

IN THE SUPREME COURT OF IOWA

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STATE OF IOWA, )  
 )  
 Plaintiff-Appellee, )  
 )  
 v. ) S.C.T. NO.17-0784  
 )  
 TRAVIS RAYMOND WAYNE )  
 WEST, )  
 )  
 Defendant-Appellant. )

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APPEAL FROM THE IOWA DISTRICT COURT  
FOR POLK COUNTY  
HONORABLE ROBERT J. BLINK, JUDGE

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APPELLANT'S BRIEF AND ARGUMENT

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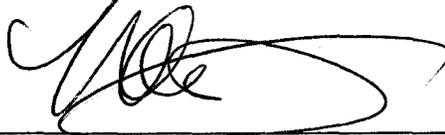
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**CERTIFICATE OF SERVICE**

On the 5<sup>th</sup> of March, 2018, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Travis Raymond Wayne West, 1724 Merle Huff Ave., Norwalk, IA 50211.

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NJ/d/10/17  
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## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

**I. Is there sufficient evidence to support West's convictions for involuntary manslaughter and delivery of a controlled substance?**

### **Authorities**

State v. Truesdell, 679 N.W.2d 611, 615 (Iowa 2004)

State v. McCullah, 787 N.W.2d 90, 93 (Iowa 2010)

State v. Duncan, 312 N.W.2d 519, 522 (Iowa 1981)

Nguyen v. State, 707 N.W.2d 317, 327 (Iowa 2005)

State v. Shanahan, 712 N.W.2d 121, 134 (Iowa 2006)

State v. Geier, 484 N.W.2d 167, 171 (Iowa 1992)

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State v. Rohm, 609 N.W.2d 504, 509, 511 (Iowa 2000)

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State v. Grady, 215 N.W.2d 213, 214 (Iowa 1974)

Iowa Code § 707.5 (2015)

Iowa Code § 124.401(1)(c)(1) (2015)

Iowa R. Evid. 5.404(b)

State v. Reynolds, 765 N.W.2d 283, 289 (Iowa 2009)

State v. Sullivan, 679 N.W.2d 19, 24 (Iowa 2004)

United States v. Daniels, 770 F.2d 1111, 1116 (D.C.Cir.1985)

**II. Did the district court err in admitting (1.) evidence that West was present at the victim's previous heroin overdose, (2.) evidence that he supplied the victim with drugs in the past, and (3.) evidence that he had been in contact with his drug dealer around the time of the victim's death? Alternatively, was trial counsel ineffective to the extent error on this evidentiary challenge was not preserved for appellate review?**

#### Authorities

State v. Tangie, 616 N.W.2d 564, 568–69 (Iowa 2000)

State v. Alberts, 722 N.W.2d 402, 406 (Iowa 2006)

State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006)

State v. Ambrose, 861 N.W.2d 550, 555 (Iowa 2015)

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State v. Cox, 781 N.W.2d 757, 760 (Iowa 2010)

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Iowa R. Evid. 5.401

Iowa R. Evid. 5.403

Iowa R. Evid. 5.404(b)

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State v. Kernes, 262 N.W.2d 602, 605 (Iowa 1978)

State v. Taylor, 490 N.W.2d 536, (Iowa 1992)

State v. Parker, 747 N.W.2d 196, 208–09 (Iowa 2008)

State v. Henderson, 696 N.W.2d 5, 12 (Iowa 2005)

State v. Plaster, 424 N.W.2d 226, 232 (Iowa 1988)

**III. Did the district court err in failing to merge defendant's convictions for involuntary manslaughter and deliver of a controlled substance at sentencing?**

**Authorities**

State v. Love, 858 N.W.2d 721, 723 (Iowa 2015)

U.S. Const. amend. V

Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187, 194 (1977)

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Iowa Code § 124.401(1)(c)(1) (2015)

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Iowa Code § 707.5(1)(a) (2015)

Iowa Code § 902.9(1)(d) (2015)

Iowa Code § 902.9(1)(e) (2015)

State v. Lewis, 514 N.W.2d 63, 69 (Iowa 1999)

State v. York, No. 08-1490, 2009 WL 4115310, at \*3 (Iowa Ct. App. November 25, 2009)

## **ROUTING STATEMENT**

This case should be transferred to the Court of Appeals because the issues raised involve applying existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

## **STATEMENT OF THE CASE**

**Nature of the Case:** Defendant-Appellant, Travis Raymond Wayne West, appeals from his convictions for involuntary manslaughter and delivery of a controlled substance, following jury trial, judgment, and sentencing in the District Court for Polk County, the Honorable Robert J. Blink presiding.

### **Course of Proceedings and Disposition in the District**

**Court:** On October 29, 2015, the State filed a trial information charging West with the crimes of involuntary manslaughter by public offense (delivery of a controlled substance), a class “D” felony in violation of Iowa Code section 707.5(1) in Count I, and delivery of a controlled substance (heroin), a class “C” felony in violation of Iowa Code section 124.401(1)(c)(1) in Count II. (Trial Information – 10/29/15) (App. pp. 4-6). Jury trial in this

