Vinson took one shot with his father's gun, then gave it back. *See* TrialTr.V4 p.785,ln.10–p.789,ln.13. Vinson informed Officer Aswegan about all of these facts when they spoke, following the assault. *See* TrialTr.V5 p.831,ln.3–p.832,ln.21; TrialTr.V5 p.899,ln.2–p.901,ln.8.

Einfeldt argues that her additional "shots fired" evidence should have been admitted to show that Vinson had a gun in her possession: Danielle's boyfriend, Jake Harker, said that he saw Vinson peer into their window, heard three shots fired, and then called the police at approximately 6:30 p.m.—he said this occurred while Beatrice was home and while Danielle and Einfeldt were still at the police station, after the assault in question. *See* TrialTr.V5 p.811,ln.6–p.817,ln.5.

Officer Aswegan remembered responding to that report at about 11:30 p.m.—his shift did not even start until 11:00 p.m.—and he spoke with a witness who reported that she went outside when she heard shots, and saw Einfeldt and Danielle "walking down the street." *See* TrialTr.V5 p.823,ln.2–p.825,ln.7; TrialTr.V5 p.835,ln.17–23.

Officer Aswegan spoke with Vinson by phone—and he did not think Vinson had known about any "shots fired" incident before that conversation. *See* TrialTr.V5 p.842,ln.11–p.843,ln.15.

Officer Moore had entered Vinson's house, and he did not see a firearm while he was there. *See* TrialTr.V4 p.598,ln.6–p.599,ln.14; TrialTr.V4 p.612,ln.17–p.613,ln.6; TrialTr.V4 p.634,ln.6–p.636,ln.9.

The State provided some additional background on this issue:

> The police responded and did an investigation that evening. They collected three shell casings from the street outside the building and likewise observed three bullet holes into the apartment 9 of the complex. The three defendants in this court right now reside, or at the time resided in an apartment number 11. It was not their apartment that's shot. Additionally, the officers collected a cigarette butt that appeared to be fresh located in the area of the shell casings, and that was submitted for DNA testing and the DNA profile came to a male, clearly not the victim in this case.

TrialTr.V1 p.101,ln.23–p.102,ln.13. The trial court evaluated the evidence presented in the offer of proof—and ultimately excluded it:

> Now, with respect to the claim that Mulika Vinson after this incident on July 14, 2015 shot a weapon at the apartment building in which these defendants resided is also subject to exclusion under 5.403. . . .
>
> In this particular case, the focus must be on the assault. We have the testimony of two witnesses. Secondly, whether there is clear proof it occurred, and by implication, that the witness whose character has been raised committed the act in this case, that's seriously disputed. We will end up trying the case involving the discharge of the firearm into the apartment building. That will subsume this case. Law enforcement has not made an arrest, law enforcement has deemed that they do not have probable cause to make an arrest. There are any number of explanations for those bullet holes in that apartment building other than Mulika Vinson having fired the shots.
>
> Third factor, the strength or weakness of the prior acts evidence in supporting the issues sought to be proved. Again, the issue is whether Mulika Vinson was prone to physical aggression as of the time of the assault. The evidence presented regarding the shooting is marginally relevant, and the degree to which the evidence would improperly influence the jury, this jury, will be so confused that I believe it will be difficult to sort out which evidence is relevant to which alleged crime. I am excluding that.

See TrialTr.V5 p.872,ln.21–p.875,ln.22.

As an initial matter, Einfeldt's attempt to use this evidence "on the question of whether Vinson had a violent or aggressive character and thus had likely acted as the first aggressor in the earlier altercation with the defendants" is the same conduct-to-propensity-to-conformity argument that Rule 5.405(b) expressly prohibits. *See* Def's Br. at 72. Again, Vinson's character is not an essential element of this defense.

The first exception cannot apply—Einfeldt and her daughters could not have known about this incident and relied upon it to arrive at a reasonable apprehension of an imminent threat, because this "shots fired" incident happened *after* the assault. *See* TrialTr.V5 p.941,ln.5–p.942,ln.16 ("That by definition is not relevant to the issue of the defendant's knowledge of violent propensities on the part of a witness because it occurred after.").

At best, this could qualify as inextricably intertwined evidence—Einfeldt correctly points out that *Jacoby* would permit admission of such evidence, if it were. *See* Def's Br. at 65–66. Because this incident appeared to happen "just a few hours after" the underlying assault, evidence showing that Vinson possessed a firearm during this event would tend to support Einfeldt's claim that she acted in self-defense in response to Vinson brandishing a gun at her. *See* Def's Br. at 72.

The problem is that none of the evidence here demonstrates that Vinson possessed a firearm in connection with this incident. Even assuming that Vinson was in the area, there is no evidence showing Vinson fired those shots. The cigarette matched her brand, but that alone did not establish her involvement (especially given that DNA results did not give investigators probable cause to arrest her).

See TrialTr.V5 p.833,ln.10–p.835,ln.6; TrialTr.V5 p.839,ln.25–p.840,ln.9. And Officer Aswegan did not think Vinson had known anything about this incident before he called to ask her about it. *See* TrialTr.V5 p.842,ln.11–p.843,ln.15.

Overall, the trial court was correct to exclude this "shots fired" evidence under Rule 5.403, to avoid confusing the ultimate issue with a "mini-trial" on whether Vinson was the unknown shooter. *See, e.g.*, *State v. Hutchins*, No. 15–0544, 2016 WL 4051601, at *7 (Iowa Ct. App. July 27, 2016) (affirming exclusion of evidence regarding subsequent assault under Rule 5.403 because it was "at best only marginally relevant," and because "the potential for confusion was high, given the reference to a separate criminal matter"); *see also* TrialTr.V5 p.872,ln.21–p.875,ln.22. Moreover, even if Vinson *was* the unknown shooter, the temporal/spatial link that is necessary to make this evidence "inextricably intertwined" is absent—Vinson could have acquired a gun *between* the assault and the shooting. *See Nelson*, 791 N.W.2d at 423 ("[W]e will only allow such evidence to complete the story of what happened when the other crimes, wrongs, or acts evidence is so closely related in time and place and so intimately connected to the crime charged that it forms a continuous transaction.").