matter was held March 27-31, 2017. (Trial Transcript Covers Vols. 1-5). The jury found West guilty as charged of the offenses of involuntary manslaughter and delivery of a controlled substance. (Trial Vol. 5 Tr. p. 4, L. 21-p. 5, L. 18). At the sentencing on May 18, 2017, the district court imposed a five-year prison term and a suspended fine of \$750 for involuntary manslaughter and a ten-year prison term and a suspended fine of \$1,000 for delivery of a controlled substance. (Sentencing Order – 5/18/17) (App. pp. 18-23). The prison sentences were ordered to run concurrently with one another. (Sentencing Order – 5/18/17) (App. pp. 18-23). The court assessed applicable surcharges on the fines as well as court costs and attorney fees. (Sentencing Order – 5/18/17) (App. pp. 18-23). West was additionally ordered to make restitution in the amount of \$150,000 to the victim's estate pursuant to Iowa Code section 910.3B. (Sentencing Order – 5/18/17) (App. pp. 18-23). The court further ordered the revocation of West's driving privileges for a period of one hundred eighty days

by the Iowa Department of Transportation under Iowa Code section 901.5. (Sentencing Order – 5/18/17) (App. pp. 18-23).

West filed timely notice of appeal on May 19, 2017; this appeal followed. (Notice of Appeal – 5/19/17) (App. pp. 24-25).

**Facts:** Bailey Brady died following a heroin overdose at her residence in West Des Moines on June 5, 2015. Travis West, a close friend who was with her at the time, was criminally charged in connection with her death. He was accused of supplying her with the drugs used in her fatal overdose. The following facts were presented at trial.

Brady went to several different bars and consumed alcohol within a day of her untimely and tragic death. Early in the evening on June 4, Brady went with her mother to Draught House for food and drinks. (Trial Vol. 2 Tr. p. 88, L. 21-p. 89, L. 13; p. 97, L. 6-12). At one point, Brady complained about feeling hot. (Trial Vol. 2 Tr. p. 93, L. 18-22; p. 98, L. 5-18). Her mother, after reaching over and touching her, joked that she was “clammy.” (Trial Vol. 2 Tr. p. 93, L. 18-22; p. 98, L. 5-18). Brady drank two beers with dinner but exhibited no

signs of intoxication or impairment at the time. (Trial Vol. 2 Tr. p. 89, L. 17-p. 90, L. 11; p. 97, L. 16-p. 98, L. 4; p. 99, L. 2-8). Brady met up with two friends later that night at Saints Pub, where she had a drink and two shots. (Trial Vol. 2 Tr. p. 118, L. 19-p. 121, L. 8). Afterwards, she and her friends went to Tonic Bar and did two shots together. (Trial Vol. 2 Tr. p. 121, L. 9-p. 123, L. 16). Brady left the last bar sometime after midnight. (Trial Vol. 2 Tr. p. 121, L. 9-p. 123, L. 16).

Brady subsequently had other friends, namely Travis West and his brother, over at her apartment in the early morning hours of June 5. (State's Exhibit 24 – West Interview). The three of them left to go to a convenience store, Kum & Go, to buy snacks and other items. (State's Exhibit 24 – West Interview; State's Exhibit 27 – Kum & Go Surveillance Tape; State's Exhibit 28 – Kum & Go Receipt) (Ex. App. p. 7). They went back to Brady's place afterward. (State's Exhibit 24 – West Interview). Sometime later, West and his brother found Brady unresponsive in the bathroom. (State's Exhibit 24 – West Interview). West immediately called 911. (Trial Vol. 2 Tr. p.

10, L. 12-21; p. 13, L. 2-10; State's Exhibit 1 – 911 Call; State's Exhibit 24 – West Interview).

Law enforcement officers and paramedics arrived at the scene shortly thereafter. (Trial Vol. 1 Tr. p. 138, L. 7-p. 140, L. 7; Trial Vol. 2 Tr. p. 17, L. 2-13). The officers interviewed both West and his brother while the paramedics were performing CPR on Brady. (Trial Vol. 1 Tr. p. 138, L. 7-p. 145, L. 21; Trial Vol. 2 Tr. p. 17, L. 2-p. 18, L. 8). The officers found beer cans and alcoholic beverages in the apartment. (Trial Vol. 2 Tr. p. 19, L. 23-p. 20, L. 4; p. 41, L. 20-p. 43, L. 25; State's Exhibit 10 – Photo of Interior of Refrigerator; State's Exhibit 13 – Photo of Empty Cans; State's Exhibit 14 – Open Bud Light Box; State's Exhibit 15 – Photo of Alcohol) (Ex. App. pp. 3-6). However, they observed no signs of illicit drug use. (Trial Vol. 2 Tr. p. 21, L. 2-p. 22, L. 16; p. 37, L. 6-p. 38, L. 2; p. 47, L. 2-7).

The paramedics transported Brady to the hospital where she was pronounced dead of a suspected drug overdose. (Trial Vol. 2 Tr. p. 25, L. 3-11). Autopsy results confirmed that she died as a result of “acute combined heroin and ethanol toxicity.”

(Trial Vol. 2 Tr. p. 71, L. 19-p. 72, L. 8). The medical examiner ruled her death an accident. (Trial Vol. 2 Tr. p. 71, L. 19-p. 72, L. 8).

The officers conducted a follow-up interview with West at the police station on June 10. (Trial Vol. 2 Tr. p. 47, L. 15-p. 48, L. 6; p. 60, L. 14-16). In the interview, West was asked about the events leading up to Brady's death. (State's Exhibit 24 – West Interview). He stated that he and his brother were in Villisca when Brady called and invited them to her place. (State's Exhibit 24 – West Interview). They drove to West Des Moines to see her. (State's Exhibit 24 – West Interview). At some point, they left to go to the convenience store and then returned. (State's Exhibit 24 – West Interview). They subsequently put on a movie to watch on TV. (State's Exhibit 24 – West Interview).

West indicated that Brady in the meantime asked him to help her pour some cat litter into a bag. (State's Exhibit 24 – West Interview). After giving her a hand, she told him that she was going to rinse out her cat's litter box in the bathroom.

(State's Exhibit 24 – West Interview). When she started running some water in the bathtub, he went to rest on the couch and dozed off. (State's Exhibit 24 – West Interview).

West next woke up when his brother yelled for him to come into the bathroom. (State's Exhibit 24 – West Interview).

Brady was found slumped over the bathtub and was not breathing. (State's Exhibit 24 – West Interview). West called 911 after he and his brother had made unsuccessful attempts to revive her. (State's Exhibit 24 – West Interview).

West told the officers that he suspected Brady had been drinking and using drugs before he saw her. (State's Exhibit 24 – West Interview). He said that she seemed drunk, "kind of messed up," and was "nodding off." (State's Exhibit 24 – West Interview). He also smelled alcohol on her during their trip to the convenience store. (State's Exhibit 24 – West Interview).

West was asked what he knew about Brady's drug history. (State's Exhibit 24 – West Interview). He responded that she used heroin, cocaine, and marijuana. (State's Exhibit 24 – West Interview). In addition, he talked about a prior heroin

overdose that she had the previous year. (State's Exhibit 24 – West Interview). West said that he and his friend took her to the hospital. (State's Exhibit 24 – West Interview). He indicated that he had not witnessed her using drugs on that occasion. (State's Exhibit 24 – West Interview).

The officers directly asked whether West supplied Brady with heroin on the day in question. (State's Exhibit 24 – West Interview). He denied giving her the drugs and said that he had no idea how she got them. (State's Exhibit 24 – West Interview). He also claimed that he saw no drugs at the apartment. (State's Exhibit 24 – West Interview). When the officers accused him of clearing the place of drugs, he maintained that he had not removed anything. (State's Exhibit 24 – West Interview). He did admit to giving Brady heroin and cocaine at other times but not on that particular day. (State's Exhibit 24 – West Interview).

The officers probed into West's drug history as well. (State's Exhibit 24 – West Interview). He acknowledged using heroin, marijuana, and "pills." (State's Exhibit 24 – West

Interview). He said that it had been a few months since his last heroin use. (State's Exhibit 24 – West Interview). When pressed for his source, West responded that he usually gets his drugs from a dealer named “Snap.” (State's Exhibit 24 – West Interview). At the officers' request, West provided his drug dealer's phone numbers. (State's Exhibit 24 – West Interview).

Cellphone records would later show that West had been in frequent contact with his drug dealer around the time of Brady's death. (State's Exhibits 25 & 26 – West Phone Records) (Conf. App. pp. 4-5).

West was ultimately arrested and charged with the crimes of involuntary manslaughter and delivery of a controlled substance. (Trial Information – 10/29/15) (App. pp. 4-6).

Other facts relevant to the appeal will be mentioned below.

## **ARGUMENT**

**I. There is insufficient evidence to support West's convictions for involuntary manslaughter and delivery of a controlled substance.**

**Preservation of Error:** Error was preserved by the defense motion for judgment of acquittal, and the trial court's

adverse rulings on said motion. (Trial Vol. 2 Tr. p. 100, L. 5-p. 114, L. 21; Trial Vol. 3 Tr. p. 7, L. 24-p. 9, L. 15). See State v. Truesdell, 679 N.W.2d 611, 615 (Iowa 2004) (“To preserve error on a claim of insufficient evidence [, a] defendant must make a motion for judgment of acquittal at trial....”).

**Standard of Review:** Sufficiency-of-the-evidence claims are reviewed for correction of errors at law. State v. McCullah, 787 N.W.2d 90, 93 (Iowa 2010). When presented with a motion for acquittal, courts must view “the evidence in the light most favorable to the State and draw[ ] all fair and reasonable inferences from it, taking all the evidence into consideration, both direct and circumstantial.” State v. Duncan, 312 N.W.2d 519, 522 (Iowa 1981) (citations omitted). This standard requires courts to assume the truth of the evidence offered by the prosecution. Nguyen v. State, 707 N.W.2d 317, 327 (Iowa 2005). The evidence must be sufficient to convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. State v. Shanahan, 712 N.W.2d 121, 134 (Iowa 2006). A fair inference of guilt is necessary, not merely suspicion,

speculation, or conjecture. State v. Geier, 484 N.W.2d 167, 171 (Iowa 1992).

**Discussion:** West asserts that the evidence does not support a finding that he supplied the heroin used in the victim's fatal drug overdose. Because the State failed to prove this beyond a reasonable doubt, there is insufficient evidence to sustain his convictions for both involuntary manslaughter and delivery of a controlled substance.