"There are any number of explanations for those bullet holes in that apartment building other than Mulika Vinson having fired the shots." *See* TrialTr.V5 p.874,ln.22–p.875,ln.11. Even if this evidence were admissible under the proper interpretation of Rule 5.405(b), the trial court was correct to exclude it as more prejudicial than probative under Rule 5.403.

D. Any error was harmless, beyond all doubt.

Any error in the trial court's rulings that excluded Einfeldt's proffered evidence would only require reversal if Einfeldt suffered some level of prejudice. *See* Iowa R. Evid. 5.103(a). In cases where evidence of guilt is overwhelming, such errors typically do not require reversal or retrial. *See, e.g.*, *State v. Elliott*, 806 N.W.2d 660, 669 n.1 (Iowa 2011); *State v. Martin*, 704 N.W.2d 665, 673 (Iowa 2005). Here, overwhelming evidence disproved Einfeldt's self-defense claim.

Hardcastle testified that Danielle and Einfeldt "essentially grabbed [Vinson] and started beating her up." *See* TrialTr.V3 p.530,ln.23–p.536,ln.7; *see also* TrialTr.V3 p.544,ln.1–p.548,ln.22. Hardcastle never saw a gun at any point. *See* TrialTr.V3 p.540,ln.5–13.

Cooper saw Vinson standing in her house and on her patio, and he never saw her brandish a gun either. *See* TrialTr.V4 p.694,ln.24–

p.697,ln.22; TrialTr.V4 p.743,ln.15–24. He was looking away at the precise moment when the confrontation turned physical, but he could tell that "the three [defendants] had come towards [Vinson] and had grabbed hold of her and drug her back towards the road," while they punched her and kicked her. *See* TrialTr.V4 p.699,ln.23–p.704,ln.10; *see also* TrialTr.V4 p.722,ln.17–p.725,ln.3; TrialTr.V4 p.718,ln.19–25.

Officer Moore said Einfeldt told him "I beat her mother fucking ass, now book me up" and remarked that Vinson was "going to need the ambulance, the paramedics." TrialTr.V4 p.593,ln.22–p.595,ln.25. Officer Deaton remembered Einfeldt saying "I'll tell you right now I beat her ass. I beat the fuck out of that bitch." TrialTr.V4 p.653,ln.18–p.654,ln.14. That is extremely potent evidence, and it establishes that Einfeldt used brutal force without caring whether it was reasonable. And the most probative evidence available is the video, which shows:

> Mulika [Vinson] on the ground on her back, with Wonetah [Einfeldt] standing over her. Wonetah's hand . . . had Mulika's hair wrapped around her fist. Wonetah was hitting Mulika as she was on the ground, and Danielle was also hitting her while Mulika was on the ground. And you can see Beatrice off to the side.

TrialTr.V4 p.661,ln.23–p.662,ln.14; State's Ex. 1; *see also* TrialTr.V6 p.1040,ln.2–p.1042,ln.14 (playing video for the jury on slow speed).

Danielle and Beatrice testified that Vinson brandished a gun at them before charging Danielle and punching her in the face. *See* TrialTr.V5 p.924,ln.20–p.933,ln.25; TrialTr.V5 p.991,ln.4–p.999,ln.9; State's Ex. 31; ExApp. 22. This would be an absurdly illogical move for Vinson—in any confrontation between a single person with a gun and three unarmed people, the armed person would be extremely likely to stay out of melee range to avoid being overpowered and/or disarmed. Moreover, Einfeldt and her daughters instigated and prolonged this fight (and walked away nonchalantly when Cooper and Hardcastle intervened), which was inconsistent with their claims that they felt threatened by Vinson. *See* TrialTr.V5 p.960,ln.18–p.962,ln.5; TrialTr.V5 p.978,ln.25–p.981,ln.14; *cf.* TrialTr.V3 p.370,ln.10–p.371,ln.10.

Even if everything that Einfeldt, Danielle, and Beatrice said were the unvarnished truth, the video would disprove any claim that they used "only the amount of force a reasonable person would find necessary to use under the circumstances to prevent death or injury." Jury Instr. 21–22; App. 29–30; State's Ex. 1. And Vinson had extensive injuries, which Danielle struggled to assimilate into her self-defense narrative. *See* TrialTr.V3 p.447,ln.20–p.455,ln.12; State's Ex. 9–25; ExApp. 4–20; TrialTr.V5 p.972,ln.5–p.976,ln.8.

Cooper said Vinson "kept begging and pleading with them to stop, and kept begging and pleading with them that her kids were sitting there watching this happen to her"—which he saw was true. TrialTr.V4 p.706,ln.9–p.707,ln.14. No amount of character evidence could have enabled Einfeldt to overcome the overwhelming evidence that she and her daughters sought Vinson out, initiated this fight, used unreasonable force, and inflicted significant injuries. Nothing that Vinson did decades ago, nothing Vinson said to Lacey Chicoine, and nothing Vinson may or may not have done later that evening could have possibly changed the outcome—so even if such evidence was erroneously excluded, any error was harmless.

CONCLUSION

The State respectfully requests that this Court reject these challenges and affirm Wonetah Einfeldt's conviction.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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