The State accused West of the public-offense alternative of involuntary manslaughter, requiring proof that he “unintentionally cause[d] the death of another person” by recklessly delivering a controlled substance, in Count I of the trial information. (Trial Information – 10/29/15) (App. pp. 4-6). See Iowa Code § 707.5(1) (2015); see also State v. Rohm, 609 N.W.2d 504, 509, 511 (Iowa 2000) (reaffirming that an essential element of involuntary manslaughter is the commission of the underlying offense in a reckless manner). The underlying offense of delivery of a controlled substance requires proof that the defendant transferred a controlled

substance to another person. Iowa Code §§ 124.101(7) (defining delivery as “the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship”), 124.401(1)(c) (2015). Transfer means the “conveyance of right, title or interest” in property from one person to another “by sale, gift or other process.” State v. Grady, 215 N.W.2d 213, 214 (Iowa 1974). West was also accused of a separate charge of delivery of a controlled substance (heroin) in Count II based upon the same facts and circumstances. (Trial Information – 10/29/15) (App. pp. 4-6).

The jury was instructed on the following elements of involuntary manslaughter by public offense (delivery of a controlled substance):

1. On or about the June 5, 2015 the defendant recklessly committed the crime of delivery of a controlled substance.
2. When the defendant committed the crime, the defendant unintentionally caused the death of Bailey Brady.

(Instruction 18 – Involuntary Manslaughter)(App. p. 15). Iowa Code § 707.5 (2015).

The jury was instructed on the following elements of delivery of a controlled substance (heroin):

1. On or about June 5, 2015, the defendant delivered a controlled substance.
2. The defendant knew that the substance delivered was heroin.

(Instruction 22 – Delivery of a Controlled Substance)(App. p. 17). Iowa Code § 124.401(1)(c)(1) (2015).

West contends that the State failed to prove beyond a reasonable doubt that he supplied the heroin used in Brady's fatal overdose. Although the medical examiner concluded that Brady died from "acute combined heroin and ethanol toxicity," he could not determine exactly how the drugs were introduced into her system – by snorting, smoking, or injection. (Trial Vol. 2 Tr. p. 71, L. 23-p.72, L. 1; p. 80, L. 1-p. 85, L. 10). No drugs or drug paraphernalia were found in either the apartment or in

West's possession. (Trial Vol. 2 Tr. p. 21, L. 2-p. 22, L. 16; p. 37, L. 6-p. 38, L. 2; p. 47, L. 2-7).<sup>1</sup>

Beyond that, the State merely offered evidence that West drove from Villisca to West Des Moines to see Brady, made a trip to the convenience store with her, and then found her unresponsive after they went back to her place. (State's Exhibit 24 – West Interview; State's Exhibit 27 – Kum & Go Surveillance Tape). No one witnessed West giving drugs to Brady.

West's cellphone records, covering the hours before and after Brady's overdose, were introduced at trial. (State's Exhibits 25 & 26 – West Phone Records) (Conf. App. pp. 4-5). They revealed that West had multiple contacts with Brady and was also in frequent communication with his drug dealer,

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<sup>1</sup> According to medical records from Brady's previous drug overdose in 2014, she told the emergency room physician that she only snorted heroin and never injected the drugs. (Defendant's Exhibit A – Brady Medical Records, p. 11) (Conf. App. p. 16). No track marks were found on her arms and legs at that time. (Defendant's Exhibit A – Brady Medical Records, p. 5) (Conf. App. p. 10). It is conceivable that she snorted heroin before she fatally overdosed, which would explain the absence of drugs or drug paraphernalia in her apartment.

“Snap.” (State’s Exhibits 25 & 26 – West Phone Records) (Conf. App. pp. 4-5). From 11:56 p.m. on June 4 to 1:55 a.m. on June 5, Brady called West three times. (State’s Exhibits 25 & 26 – West Phone Records) (Conf. App. pp. 4-5). At 2:48 a.m., West placed a call to Brady. (State’s Exhibits 25 & 26 – West Phone Records) (Conf. App. pp. 4-5). Between 2:49 a.m. and 2:50 a.m., West made three calls to “Snap.” (State’s Exhibits 25 & 26 – West Phone Records) (Conf. App. pp. 4-5). West received three calls from “Snap” between 2:51 a.m. to 2:52 a.m. (State’s Exhibits 25 & 26 – West Phone Records) (Conf. App. pp. 4-5). At 2:55 a.m., West called Brady for the final time. (State’s Exhibits 25 & 26 – West Phone Records) (Conf. App. pp. 4-5). Beginning at 3:11 a.m. until 7:02 a.m., West had sixteen outgoing calls to “Snap” and three incoming calls from him. (State’s Exhibits 25 & 26 – West Phone Records) (Conf. App. pp. 4-5).

However, the State offered no evidence regarding the substance of these phone communications. There was also no showing that West actually met up with his drug dealer and

purchased drugs to give to Brady. The inference that he might have done so merely because he contacted his drug dealer is not fair or reasonable. Without additional evidence pointing to West's guilt, it would be mere suspicion, speculation, or conjecture.

Moreover, West's guilt cannot be legitimately inferred or deduced from his prior conduct. During his follow-up interview with law enforcement, West indicated that he was present when Brady previously overdosed on heroin but had not provided her with drugs then. (State's Exhibit 24 – West Interview). This past incident sheds no light on whether he gave her drugs in the present case. In the same interview, West further admitted that he delivered drugs to Brady on other occasions. (State's Exhibit 24 – West Interview). Yet, this conduct cannot be considered for propensity to show that he more likely committed the crime in question.<sup>2</sup>

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<sup>2</sup> Under Iowa Rule of Evidence 5.404(b), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith.” Iowa R. Evid. 5.404(b). Therefore, such evidence “is not admissible to demonstrate the defendant has a criminal

Because the evidence does not support a finding that West supplied the victim with the heroin used in her fatal overdose, there is insufficient evidence to sustain his convictions for both involuntary manslaughter by public offense (delivery of a controlled substance) and delivery of a controlled substance (heroin). Consequently, his convictions must be vacated and the case remanded with instructions to dismiss the charges.

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disposition and was thus more likely to have committed the crime in question.” State v. Reynolds, 765 N.W.2d 283, 289 (Iowa 2009). The public policy for this rule

“is founded not on a belief that the evidence is irrelevant, but rather on a fear that juries will tend to give it excessive weight, and on a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds.”

State v. Sullivan, 679 N.W.2d 19, 24 (Iowa 2004) (quoting United States v. Daniels, 770 F.2d 1111, 1116 (D.C.Cir.1985)).

**II. The district court erred in admitting (1.) evidence that West was present at the victim's previous heroin overdose, (2.) evidence that he supplied the victim with drugs in the past, and (3.) evidence that he had been in contact with his drug dealer around the time of the victim's death. Alternatively, trial counsel was ineffective to the extent error on this evidentiary challenge was not preserved for appellate review.**

**Preservation of Error:** Error was preserved by West's objections to the admission of the challenged evidence and the adverse rulings by the district court. (Motion in Limine – 11/10/16; Trial Vol. 1 Tr. p. 3, L. 1-p. 17, L. 24; p. 126, L. 22-p. 127, L. 9; Trial Vol. 2 Tr. p. 50, L. 7-12; p. 54, L. 5-10) (App. pp. 7-14).

A ruling on a motion in limine is generally not sufficient to preserve error for evidentiary challenges on appeal; and if a motion in limine does not definitively resolve an evidentiary issue with ultimate finality, a timely objection during trial is necessary to preserve error). See State v. Tangie, 616 N.W.2d 564, 568–69 (Iowa 2000). However, more recently, our supreme court has clarified the rule:

The key to our analysis is to determine what the trial court ruling purported to do. State v. O'Connell,

275 N.W.2d 197, 202 (Iowa 1979). “A ruling [on a motion in limine] only granting or denying protection from prejudicial references to challenged evidence cannot preserve the inadmissibility issue for appellate review.” Id. However, “if the ruling reaches the ultimate issue and declares the evidence admissible or inadmissible, it is ordinarily a final ruling and need not be questioned again during trial.” Id.

State v. Alberts, 722 N.W.2d 402, 406 (Iowa 2006).

If this court finds that error was not preserved, West contends that his trial attorney provided ineffective assistance of counsel. Ineffective-assistance-of-counsel claims are not bound by traditional rules of error preservation. State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006). “To the extent error is not preserved on an issue, any objections must be raised within an ineffective-assistance-of-counsel framework.” State v. Ambrose, 861 N.W.2d 550, 555 (Iowa 2015).

**Standard of Review:** Review of evidentiary rulings is generally for an abuse of discretion. State v. Helmers, 753 N.W.2d 565, 567 (Iowa 2008); see also State v. Cox, 781 N.W.2d 757, 760 (Iowa 2010) (review of rulings regarding admission of prior bad acts is for abuse of discretion). The district court has

abused its discretion when it exercises it “on ground or for reasons clearly untenable or to an extent clearly unreasonable.”

Helmets, 753 N.W.2d at 567.

Review of ineffective-assistance-of-counsel claims is de novo. State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012). The right to assistance of counsel under the Sixth Amendment to the United States Constitution and article I, section 10 of the Iowa Constitution is the right to “effective” assistance of counsel. Ondayog, 722 N.W.2d at 784.

To establish his claim of ineffective assistance of counsel, Straw must demonstrate (1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 693 (1984); State v. Gaskins, 866 N.W.2d 1, 5 (Iowa 2015). The defendant has the burden of proving both elements by a preponderance of the evidence. See State v. Halverson, 857 N.W.2d 632, 635 (Iowa 2015).

**Discussion:** West asserts that the district court erred and abused its discretion in admitting (1.) evidence that he was

present at the victim's previous heroin overdose, (2.) evidence that he supplied the victim with drugs in the past, (3.) evidence that he was in contact with his drug dealer around the time of the victim's death. Should this court determine that the evidentiary challenge was not preserved for appellate review, West alternatively claims his trial counsel ineffective for not raising the proper evidentiary objections.

*Relevant Legal Principles:* The rules of evidence provide the framework for analysis of this issue. In general, relevant evidence is admissible and irrelevant evidence is not admissible. See Iowa R. Evid. 5.402. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401. Even when evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Iowa R. Evid. 5.403.

Rule 5.404(b) sets forth a specific rule governing the admissibility of a person's other crimes, wrongs or acts. It provides in pertinent part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of the person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Iowa R. Evid. 5.404(b). Thus, when a prosecutor seeks to introduce evidence of a defendant's prior misconduct, the evidence must be probative of " 'some fact or element in issue other than the defendant's criminal disposition.' " State v. Castaneda, 621 N.W.2d 435, 440 (Iowa 2001) (citation omitted).

If a court determines prior-bad-acts evidence "is relevant to a legitimate factual issue in dispute, the court must then decide if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." Id. at 25 (emphasis added) (*citing* Iowa R. Evid. 5.403). Unfair prejudice arises when the evidence would cause the jury to base its decision on something other than the proven facts and

applicable law, such as sympathy for one party or a desire to punish a party. State v. Rodriguez, 636 N.W.2d 234, 240 (Iowa 2001). In determining whether unfair prejudice generated by evidence of a defendant's other misconduct substantially outweighs the probative value of the evidence, the court should consider the need for the evidence in light of the issues and the other evidence available to the prosecution, whether there is clear proof the defendant committed the prior bad acts, the strength or weakness of the evidence on the relevant issue, and the degree to which the fact finder will be prompted to decide the case on an improper basis.<sup>3</sup> Id.

*Evidence of West's Presence at Victim's Previous Drug*

*Overdose:* Over defense objections, the State offered evidence

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<sup>3</sup> In State v. Sullivan, 679 N.W.2d 19, 25 (Iowa 2004), the court described the analysis in determining whether the proffered prior-bad-acts evidence is admissible under Rule 5.404(b) as a three-step process. The three steps are (1) "the evidence must be relevant and material to a *legitimate* issue in the case other than a 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." Id.

regarding West was around at Brady's previous drug overdose. (Trial Vol. 1 Tr. p. 6, L. 16-p. 9, L. 4; Trial Vol. 2, Tr. p. 50, L. 7-16; State's Exhibit 24 – West Interview). During his follow-up interview at the police station, West mentioned that West had overdosed on heroin the year before. (State's Exhibit 24 – West Interview). He indicated that he and his friend met up with her and were the ones who took her to the hospital. (State's Exhibit 24 – West Interview). He also stated that he did not witness her using drugs at that time. (State's Exhibit 24 – West Interview).

West asserts that the challenged evidence was not relevant to a legitimate issue in the case. See Iowa Rs. Evid. 5.401, 5.402. Contrary to the State's contention at trial, this evidence was not relevant to establish the element of "recklessness,"<sup>4</sup> since there was no indication that he actually supplied her with

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<sup>4</sup> The jury was instructed on the definition of recklessness. (Instruction 19 – Recklessness) (App. p. 16). Recklessness is conduct that shows a willful or wanton disregard for the safety of others. State v. Ayers, 478 N.W.2d 606, 608 (Iowa 1991). It is ordinarily conscious and intentional, and involves an unreasonable risk of harm to others which is or should be known to the offender. State v. Kernes, 262 N.W.2d 602, 605

heroin at the other overdose. (Trial Vol. 1 Tr. p. 7, L. 18-25).

Had he done so, his prior conduct might have been material to show an awareness of the risk of harm to Brady and his willful disregard of her safety on the day in question.

Even assuming the challenged evidence was minimally relevant, West argues that its probative value was far outweighed by the prejudicial effect generated by its admission. See Iowa R. Evid. 5.403. This evidence unfairly suggests that West's presence at Brady's overdoses is suspicious and must be more than just a coincidence. There is a danger the jury might draw the inference, based upon mere speculation, that he must have therefore been the source of the drugs. The evidence also portrays him as a shady person, and there is a considerable risk that the jury would give this character evidence more weight than it deserves.

*Evidence of West's Prior Drug Deliveries to Victim and West's Contacts with His Drug Dealer:* West contends that evidence that he provided drugs to Brady in the past was

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(Iowa 1978).

inadmissible as prior bad acts under Iowa R. Evid. 5.404(b). During his follow-up interview at the police station, West denied supplying Brady with drugs when she fatally overdosed. (State's Exhibit 24 – West Interview). He did acknowledge, though, giving her heroin and cocaine on other occasions. (State's Exhibit 24 – West Interview). West asserts that the only purpose to admit this evidence was to show a general propensity to commit crimes.

The State's purported non-character theory for admission was to show "knowledge" and "absence of mistake," yet these were not really disputed factual issues.<sup>5</sup> (Trial Vol. 1 Tr. p. 3, L. 16-p. 4, L. 4; p. 9, L. 13-20). West completely denied committing the underlying public offense of delivery of a controlled substance in this case. (State's Exhibit 24 – West Interview). He never claimed that he delivered the drugs used in Brady's fatal overdose "by accident" or "by mistake." See e.g. State v. Taylor, 490 N.W.2d 536 (Iowa 1992) (in a

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<sup>5</sup> At the same time, the prosecutor essentially suggested the real theory of admission was for propensity ("because [West] supplied the drugs in the past, it's likely that he supplied them in this instance"). (Trial Vol. 1 Tr. p. 9, L. 21-25).

prosecution for willful failure to file tax returns, no abuse of discretion found in admission of prior filing violations as they show intent, knowledge, and absence of mistake).

Balanced against the minimal probative value of the prior-acts evidence was the strong prejudicial impact of this information. See Iowa R. Evid. 5.403. This evidence likely inflamed the jurors and caused them to base their decision on something other than the proven facts and applicable law, such as a desire to punish West for other misdeeds. Evidence of a defendant's drug-related activity is "inherently prejudicial." State v. Parker, 747 N.W.2d 196, 208-09 (Iowa 2008).

Over defense objections, the State also admitted cellphone records showing West called his drug dealer multiple times around the time of Brady's fatal overdose. (Motion in Limine - 11/10/16; Trial Vol. 1 Tr. p. 6, L. 16-p. 17, L. 23; p. 126, L. 22-p. 127, L. 14; Trial Vol. 2 Tr. p. 54, L. 5-10; State's Exhibits 25 & 26 - West Phone Records) (App. 7-14; Conf. App. pp. 4-5). The State presented no evidence as to the substance of those

conversations. As well, there was nothing establishing that West purchased drugs from his dealer on the date in question.

West asserts that this evidence should have been excluded as other bad acts under Iowa R. Evid. 5.404(b). The frequency of West's contacts with his drug dealer clearly reflects a close association with criminal activity. The State offered the evidence for no purpose other than to prove he was a bad person and that he acted in conformity with his character. The evidence is more prejudicial than probative in light of the considerable risk the jury would improperly consider this evidence for propensity to commit wrongful acts. See Iowa R. Evid. 5.403.

*Harmless Error Analysis:* "Reversal is required in cases of nonconstitutional error when it appears 'that the rights of the complaining party have been injuriously affected by the error or that he has suffered a miscarriage of justice.'" State v. Henderson, 696 N.W.2d 5, 12 (Iowa 2005) (*quoting Sullivan*, 679 N.W.2d at 29). We presume prejudice and "reverse unless the

record affirmatively establishes otherwise.” Sullivan, 679 N.W.2d at 30.

Error in admitting the challenged evidence, when considered in the aggregate, was not harmless in the present case. In closing arguments, the State advanced the theory that (1.) West’s presence at Brady’s previous heroin overdose, (2.) his drug deliveries to Brady on other occasions, and (3.) his contacts with his drug dealer, together, supplied the necessary circumstantial evidence to convict him of the crimes of involuntary manslaughter and delivery of a controlled substance. (Trial Vol. 3 Tr. p. 11, L. 18-p. 18, L. 21).

As well, it would be extremely difficult for jurors to put out of their minds knowledge that the defendant had supplied the victim with drugs in the past and not allow this information to consciously or subconsciously influence their decision. The very reason prior-bad-acts evidence is prejudicial is its persuasiveness that if a person delivered drugs to the victim before, he probably delivered it to her again. See Sullivan, 679 N.W.2d at 24 (“Empirical studies have confirmed the courts’

fear that juries treat bad-acts evidence as highly probative.”). Furthermore, there was no jury instruction limiting the use of the bad-acts evidence which would guard against this type of unfair prejudice. See State v. Plaster, 424 N.W.2d 226, 232 (Iowa 1988) (prejudice to the defendant can be limited with the use of a cautionary instruction explaining the purpose for which the prior acts evidence may be used).

In addition, the evidence of guilt in this case was not overwhelming. The State did not have the benefit of any direct evidence proving West supplied Brady with the drugs used in the fatal overdose. There was also little circumstantial evidence to establish guilt, as no drugs or drug paraphernalia were observed at Brady’s apartment or found in West’s possession. Although there was evidence that West was in contact with his drug dealer around the time of Brady’s death, there was no showing that he actually purchased drugs from his dealer.

Because this record does not affirmatively establish a lack of prejudice, West’s convictions for involuntary manslaughter

and delivery of a controlled substance must be vacated and the case remanded for a new trial.

*Ineffective Assistance of Counsel Claims:* Should this court conclude that error was not preserved on the evidentiary issue, West claims his trial counsel was ineffective for not making the appropriate arguments. Failure to properly object to the challenged evidence under Iowa Rs. Evid. 5.401, 5.402, 5.403, and 5.404(b) constitutes a breach of an essential duty. For the reasons articulated above, the jury should not have been allowed to consider this evidence in the first place. West was prejudiced by trial counsel's errors and omissions insofar as the evidence against him was slim at best.

West has met his burden in establishing his claim of ineffective assistance of counsel. His convictions for involuntary manslaughter and delivery of a controlled substance must therefore be vacated and his case remanded for a new trial. Alternatively, should this court find an insufficient record upon which to rule on his claim on direct appeal, West respectfully requests that his claims be preserved for possible

postconviction relief proceedings. See State v. Clay, 824 N.W.2d 488, 500 (Iowa 2012) (stating if the challenged actions of counsel implicate trial tactics or strategy, the issue will not be addressed until the record is fully developed.”).

**III. The district court erred in failing to merge defendant’s convictions for involuntary manslaughter and deliver of a controlled substance.**

**Preservation of Error and Standard of Review:** Claims that the district court erred in failing to merge convictions can be raised at any time because the failure to merge convictions as required by statute results in an illegal sentence. State v. Love, 858 N.W.2d 721, 723 (Iowa 2015). “Review of an illegal sentence for lack of merger is for correction of errors at law.” State v. Love, 858 N.W.2d 721, 723 (Iowa 2015).

**Discussion:** West argues that the sentencing court erred in failing to merge defendant’s convictions for involuntary manslaughter and deliver of a controlled substance.

The Fifth Amendment to the United States Constitution holds that no person shall be “subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V.

This provision is applicable to the States through the Fourteenth Amendment to the United States Constitution. Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187, 194 (1977). The amendment provides a criminal defendant with three basic protections: “It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.” State v. Schmitz, 610 N.W.2d 514, 515 (Iowa 2000).

The Iowa Code provides:

No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

Iowa Code § 701.9 (2015). Likewise, Iowa Rule of Criminal Procedure 2.6(2) provides: “upon prosecution for a public offense, the defendant may be convicted of either the public offense charged or an included offense, but not both.” Iowa R.

Crim. P. 2.6(2) (2015). The statute and the rule express the merger doctrine in Iowa. State v. Anderson, 565 N.W.2d 340, 343 (Iowa 1997). Iowa Code § 701.9 codified the double jeopardy protection against cumulative punishment. State v. Halliburton, 539 N.W.2d 339, 344 (Iowa 1995).

Iowa courts apply a strict statutory approach when considering merger issues. State v. Anderson, 565 N.W.2d at 343. “Under this approach, if the lesser offense contains an element that is not part of the greater offense, the lesser cannot be included in the greater.” Id. (citing State v. Jeffries, 430 N.W.2d 728, 730 (Iowa 1988)). Courts also adhere to the impossibility test, which provides that “one offense is a lesser-included offense of the greater when the greater offense cannot be committed without also committing the lesser.” Id. (citing State v. McNitt, 451 N.W.2d 824, 825 (Iowa 1990)).

Involuntary manslaughter by public offense is committed when a person “unintentionally causes the death of another person by the commission of a public offense other than a forcible felony or escape.” Iowa Code § 707.5 (2015). Our

supreme court has retained an element of recklessness to the crime, which was in the instruction defining involuntary manslaughter for the jury. (Instruction 18 – Involuntary Manslaughter) (App. p. 15). See State v. Conner, 292 N.W.2d 682, 686 (Iowa 1980).

The “public offense” element of involuntary manslaughter may be committed in as many alternative ways as there are public offenses defined by the Code, other than a forcible felony or escape. State v. Webb, 313 N.W.2d 550, 552 (Iowa 1981). When a statute provides alternative ways of committing the offense, the alternative submitted to the jury controls. State v. Anderson, 565 N.W.2d at 344; State v. Hickman, 623 N.W.2d 847, 850 (Iowa 2001); State v. Steens, 464 N.W.2d 874, 875 (Iowa 1991). In this case, the public offense alleged in the trial information and on which the jury was instructed is delivery of a controlled substance in violation of Iowa Code section 124.401(1)(c)(1). (Trial Information – 10/29/15; Instruction 22 – Delivery of a Controlled Substance) (App. pp. 4-6, 17).

The involuntary manslaughter alternative submitted to the jury was the reckless commission of delivery of a controlled substance. The determination of whether it is possible to commit the greater offense without also committing the lesser offense involves a comparison of the instructions submitted to the jury.

The State was required to prove the following elements of involuntary manslaughter by public offense (delivery of a controlled substance):

1. On or about the June 5, 2015 the defendant recklessly committed the crime of delivery of a controlled substance.
2. When the defendant committed the crime, the defendant unintentionally caused the death of Bailey Brady.

(Instruction 18 – Involuntary Manslaughter)(App. p. 15). Iowa Code § 707.5 (2015).

The State was required to prove the following elements of delivery of a controlled substance:

1. On or about June 5, 2015, the defendant delivered a controlled substance.

2. The defendant knew that the substance delivered was heroin.

(Instruction 22 – Delivery of a Controlled Substance)(App. p. 17). Iowa Code § 124.401(1)(c)(1) (2015).

The elements of involuntary manslaughter as presented to the jury are necessarily identical to the elements of delivery of a controlled substance with the exception that the State must also prove that defendant committed delivery of a controlled substance recklessly, and unintentionally caused the death of the victim. Thus, it is impossible to commit the greater offense of involuntary manslaughter by commission of delivery of a controlled substance without also committing the lesser offense of delivery of a controlled substance. Moreover, it makes no difference that the lesser-included offense here carries a higher penalty than the greater offense. State v. Gallup, 500 N.W.2d 437, 442 (Iowa 1993); see Iowa Code §§ 124.401(1)(c)(1), 707.5(1)(a), 902.9(1)(d), 902.9(1)(e) (2015).

Moreover, there is no indication the legislature clearly intended cumulative punishments for these two offenses

charged on the basis of a single act. See Halliburton, 539 N.W.2d at 344 (noting that if the crimes meet the legal elements test for lesser-included offenses, “we then study whether the legislature intended multiple punishments for both offenses”) (citing State v. Lewis, 514 N.W.2d 63, 69 (Iowa 1999)). In an unpublished decision, State v. York, No. 08-1490, 2009 WL 4115310, at \*3 (Iowa Ct. App. November 25, 2009), our court of appeals determined the offenses of involuntary manslaughter by public offense (child endangerment) and child endangerment causing bodily injury were greater and lesser-included offenses for purposes of double jeopardy analysis. After finding no clear indication of legislative intent against the merger of those two offenses, the court did not presume the legislature intended cumulative punishments. Id. at \*5. As in York, this court should similarly hold here that the offenses of involuntary manslaughter by public offense (delivery of a controlled substance) and delivery of a controlled substance merge.

For the reasons stated above, it is impossible to commit the greater offense of involuntary manslaughter by deliver of a

controlled substance without also committing the lesser offense of delivery of a controlled substance. Consequently, West's conviction for delivery of a controlled substance merges with his conviction for involuntary manslaughter. Because there is not clear indication that the legislature intended cumulative punishments, his case should be reversed and remanded for resentencing.

### **CONCLUSION**

For the reasons stated above, Defendant-Appellant, Travis Raymond Wayne West, respectfully requests that his convictions for involuntary manslaughter and delivery of a controlled substance be vacated and his case remanded for (1.) dismissal of the charges, (2.) a new trial, or (3.) resentencing. Alternatively, he requests his ineffective-assistance-of-counsel claims be preserved for possible postconviction relief proceedings.

### **NONORAL SUBMISSION**

Counsel requests not to be heard in oral argument.

**ATTORNEY'S COST CERTIFICATE**

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$ 4.29, and that amount has been paid in full by the Office of the Appellate Defender.

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